COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Case No. 2018-P-0990

JAMES M. RYAN, Executor of the ESTATE OF JULIA W. RYAN,
individually, and on behalf of all others similarly situated,

Plaintiff/Appellant,

v.

MARY ANN MORSE HEALTHCARE CORP. d/b/a HERITAGE AT FRAMINGHAM

Defendant/Appellee.

ON APPEAL FROM AN ORDER AND JUDGMENT
OF THE MIDDLESEX SUPERIOR COURT

BRIEF OF THE APPELLANT

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STATEMENT OF ISSUES

Plaintiff-Appellant James M. Ryan, Executor of the estate of Julia W. Ryan, individually, and on behalf of all others similarly situated ("Ryan") presents the following issues for review on appeal:

I. Whether the prohibition against collecting fees beyond those enumerated in G. L. c. 186, § 15B applies to assisted living residences.

II. Whether the Trial Court erred in holding that assisted living residences are exempt from the fee limitations of G. L. c. 186, § 15B – a consumer protection law designed to protect tenants from financial exploitation.

STATEMENT OF THE CASE

Massachusetts landlord/tenant law unambiguously prohibits a landlord from collecting any up-front fee other than four specific fees identified by the statute. See e.g., G. L. c. 186, § 15B(1)(b); Dolben Co. v. Friedmann, 2008 Mass. App. Div. 1 (Dist. Ct. 2008); Perry v. Equity Residential Mgmt., L.L.C., No. CIV.A. 12-10779-RWZ, 2014 WL 4198850, at * 3 (D. Mass. Aug. 26, 2014); Gardner v. Simpson Fin. Ltd.

Partnership, No. 09-11806-FDS, 2012 WL 1109104, at * 8 (D. Mass. Mar. 30, 2012); Hermida v. Archstone, 826 F. Supp. 2d 380, 384 (D. Mass. 2011). Despite the unambiguous mandate of G. L. c. 186, § 15B, Defendant-Appellee, Mary Ann Morse Healthcare Corp. d/b/a Heritage at Framingham ("Heritage") – an Assisted Living Residence ("ALR") - charges an up-front "Community Fee" to its residential tenants at or before the inception of their respective residential tenancies.

Ryan filed a putative class action lawsuit against Heritage arising from the imposition of these impermissible fees upon Ryan and similarly situated elderly and infirm residents at the inception of the subject residential leases. In addition to collecting a payment of $8,000 from Ms. Ryan (as payment of first and last month's rent), Heritage also charged Ms. Ryan a "Community Fee" of $2,800. See RA 55. Heritage conceded that it imposed Community Fees at the inception of all its other elderly residents' tenancies. See RA 19. Heritage used these Community Fees, at least in part, to "establish a replacement reserve for building improvements." See RA 19 and 33.

On November 21, 2016, Heritage moved to dismiss

Ryan's Complaint. In its motion, Heritage relied upon a mistaken interpretation of G. L. c. 186, § 15B and G. L. c. 19D, which interpretation departs from the Commonwealth's long tradition of protecting residential tenants, preventing elderly abuse and preventing unfair and deceptive practices. By allowing Heritage's motion to dismiss, the Middlesex Superior Court ("Trial Court") deprived elderly and infirm residents of their rights expressly provided by law (G. L. c. 186), which rights are otherwise enjoyed by all residential tenants throughout the Commonwealth.

The Superior Court's position is directly at odds with the thoughtful analysis of the Suffolk Superior Court, Business Litigation Session, in **two** recent decisions addressing the exact issue now on appeal. See Gowen v. Benchmark Senior Living, LLC, No. 1684CV03972-BLS2, 2017 WL 3251585 (Mass. Super. May 8, 2017) (Salinger, J.);[1] see also, Hennessy v. Brookdale Senior Living Communities, Inc., No. 1784CV04215-BLS2, 2018 WL 4427020 (Mass. Super. Aug. 1, 2018) (Salinger,

[1] A copy of the Gowen decision denying the defendant's motion to dismiss is appended to this brief at Addendum 20-28.

J.).[2] These two decisions of the Suffolk Superior Court align with the example of decency and fairness which the Legislature intended to afford to the Commonwealth's most vulnerable residential tenants. That is, the Suffolk Superior Court (on two separate occasions) correctly held that elderly, infirm and/or disabled residents of ALRs must possess **at least** the same rights as all other residential tenants in Massachusetts.

For the reasons set forth herein, as well as the reasons set forth in Gowen and Hennessy, Ryan respectfully requests that this Court reverse the decision of the Trial Court and remand this matter for further proceedings.

STATEMENT OF FACTS

In April 2013, Julia W. Ryan entered into a lease agreement with Heritage for the apartment located at 747 Water Street, Unit 150, Framingham, Massachusetts. See RA 9, RA 27-55. Prior to the commencement of the tenancy, Heritage required payment of first month's rent ($4,000), last month's rent ($4,000) and a "Community Fee" in the amount of $2,800. See RA 55.

[2] A copy of the Hennessy decision denying the defendant's motion to dismiss is appended to this brief at Addendum 29-39.

Heritage assessed a "Community Fee" on all tenants in the putative class. See RA 19. Community Fees were collected for: (1) up-front staff administrative costs; (2) the Resident's initial service coordination plan and move-in assistance; and (3) establishing a replacement reserve for building improvements. See RA 33.

On August 24, 2016, Ryan filed a three count Complaint alleging violations of G. L. c. 186, § 15B; G. L. c. 93A; and seeking Injunctive Relief. Ryan specifically alleged that Heritage impermissibly collected a Community Fee from Ryan at or before the inception of her residential tenancy, and that Heritage collected the Community Fee for something other than: (i) rent for the first full month of occupancy; (ii) rent for the last full month of occupancy calculated at the same rate as the first month; (iii) a security deposit equal to the first month's rent; or (iv) the purchase and installation cost for a key and lock. See RA 9. On November 21, 2016 Heritage filed a Motion to Dismiss. The Trial Court held a hearing on February 28, 2017 and issued a decision on January 9, 2018 allowing Heritage's motion. See RA 232-248; Add. 3. Ryan filed a notice

of appeal on March 9, 2018. See RA 250.

As set forth herein, Ryan sufficiently alleged an identifiable course of unlawful conduct committed by Heritage which caused harm to Ryan and numerous other similarly situated residential tenants. Therefore, the decision must be reversed and remanded for further proceedings.

SUMMARY OF THE ARGUMENT

The Trial Court's order dismissing the case pursuant to Mass. R. Civ. P. 12(b)(6) must be reversed because the Security Deposit Statute prohibits all lessors from charging fees at the commencement of a tenancy beyond: (1) first month's rent; (2) last month's rent; (3) a security deposit; and (4) a new lock and key. See G. L. c. 186, § 15B(1)(b); see also, 940 Code Mass. Regs., § 3.17(4)(a). Here, Heritage unlawfully charged Ryan – and all other tenants – a mandatory "Community Fee" at the commencement of the tenancy. The Security Deposit Statute is a strict liability statute that applies to all lessors and all tenancies. It is designed to protect tenants from financial abuse. It is for this reason that the Supreme Judicial Court, the Appeals Court, the Housing Court and the federal District

Court have uniformly declared that fees assessed to any tenant beyond those articulated in the Security Deposit Statute are unlawful. No distinction should be made because the tenancy at issue is between an elderly tenant and an ALR. The law is clear: the Security Deposit Statute applies to all tenancies, and any contractual provision that violates the Security Deposit Statute is void as against public policy and unenforceable. See G. L. c. 186, § 15B. Most recently, the Suffolk Superior Court, Business Litigation Session, issued two opinions addressing the same issues present here. See Gowen, and Hennessey, supra. In both cases, the Court held that an ALR must comply with the Security Deposit Statute. [pp 11-22]

The Trial Court's decision must be reversed because it improperly created an exemption to the Security Deposit Statute for tenancies in an ALR facility. However, it is clear that the law creates no such exemption. This is for several reasons. First, the Legislature enacted G. L. c. 19D, § 14 that requires ALRs to comply with all consumer protection laws and all laws designed to prevent financial exploitation. Second, the Legislature enacted G. L. c. 19D, § 18 that listed several existing laws that

would not apply to ALRs. This means the Legislature knew that in order to exempt ALRs from certain laws, those laws must be expressly excluded in the statute. However, § 18 does not include the Security Deposit Statute as one of these laws that do not apply to ALRs. Third, affirming the decision would have catastrophic consequences relating to fundamental tenant rights. If affirmed, tenants residing in ALRs would not have the right to enforce laws relating to housing discrimination, habitability, quiet enjoyment, sanitary code violations, privacy, and the provision of essential utilities such as heat and water. Aside from an ALR unfairly claiming a wholesale exemption to these laws, the Trial Court's decision, if affirmed, would effectively require an ALR tenant to yield to the mandates of Chapter 19D which contains no stated private right of action and would render any tenant protections wholly unenforceable in a court of law. [pp 22-38].

Because the Trial Court's decision effectively provided ALRs an exemption for liability under what is otherwise a strict-liability law, it failed to "harmonize" the two statutes in accord with basic rules of statutory construction. Conversely, the

Courts in Gowen and Hennessy both harmonized the two statutes in a way that enforces ALR regulations relating to licensure and certification, while also respecting the rights of its tenants. [pp 38-40]

Finally, the Trial Court erred in relying on facts beyond the pleadings concerning the Executive Office of Elder Affairs' regulatory review of Heritage's form lease. Heritage posited that the review of its "operating plan" meant that its lease (and all its provisions, including the Community Fees) somehow obtained regulatory approval. This argument fails, however, because the Executive Office of Elder Affairs' jurisdiction is limited to licensure and certification of ALRs only, and nothing more. Indeed, the agency itself, expressly cautions that it does not regulate fees. Accordingly, like the other errors discussed above, this Court should reverse the decision of the Trial Court and remand for further proceedings. [pp 40-43]

ARGUMENT

I. STANDARD OF REVIEW.

An appellate court, "[i]n reviewing the allowance of a motion to dismiss under Mass. R. Civ. P. 12(b)(6), [examines] the same pleadings as the motion

judge and therefore proceed[s] *de novo*." Town of Dartmouth v. Greater New Bedford Reg'l Vocational Tech. High Sch. Dist., 461 Mass. 366, 373 (2012). Therefore, the appellate court should "take as true 'the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor . . . .'" Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 223 (2011) (internal citations omitted).

The standard of review for a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6) requires a complaint have "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008) (citation omitted). Accordingly, for Ryan "to survive a motion to dismiss, [his] Complaint must contain factual allegations enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the Complaint are true." Flomenbaum v. Commonwealth, 451 Mass. 740, 751, n. 12 (2008). In addition, "all contravening assertions in Heritage's pleadings are taken to be false." Ritchie v. Department of State Police, 60 Mass. App. Ct. 655, 659

(2004).

As demonstrated herein, Ryan's Complaint contains sufficient factual allegations which rise far above the "speculative level" and provides enough "heft to show that [Ryan and the Class are] entitled to relief." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

II. AN ALR VIOLATES MASSACHUSETTS LAW WHEN IT COLLECTS FEES FROM ITS RESIDENTS THAT ARE PROHIBITED BY THE UNAMBIGUOUS PROVISIONS OF G. L. c. 186, § 15B.

A. G. L. c. 186, § 15B Protects All Tenants From Excessive Up-front Fees.

It is well-settled law that G. L. c. 186, § 15B(1)(b) "limits the up-front charges that the landlord legally can collect from the tenant in order to prevent unfair or deceptive charges." Hermida, 826 F. Supp. 2d, at 384; Perry, 2014 WL 4198850, at * 4; Gowen, supra; Hennessy, supra. The statute specifically reads as follows:

> At or prior to the commencement of any tenancy, no lessor may require a tenant or prospective tenant to pay any amount in excess of the following:
>
> (i) rent for the first full month of occupancy; and,
>
> (ii) rent for the last full month of occupancy calculated at the same rate as the first month; and,

> (iii) a security deposit equal to the first month's rent provided that such security deposit is deposited as required by subsection (3) and that the tenant is given the statement of condition as required by subsection (2); and, (iv) the purchase and installation cost for a key and lock.

See G. L. c. 186, § 15B(1)(b). This statutory language is similarly included in the Attorney General's regulations as conduct that is *per se* unfair and deceptive. See 940 Code Mass. Regs., § 3.17(4)(a).

Cases interpreting this statutory prohibition have uniformly declared that any up-front fee not expressly enumerated by the statute is unlawful. See e.g., Hermida, 826 F. Supp. 2d, at 384 (amenity fees declared unlawful); Dolben, 2008 WL 81549, at * 4 (application fees unlawful); Carter v. Seto, 2005 Mass. App. Div. 62, 2005 WL 1383337, at * 4 (June 23, 2005) (fee for garage door mechanism unlawful); Perry, 2014 WL 4198850, at * 4 (community fees unlawful); Broad Street Assoc. v. Levine, No. 12-SP-2041 (Mass. N.E. Hous. Ct. Jul 30, 2012) (monthly pet fees unlawful).

Moreover, in **two** recent cases, the Business Litigation Session of the Suffolk Superior Court

decided that Community Fees assessed by ALRs, like the fees charged by Heritage here, may violate G. L. c. 186, § 15B(1)(b). See Gowen, supra; Hennessy, supra.

The Security Deposit Statute is a strict liability statute. See Hermida, 826 F. Supp. 2d, at 384. These prohibitions apply to all lessors of residential property, and there is no exception for ALRs. See G. L. c. 186, § 15B(1)(b) ("**no lessor** may require a tenant or prospective tenant to pay . . ." (emphasis added). Further, the public policy concerns embodied within this statute are designed to protect all residential tenants from financial abuse at the inception of their leases; and further, from being taken advantage of by unscrupulous, powerful landlords.

This is especially important when regulating a landlord's dealings with an elderly tenant population and their inherent vulnerabilities:

> [b]y limiting the freedom of landlords and tenants to contract in this regard (as to security deposits), the Legislature manifested a concern for the welfare of tenants in residential property who, as a practical matter, are generally in inferior bargaining positions and find traditional avenues of redress relatively useless.

Goes v. Feldman, 8 Mass. App. Ct. 84, 91 (1979);

Hampshire Village Assoc. v. Dist. Ct. of Hampshire, 381 Mass. 148, 152-153 (1980), cert. denied sub nom. Ruhlander v. Dist. Ct. of Hampshire, 449 U.S. 1062 (1980).

Consistent with this well-settled public policy requiring strict enforcement, the statute expressly states that any contractual provision that requires payment of fees in excess of those enumerated in the G. L. c. 186, § 15B is "deemed to be against public policy and therefore void and unenforceable." See G. L. c. 186, § 15B(8). A tenant may not waive any provision of the Security Deposit Statute, and any contract provision to the contrary is void as against public policy. See id.

B. The Legal Protections Afforded to Tenants by G. L. c. 186, § 15B(1)(b) Apply to ALR's and Its Elderly Residents.

While other cases address the strict-liability nature of this prohibition against excessive up-front fees as they apply generally, on two separate occasions, the Business Litigation Session of the Suffolk Superior Court addressed the precise issue of whether the collection of a Community Fee by an ALR violates G.L. c. 186, § 15B. See Gowen, supra. After a thorough analysis these courts both held that it was

unlawful for an ALR to charge any up-front "costs that are associated with any residential tenancy," including a community fee. Id.; see also, Hennessy, supra.

For these reasons, and in accord with the well-established law regarding the limitations of permissible fees allowed under G. L. c. 186, § 15B, the Suffolk Superior Court in Gowen and Hennessy correctly concluded that the restrictions imposed by G. L. c. 186, §15B(1)(b) prohibit ALR's from requiring any tenant or prospective tenant, to "pay any amount in excess of the enumerated categories in clauses (i) through (iv)." Hermida, 826 F. Supp. 2d, at 384.

Here, the facts before the Trial Court on Heritage's motion to dismiss included an admission by Heritage that the Community Fees assessed to Heritage's residents were directly related to costs associated with residential tenancies. See RA 033 (the Community Fee covers, among other things, reserve for building improvements); see also, RA 012, at ¶ 27. Accordingly, the Community Fee was not a lawful fee enumerated in clauses (i) through (iv) of G. L. c. 186, §15B, and Heritage violated the Security Deposit Statute by collecting these Community Fees from its

elderly tenants.

C. The Legislature Intended G. L. c. 186, § 15B to Protect the Welfare of All Residential Tenants.

In considering the legislative purpose of G. L. c. 186, § 15B, the Supreme Judicial Court ("SJC") oftentimes begins with the premise that any residential landlord is in a naturally superior position in any negotiation or dispute arising in the context of the landlord/tenant relationship. See Mellor v. Berman, 390 Mass. 275, 282 (1983) (internal citations omitted). This Court has also commented on the protections afforded to all residential tenants. In Jinwala v. Bizzaro, 24 Mass. App. Ct. 1, 7 (1987), the Appeals Court concluded that, "[t]he evils which the security deposit law sought to address are suggested by the statute itself." Id. at 4. In Hermida, supra, the Federal District Court for the District of Massachusetts also addressed the legislative purpose and development of G. L. c. 186, § 15B, holding that:

> To protect the tenant, the Legislature has created statutory limitations on the amount and purpose for which the landlord can legally collect moneys. Amendments to the statute show that the Legislature has also reduced the amounts of money the landlord can

> collect prior to the commencement of the tenancy, as well as increasing the landlord's accountability for the safekeeping and expenditure of those amounts. This trend is also followed in other sections of the Security Deposit Statute.

Id. at 387 (emphasis added), citing, Commonwealth v. Chatham Development Co., 49 Mass. App. Ct. 525, 527 (2000). The Federal Court in Hermida also noted the development of this purpose as acknowledged by the Courts:

> The over-all legislative intent of the statute [G. L. c. 186, § 15B] is amply demonstrated to be the protection of the tenant. The legislative history of amendments to the statute evince an increasing concern for the tenant.

Id. The Hermida Court further commented that an interpretation similar to that which Heritage (and the Trial Court) have posited "would erode the protection granted by section 15B(1)(b) to tenants and would allow landlords to circumvent the statutory limitations on the amount and purpose for which the landlord can legally collect under section 15B(1)(b)." Id. at 387.

A landlord's qualification as an ALR in no way justifies the abolishment of any of the tenancy protections provided by Massachusetts law. In fact,

the Legislature made this abundantly clear in the ALR statute when it reaffirmed the applicability of **all** consumer protection laws and **all** laws preventing financial exploitation. See G. L. c. 19D, § 14 (mandating, without equivocation, that ALRs comply with all "applicable federal and state laws and regulations regarding consumer protection and protection from abuse, neglect and financial exploitation of the elderly and disabled").

Similarly, G. L. c. 19D, § 18 states that "assisted living residences certified under this chapter **shall be regarded as residential uses** for the purposes of the state building code and shall be so regarded by the building inspectors of each city and town in the commonwealth." Id. (emphasis added). In the Legislature's view (and apparently local zoning commissions) ALRs are to be considered residences, not hospitals or nursing homes. See Executive Office of Elder Affairs, Assisted Living in Massachusetts: A Consumer Guide (May 2007 ed.), at * 1 (hereinafter "A Consumer Guide")[3] ("Assisted Living Residences are not the same as licensed nursing facilities, often

[3] https://www.mass.gov/files/2017-08/consumer-guide.pdf (last visited, Dec. 11, 2018).

referred to as 'nursing homes,' 'skilled nursing facilities,' or 'nursing and rehabilitation facilities.' ALRs do not provide medical or nursing services and they are not designed for people who need serious medical care on an ongoing basis. ALRs are intended for adults who may need some help with activities such as housekeeping, meals, bathing, dressing and/or medication assistance and who would like the security of having assistance available on a 24 hour basis in a home-like and non-institutional environment"). In fact, G. L. c. 19D § 18 states that ALRs are to be classified in the same manner as other residential units, and implicitly, the same controlling laws associated therewith. See G. L. c. 19D, § 18(c)(" For the purposes of this chapter, and any other general or special law classifying real estate property for the purpose of taxation, and notwithstanding the provisions of section twenty-seven C of chapter twenty-nine of the General Laws, a municipality shall classify the portion of any building operated as an assisted living residence in the same category as property held or used for human habitation"); and G. L. c. 19D, § 18(d)(" Regardless of the designation of an assisted living residence as

a residential, institutional or other use under any zoning ordinance, **assisted living residences certified under this chapter shall be regarded as residential** uses for the purposes of the state building code and shall be so regarded by the building inspectors of each city and town in the commonwealth") (emphasis added).

This designation is important, and is established for sound reason: a person moving into an ALR is a tenant of the ALR, not a patient in a ward or a hospital. Legally speaking, a landlord/tenant relationship is established when one in legal possession of property enters into an agreement with another permitting possession, use and enjoyment of that property for a specified period of time, in exchange for a specific sum in compensation thereof. See Backoff v. Weiner, 305 Mass. 375 (1940); Baseball Pub. Co. v. Bruton, 302 Mass. 54 (1938); see also, 33 Mass. Prac., Landlord and Tenant Law, § 1:4 (3d ed.). This is precisely the transaction that occurs between an ALR and its tenants. Thus, because a landlord/tenant relationship has been created, all landlord/tenant laws – including the provisions of G. L. c. 186, § 15B – govern the tenancy.

The Hennessy Court properly reached this very conclusion, holding:

> The resident agreement between Hennessy and Defendants is in part a residential lease and is therefore, to that extent, subject to § 15B.
>
> Under Massachusetts common law, "[a] tenancy at will arises out of an agreement, express or implied, by which one uses and occupies the premises of another for a consideration—usually the payment of rent." Williams v. Seder, 306 Mass. 134, 136 (1940). The tenancy is residential, of course, if it involves the lease of residential property. The contract in this case gives Hennessy the legal right to live in an apartment within the residential facility, in exchange for paying a monthly fee. It is a month-to-month lease of an apartment. Though the landlord has the right to move Hennessy to a substitute apartment, the contract expressly gives Hennessy the right to exclusive occupancy of whichever apartment she is living in, in consideration for her monthly payment. The "resident agreement" therefore creates a residential tenancy and is subject to § 15B.
>
> Since Hennessy contracted to live in an assisted living facility, and not just any residential apartment, by law Defendants were required to offer and provide a variety of personal care services in addition to Hennessy's right to exclusive occupancy of a residential apartment. See, G. L. c. 19D, § 2(v) & § 10(a). The Legislature enacted c. 19D to establish minimum standards that all "assisted living residences" must meet in providing support and services in addition to

residential tenancies.

Id. at * 3. Accordingly, because the tenant of an ALR enters into a residential tenancy, he or she is afforded, by statute, the same rights as all other residential tenants in the Commonwealth.

III. ELDERLY, INFIRM AND DISABLED TENANTS ARE NOT STRIPPED OF THEIR RIGHTS UNDER G. L. c. 186 BECAUSE THEIR LANDLORD IS AN ALR.

The Trial Court's decision must be reversed because it incorrectly created an exception to the provisions of G. L. c. 186, § 15B for ALRs based upon the enactment of G. L. c. 19D – a statutory scheme **governing services** provided by ALRs. There are many reasons why the Court's conclusion was incorrect as a matter of law.

First, Chapter 19D expressly requires ALRs to comply with the Security Deposit Statute. See G. L. c. 19D, § 14 (all ALR leases must include a provision that the ALR will comply with **all** consumer protection laws and **all** laws designed to prevent financial exploitation).

Second, there can be no preemption where the Executive Office of Elder Affairs ("EOEA") – the agency tasked with overseeing the licensure and certification of ALR facilities – has unambiguously

stated that the regulation of fees such as the "Community Fees" assessed by Heritage fall outside of its regulatory jurisdiction. See A Consumer Guide, supra at * 3 ("Elder Affairs **does not** regulate ALR fees") (emphasis added).

Third, the Superior Court's decision departs from the well-reasoned rulings in Gowen and Hennessy.

Finally, from a public policy standpoint, Chapter 19D was designed to provide an ALR's elderly and infirm population with additional rights beyond other rights that already exist, and was not designed to reduce or eliminate any other rights to only those marginal provisions mentioned in Chapter 19D.

A. Consistent with The Decisions in *Gowen* and *Hennessy*, G. L. c. 19D Does Not Supplant the Protections Afforded by Consumer Protection laws such as G. L. c. 186, § 15B.

The Trial Court's opinion departs from the well-reasoned Gowen and Hennessy opinions. In doing so, the Trial Court's decision carves out an impermissible exemption from liability under G. L. c. 186, § 15B for ALRs that does not otherwise exist as a matter of law with respect to all other residential tenancies. This exemption cannot withstand this Court's appellate scrutiny.

In examining the applicability and interplay between the two statutes (G. L. c. 186, § 15B and G. L. c. 19D), the Trial Court failed to recognize that G. L. c. 19D is "not to be deemed to repeal or supersede a prior statute in whole or in part in the absence of express words to that effect or of clear implication." George v. Nat'l Water Main Cleaning Co., 477 Mass. 371, 378 (2017). This is because "[r]epeal is not clearly implied '[u]nless the prior statute is so repugnant to and inconsistent with the later enactment that both cannot stand.'" Id. citing, Commonwealth v. Hayes, 372 Mass. 505, 511 (1977). The Court should not "read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose." Provencal v. Commonwealth Health Ins. Connector Auth., 456 Mass. 506, 516 (2010) (internal citations omitted).

As such, the Hennessy Court correctly concluded that "19D is not intended to be an exhaustive regulatory scheme that governs all aspects of assisted living operations." See Hennessy, at * 2. Moreover, the Gowen court properly examined the interplay between both G. L. c. 186, § 15B and Chapter 19D as

they apply to the protections afforded to tenants of ALRs:

> The additional services beyond a mere residential tenancy are governed by c. 19D. But nothing in that statute supersedes, either expressly or by necessary implication, the legal protections that 15B provides to all residential tenants in Massachusetts.

Gowen, at * 2-3.

The Gowen Court further recognized that "[n]othing in c. 19D expressly exempts assisted living facilities from the requirements imposed by c. 186." Id. at * 3. Finally, the Gowen court recognized that:

> Although the Legislature expressly exempted such facilities from having to comply with certain [other] statutes that regulate health care facilities . . . it did not exempt such facilities from the fee limitations and security deposit requirements that apply to all residential tenancies.

Id. at * 3.

The Trial Court in this case acknowledged that G. L. c. 19D does "not explicitly exempt [ALR's] from landlord tenant law in Section 18(a) and that Section 16 requires ALR's to comply with otherwise applicable law[]". See RA at 243. However, the Trial Court's analysis curiously departs from this position and the analysis set forth in both Gowen and Hennessy and

fails to explain how the remainder of Chapter 19D effectively vacates the other protections afforded by G. L. c. 186; or further, how any other "applicable law" relating to tenants' rights should be abrogated. See RA 243. The Trial Court also fails to explain how an ALR's tenant's rights are abrogated in light of the contradictory mandate in the statute **requiring** ALRs to comply with all federal and state laws relating to consumer protection and financial exploitation. See G. L. c. 19D, § 14.

In contrast, the Gowen court correctly determined that "[d]efendants must comply with all laws that govern residential tenancies to the extent they apply to their facilities." Gowen, at * 3. The Trial Court should have followed the analysis set forth by the Gowen Court.

B. The Text of Chapter 19D and the EOEA Regulations Affirm, and Ratify, That Consumer Protections, Such as G. L. c. 186, § 15B, Apply to Tenants at ALRs.

Although the Trial Court concluded that a tenant residing in an ALR is only entitled to those rights that are set forth in Chapter 19D, the entire statutory and regulatory scheme governing ALRs affirms that the Legislature (and the EOEA) intended to afford

rights **greater than** those expressly stated in Chapter 19D to elderly, disabled and infirm ALR tenants.

The law exposes the shortsighted nature of the position that a tenant residing in an ALR has a limited set of residential rights simply due to the enactment of Chapter 19D. In fact, G. L. c. 19D, § 16 includes the express requirement that an ALR:

> [S]hall meet the requirements of **all applicable federal and state laws and regulations**, including, **but not limited to**, the state sanitary code, state building and fire safety codes and regulations, and laws and regulations governing handicapped accessibility.

Id. at § 16 (emphasis added). Moreover, G. L. c. 19D, § 14 states that ALRs shall:

> [C]omply with applicable federal and state laws and regulations regarding **consumer protection** and protection from abuse, neglect and **financial exploitation of the elderly and disabled.**

Id. at § 14 (emphasis added).

In other words, by enacting these two provisions, the Legislature made abundantly clear that Chapter 19D was not intended to deprive ALR residents of rights held by all other ordinary consumers or tenants in Massachusetts. This express ratification of all other laws is consistent with the overall legislative theme

of Chapter 19D, which is designed to promote the best interests of the elderly, infirm and often disabled tenants in ALRs with respect to the care and services they receive, without displacing other important rights they would otherwise possess if they were a tenant at any residence other than an ALR.

The reach of Chapter 19D is limited. Chapter 19D, and its counterpart 651 Code Mass. Regs., § 12.00, *et seq.*, establish rules for the delivery of **services** provided by ALRs; however, the EOEA and the regulation are not the sole (or controlling) authority with respect to consumer protection, landlord/tenant or financial exploitation protections these ALR tenants also enjoy. See e.g., 651 Code Mass. Regs., § 12.01 ("[t]he purpose of 651 Code Mass. Regs., § 12.00 is to promote the availability of **services** for elderly or disabled persons in a residential environment; to promote the dignity, individuality, privacy and decision-making ability of such persons and to promote for their health, safety, and welfare; and to promote continued improvement of Assisted Living Residences.") (emphasis added). Chapter 19D, and its counterpart 651 Code Mass. Regs., § 12.00, *et seq.*, are limited to issues dealing with services, **only**. All other matters

are governed by other laws and regulations that each ALR is obligated to follow. See e.g., G. L. c. 19D, §§ 14 and 16.

C. G. L. c. 19D Does Not Exempt ALRs From G. L. c. 186, § 15B.

The Legislature signaled its intent to bind ALRs to the provisions of G. L. c. 186, § 15B when it expressly declined to exempt ALRs from compliance with the Security Deposit Statute. That is, unlike other statutes from which ALRs are expressly exempt, G. L. c. 186, § 15B is not excepted by Chapter 19D. See G. L. c. 19D, § 18; 651 Code Mass. Regs., § 21.14.

More precisely, both G. L. c. 19D, § 18 and 651 Code Mass. Regs., § 21.14 set forth a list of statutes and regulations that do not apply to ALRs. **This means that the Legislature knew that in order to exempt ALRs from certain laws, those laws must be expressly excluded in the statute.** See Gowen, supra, at * 3 ("[a]lthough the Legislature expressly exempted such facilities from having to comply with certain [other] statutes that regulate health care facilities . . . it did not exempt such facilities from the fee limitations and security deposit requirements that apply to all residential tenancies"); see also,

Hennessy, supra.

The following is a comprehensive list of statutes that expressly do not apply to ALRs as they have been expressly exempted by Chapter 19D:

- G. L. c. 111, § 25B-25H (determination of need process applicable to health care facilities in the Commonwealth);
- G. L. c. 111, § 51 (licensing requirements for hospitals or institutions for unwed mothers or clinics);
- G. L. c. 111, § 70E-73B (certain patients and Residents rights requirements at long term care facilities);
- G. L. c. 40A, § 9 (7th para.) (special permit under local zoning by-laws for the use of structures as shared elderly housing);
- G. L. c. 111, § 71 (licensing requirements for convalescent and nursing homes, rest homes, charitable homes for the aged, intermediate care facilities for the mentally retarded and infirmaries maintained in towns at these long-term care facilities; and
- G. L. c. 111, § 71A (requirements for deposit of inpatient or Resident funds for a long term care facility).

See 651 Code Mass Regs., § 12.14.

As is evident from the plain text of 651 Code Mass. Regs., § 12.14 and G. L. c. 19D, § 18, the list of statutory or regulatory exemptions **does not** include exemption from the requirements of Chapter 186. Had the Legislature or EOEA intended to exempt ALR's from the requirements of G. L. c. 186, § 15B, they would

have expressly included such an exemption in Chapter 19D or in 651 Code Mass Regs., § 12.14.

However, neither the Legislature nor the EOEA included any such exclusion.

Indeed, by excluding the application of other laws, the Legislature was implicitly cognizant of its obligation to expressly exclude laws that would not apply to ALRs. There can be no doubt that the express exclusion of some laws (but not Chapter 186), read in conjunction with the express requirement that ALRs comply with all other federal and state laws and regulations (including Massachusetts consumer protection laws and laws concerning financial exploitation), mandates an ALRs' compliance with the Security Deposit Statute.

The Trial Court, however, wholly disregarded this analysis. Instead, the Trial Court made specific refence to a single, isolated, provision in Chapter 19D – the provision addressing a tenant's rights to the eviction protections afforded by G. L. c. 186 (see G. L. c. 19D, § 9(a)(18)) – and in a conclusory fashion opined that the inclusion of this provision in Chapter 19D, to the exclusion of all others specific statutory citations, meant that the Legislature

somehow meant to exclude all other Chapter 186 protections.

The Trial Court's application of the interpretive maxim of *expressio unius est exclusio alterius* ("to express or include one thing implies the exclusion of the other, or of the alternative") was misplaced. As the SJC noted, this maxim "should not be applied where to do so would frustrate the general beneficial purposes of the legislation . . . or if its application would lead to an illogical result." Bank of America, NA v. Rosa, 466 Mass. 613, 619-620 (2013) (the maxim is not a rule of law but merely an aid for interpretation). Applying this maxim to the present issues does produces an absurd result and would "frustrate the general beneficial purposes of the legislation". Id.; see also, Hennessy, supra, at * 4 ("[t]he statutory construction favored by [the ALR] Defendant would frustrate the general beneficial purpose of G. L. c. 186, § 15B." Id. at * 4.

Accordingly, this Court should not rely on such obscure interpretative tools. Doing so would simply increase the likelihood of conflicting *ad hoc* interpretations predicated on the myriad of contradictory canons of statutory interpretation at a

court's disposal. See Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J. Concurring) (reliance on canons of statutory construction or legislative history is the "equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends"); see also, Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes are to be Construed, 3 VAND. L. REV. 395, 401-406 (1950) (listing 28 canons of statutory construction alongside another canon stating the opposite). Such an undertaking is not necessary in the matter before this Court since Chapter 19D expressly requires ALRs to comply with all state and federal consumer protection laws. This Court need not go any further than that analysis.

D. The Trial Court's Opinion, if Affirmed on Appeal, Would Deprive Elderly, Infirm and Disabled Tenants of the Most Basic of Tenant Rights.

Heritage's position is even more confounding when applied to tenant's rights in general. That is, following Heritage's logic, Chapter 19D would vitiate all other tenant rights not enumerated in Chapter 19D. This position, if affirmed, would be catastrophic for elderly and infirm tenants of ALRs.

Adopting this faulty logic, here are some basic landlord/tenant rights that would not apply to ALRs because none of these rights are specifically referenced in Chapter 19D:

- the obligation to furnish water, hot water, heat, light, power, gas, elevator service, telephone service, janitor service or refrigeration service. See G. L. c. 186, § 14;
- the implied covenant of quiet enjoyment. See G. L. c. 186, § 14;
- the obligation to comply with laws regarding submetering for utilities. See G. L. c. 186, § 22;
- the implied covenant of habitability. See Boston Housing Auth. v. Hemingway, 363 Mass. 184 (1973);
- the obligation to provide a dwelling unit that does not endanger or materially impair the health, safety, or well-being of the occupant. See id.; see also, 940 Code Mass. Regs., § 3.17(1)(a)(1);
- the obligation to provide and maintain a dwelling unit which is fit for human habitation. See G. L. c. 111, § 127C; 940 Code Mass. Regs., § 3.17(1)(a)(2) and 3.17(1)(b)(2));
- the right to be free from any form of housing discrimination, including, specifically, age and disability based discrimination. See G. L. c. 151B, § 4;
- the right to be free from any invasion of privacy. See G. L. c. 214, § 1B;
- the protections against a tenant from reprisals for reporting violations of a lease or the law. See G. L. c. 186, § 14; and
- the right to institute an action for injuries sustained by a defect in a common area or for a

violation of the building code. See G. L. c. 186, § 15E.

These are just a handful of rights and protections that each and every tenant in the Commonwealth enjoys. These rights have not been specifically identified in Chapter 19D; however, such rights clearly have not been abrogated simply because they lack explicit inclusion by reference in Chapter 19D. Any such interpretation of the rights and duties of ALRs that does not include these rights and protections would frustrate the purpose of Chapter 19D, which is to maintain, not vitiate, the rights of the elderly. Curiously, the Trial Court acknowledges that "Chapter 19D does not displace landlord-tenant law and leave residents to fend for themselves." See RA 245. However, the analysis, for all intent and purposes, stops there. Accordingly, the Trial Court's conclusion that G. L. c. 186, § 15B does not apply is seemingly inconsistent with its otherwise accurate portrayal of Chapter 19D.

E. The Protections of G. L. c. 186 Must Apply to ALRs Because They Provide Legal Remedies for Harmful Acts by Landlords That Chapter 19D Does Not Afford.

Heritage committed unfair and deceptive acts by charging fees in violation of G. L. c. 186, § 15B as

part of the profit-based aspect of its business, and further, Heritage did so to gain financial benefit and obtain financial leverage over its tenants. There is, however, no stated private right of action for bringing a claim pursuant to Chapter 19D (or the applicable EOEA regulations) including for violations of any of the ALR tenant's rights that are articulated in the statute. Whatever ephemeral protections are purportedly provided by Chapter 19D are, therefore, wholly unenforceable in a court of law. As such, the Trial Court erred when claiming Chapter 19D is comprehensive in its protections for ALR tenants.

Fortunately, the Legislature appears to have cured this defect in Chapter 19D by recognizing that ALR tenants **still** maintain the protections (and remedies) afforded generally under landlord/tenant law. See e.g., G. L. c. 19D, § 14 (allowing tenants to retain all other rights at law); accord, Humphrey v. Byron, 447 Mass. 322, 327 (2006) (the SJC has "recognized that 'modern notions of consumer protection' have played a role in the development of the law regarding residential leases, and in particular in the emergence of 'the almost universally recognized warranty of habitability implied in

residential leases.'") (citations omitted).

Similarly, the SJC routinely affirms that a residential tenant is afforded overlapping rights and is entitled to bring overlapping causes of action with respect to their protections and remedies as tenants. In McGrath v. Mishara, for example, the SJC opined:

> Our review of the statutory provisions discloses no error in the judge's conclusion that the tenants had causes of action based on G. L. c. 186, § 15B, the Boston Rent Control Ordinance, and G. L. c. 93A. The mere fact that these statutes contain some overlapping prohibitions and remedies does not establish a legislative intent to preclude their concurrent application.

386 Mass. 74, 83 (1982), citing, Dodd v. Commercial Union Ins. Co., 373 Mass. 72, 75-78 (1977). The Trial Court's opinion that Chapter 19D is the sole remedy for a tenant residing in an ALR facility is, therefore, inconsistent with the SJC's long-standing precedent of concurrent enforcement of important consumer protections.[4] There is nothing in Chapter 19D

[4] Of course, the Legislature knows that if it wants to create an **exclusive** remedy for the enforcement of a particular law, it has to do so expressly. See, e.g., G. L. c. 152, § 24 (workers' compensation is exclusive remedy for workplace injuries). Chapter 19D contains no such express exclusive remedy provision. Thus, the Trial Court's conclusion that Chapter 19D is somehow the only way to enforce a tenant's rights is simply wrong as a matter of law.

to suggest that ALR residents do not have the same protections under the law as granted to other tenants throughout the Commonwealth. This Court should, therefore, read Chapter 19D and G. L. c. 186, § 15B harmoniously so that these statutes may work together to serve their purposes of protecting elderly, infirm and disabled tenants while simultaneously protecting these same tenants' rights to certain elder-care services.

IV. THE TRIAL COURT DID NOT APPLY THE CORRECT STATUTORY ANALYSIS IN HARMONIZING THE TWO STATUTES.

The Trial Court failed to "harmonize the two statutes" in accord with basic rules for statutory construction. That is, the Trial court suggested that it must "harmonize" the application of G. L. c. 186, § 15B and Chapter 19D, but it failed to accomplish these ends. Id. at * 4. More precisely, the Trial Court's "harmonization" amounts to a complete vitiation of the rights afforded by G. L. c. 186, § 15B as well as, apparently, any other rights or remedies traditionally afforded to Massachusetts residential tenants.

To reach this tortured conclusion, the Trial court erroneously concluded that the use of the terms "resident" and "Assisted Living Residence" in Chapter

19D indicated the Legislature's intent to excuse ALRs from G. L. c. 186, § 15B. Id. at * 6 and * 10. Curiously, at the outset of its decision, the Trial Court itself noted that G. L. c. 186 similarly used the term, "residential leases," yet it inexplicitly later concluded (without support) that the terms "resident" and "Assisted Living Residence" as found in Chapter 19D signaled the Legislature's intention to excuse ALRs from the mandates of G. L. c. 186. This conclusion cannot surpass appellate scrutiny.

In addition, the Trial Court relies upon its characterization of ALRs as "statutorily unique" because they offer services in addition to offering lodging. See RA at 242. Ryan does not dispute that ALRs must offer services, in addition to the rental of residential units. However, it does not follow that by simply offering elder-care services, ALRs are somehow rendered wholly exempt from the law that prohibits a residential landlord from charging certain fees or other protections afforded by the Security Deposit Statute.

Conversely, the Suffolk Superior Court has had two separate opportunities to address the same issues facing this Court. In Gowen and in Hennessy, the

court harmonized Chapter 19D and the Security Deposit Statute and set forth a well-founded explanation as to why the protections of both statutes can be realized concurrently. See Gowen, supra, at * 2-4; see also, Hennessy, supra, at * 3-6.

These decisions contain a thorough review of the respective laws in a manner that brings the laws in harmony with each other and upholds their respective purposes. See Gowen at * 3, citing, Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass 663, 673 (2010); quoting, Commonwealth v. Harris, 443 Mass. 714, 725 (2005) ("Assisted living facilities can easily comply with both statutory schemes, providing supportive services in accord with c. 19D to a resident whose tenancy is also governed by § 15B. Courts must therefore construe and apply these two statutes in a manner that give 'meaning and purpose to both . . . so that the policies underlying both may be honored'").

V. APPROVAL OF THE RENTAL AGREEMENT BY THE EOEA DOES NOT NEGATE THE APPLICATION OF LAWS GOVERNING ALR TENANTS' RIGHTS.

Heritage argues that because the EOEA approved Ryan's lease agreement, all terms are consonant with the law. As an initial matter, this argument is

irrelevant as it raises facts outside the pleadings and is not properly before this Court at the motion to dismiss stage. Nonetheless, Heritage submitted its proposed lease simply as part of Heritage's "operating plan." See RA at 023 (Heritage's Motion to Dismiss at 7); see also, APT Asset Mgmt., Inc. v. Bd. of Appeals of Melrose, 50 Mass. App. Ct. 133, 135 (2000) (holding that the purpose of Chapter 19D is to mandate "that anyone seeking to establish or maintain an assisted living residence be certified by the Executive Office of Elder Affairs, that the residence meet certain structural requirements, and that specific and detailed services be available to the residents").

The EOEA's review of residency agreements is limited to its determination that the ALR submitted sufficient materials as outlined in 651 Code Mass Regs., § 12.00, *et seq*. in order to obtain certification for licensure related to the services offered. Again, the EOEA itself acknowledges that it does not approve the fees contained in these residential leases. See RA 157; see also, A Consumer Guide, at * 2 ("Elder Affairs **does not** regulate ALR fees.") (emphasis added).

The leases are not submitted to EOEA for any

other purposes – including, as Heritage wrongfully and self-servingly suggests – to justify its failure to comply with the Security Deposit Statute. The defendant ALR in the Gowen case raised the same failed argument. However, unlike the Trial Court here, the Gowen Court correctly concluded that such an argument was baseless by reasoning that "[The ALR's] assertion that assisted living facilities are not subject to c. 186, § 15B because they are regulated by the Executive Office of Elder Affairs under G. L. c. 19D is without merit." Gowen, supra, at 2. As stated above, the EOEA does not claim to review a residency agreement to determine if the agreement complies with all laws, nor does the EOEA represent that it is has the authority to circumvent landlord/tenant law. That is, the EOEA expressly cautions prospective tenants that it does not regulate fees charged by ALRs, as such regulation is beyond the scope of its limited jurisdiction. See A Consumer Guide, supra at * 3.

Accordingly, because the EOEA acknowledges that it does not regulate ALR residential fees, the Trial Court erred in deferring to the EOEA's imprimatur of a lease to suggest that Heritage was otherwise in compliance with all state and federal laws relating to

consumer protection and financial exploitation. Such a review was never undertaken by EOEA, and it was error to conclude otherwise.

CONCLUSION

Chapter 19D expressly requires ALRs to comply with all state and federal laws dealing with consumer protections. See G. L. c. 19D, § 14. Chapter 19D also requires ALRs to comply with all state and federal laws providing protection against financial exploitation. See id. Further, Chapter 19D expressly requires ALRs to comply with all established laws relating to residential tenancies. See G. L. c. 19D, § 16. The Legislature had the opportunity to exempt ALRs from complying with the Security Deposit Statute, just like other express exemptions included in Chapter 19D. The Legislature opted not to do so.

Similarly, the EOEA expressly warned in its A Consumer Guide that it does not regulate ALR fees, knowing that laws in Massachusetts provide these protections, and a mechanism for its enforcement.

Heritage's tenants represent some of the most vulnerable of our fellow citizens. They are elderly, infirm and often disabled. Fortunately, the law is clear that these tenants enjoy the very same

landlord/tenant protections as everyone else renting a residence in the Commonwealth. ALRs are not entitled to a judicially-created exemption to these vital consumer protection laws, particularly when the laws, as written, so clearly afford these tenants these protections. Heritage must therefore be held accountable for charging "Community Fees" in violation of G. L. c. 186, § 15B.

WHEREFORE, for the reasons set forth herein, Ryan respectfully requests that this Court vacate dismissal of the action entered on behalf of Heritage and remand this case for further proceedings consistent with the Court's findings.[5]

[5] In accordance with G. L. c. 93A, §§ 2 and 9, Ryan respectfully requests that this Court award reasonable attorneys' fees and costs associated with the pursuit of this appeal. See Fabre v. Walton, 441 Mass. 9, 10-11 (2004).

Respectfully submitted,

/s/ Joshua N. Garick, Esq.

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Dated: December 13, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a copy of the within Brief of the Appellant to be served upon the Defendant-Appellee electronically and by first class mail, to counsel of record:

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Dated: December 13, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

/s/ Joshua N. Garick
Joshua N. Garick

Dated: December 13, 2018

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Case No. 2018-P-0990

JAMES M. RYAN, Executor of the ESTATE OF JULIA W. RYAN,
individually, and on behalf of all others similarly situated,

Plaintiff/Appellant,

v.

MARY ANN MORSE HEALTHCARE CORP. d/b/a HERITAGE AT FRAMINGHAM

Defendant/Appellee.

ON APPEAL FROM AN ORDER AND JUDGMENT
OF THE MIDDLESEX SUPERIOR COURT

ADDENDUM

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1681CV02433-A

JAMES M. RYAN, Executor of the ESTATE OF JULIA W. RYAN, individually and on behalf of others similarly situated

vs.

MARYANN MORSE HEALTHCARE CORP., d/b/a HERITAGE AT FRAMINGHAM

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO DISMISS

In this nominal class action, the plaintiff, James Ryan, executor of the Estate of Julia Ryan ("Ryan"), alleges that the defendant assisted living facility, Maryann Morse Healthcare Corp., d/b/a Heritage at Framingham ("Heritage") violated G.L. c. 186, § 15B, the Security Deposit Statute, and chapter 93A by charging Plaintiff a "community fee" of $2,800, together with first and last month's rent ($4,000 each) at the outset of Julia Ryan's residency at Heritage. Heritage acknowledges the "community fee" was not treated as a security deposit under the Security Deposit Statute.[1] Ryan alleges the community fee is an impermissible fee in violation of the Security Deposit Statute, which also constitutes unfair business conduct in violation of chapter 93A pursuant to 940 C.M.R. § 3.17(4)(a). Before the court is Heritage's motion to dismiss under Rule 12(b)(6).

Heritage contends that because it is an Assisted Living Residence ("ALR") and subject to a statutory and regulatory scheme that governs ALRs, the Security Deposit Statute does not apply and Ryan's claims fail as a matter of law. In response, Ryan contends that the Security

[1] The community fee, without limitation, was not held in a separate interest-bearing account and Ryan's mother, as a new resident, was not provided information concerning the account, as required by G.L. c. 186, § 15B.

Deposit Statute is a generally applicable law and that the latter-enacted statute governing ALRs, chapter 19D, not only did not exempt ALRs from the Security Deposit Statute (though it exempted ALR's from certain other statutes), it required ALRs to conform to "all applicable federal and state laws and regulations," including the Security Deposit Statute. Heritage's motion turns on whether the Legislature intended the Security Deposit Statute to apply to ALRs which are subject to chapter 19D.

I. Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege facts that, if true, would "plausibly suggest[] . . . an entitlement to relief." *Lopez v. Commonwealth*, 463 Mass. 696, 701 (2012), quoting *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) and *Bell v. Twombly*, 550 U.S. 544, 557 (2007). To decide the motion, the court must presume that the factual allegations in the complaint and any reasonably inferences that may be drawn in plaintiff's favor from the facts alleged are true. *See Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011). The court, however, also must "look beyond the conclusory allegations in the complaint and focus on whether the factual allegations plausibly suggest an entitlement to relief." *Maling v. Finnegan, Henderson, Farabow, Garett & Dunner, LLP*, 473 Mass. 336, 339 (2015), quoting *Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011).

II. Facts

The facts essential to the motion to dismiss are drawn from the complaint and are of limited scope. The court has also drawn additional limited facts from Heritage's moving papers. Specifically, Heritage attached a copy of Heritage's certification as an Assisted Living Residence, issued by the Executive Office of Elder Affairs ("EOEA"). The EOEA on its website publishes a list of certified ALRs, which includes Heritage. There is no dispute that Heritage

holds an ALR certification and the court takes judicial notice of EOEA's certification issued to Heritage. *See Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000) (evaluation of Rule 12(b)(6) motion may consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint"); *Jarosz v. Palmer*, 49 Mass. App. Ct. 834, 836 (2000) (court may consider "facts of which judicial notice may be taken"). The court also considers, though to a limited degree, the Consumer Guide to ALRs, published by the EOEA and a matter of public record. *See id.* And, because Ryan acknowledges that his mother signed a contract with Heritage at the outset of her residency, and both parties have referred to that contract in their papers, this decision also refers to the Residency Agreement between the parties. *See Maram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 & n.4 (2004) (Rule 12(b)(6) motion considers facts alleged in complaint and "uncontested documents of record").

The following facts are relevant to Heritage's motion to dismiss:

Heritage holds a license as an ALR from EOEA. Ryan's mother and Heritage executed a contract, captioned "Residency Agreement," by which Ryan's mother became a resident at Heritage, in Framingham, Massachusetts. In connection with that contract, at the inception of her residency Heritage charged Ryan first and last month's rent, at $4,000 each, as well as a "community fee" of $2,800. The Residency Agreement states that the community fee "is intended to cover upfront staff administrative costs, the Resident's initial service coordination plan and move-in assistance, and establish a replacement reserve for building improvements." Residency Agreement, IV.A, at p.7. The community fee was not first or last month's rent, was not for installing a lock and key, and Heritage did not treat the community fee as a "security deposit" under the Security Deposit Statute. Heritage, without limitation, did not place the

community fee in a separate interest bearing account and did not provide Ryan's mother a receipt and notice of rights.

In his complaint, Ryan seeks to hold Heritage liable for failing to comply with the Security Deposit Statute, and for unfair or deceptive acts or practices in violation of G.L. c. 93A, § 2 due to the alleged violations of the Security Deposit Statute.

III. Analysis

Heritage's motion to dismiss requires the interpretation and harmonization of two statutes: i) G.L. c. 186, § 15B (the "Security Deposit Statute"), originally enacted in 1969 and updated several times since then, which governs several aspects of the landlord-tenant relationship and contains restrictions on the amounts of money a landlord may collect at the outset of a tenancy and how that money must be treated; and i) G.L. c. 19D, §§ 1-18 ("Chapter 19D"), enacted in 1995, which governs "Assisted Living Residences." Heritage contends that Chapter 19D expressly or impliedly exempts ALR's from the Security Deposit Statute; Ryan disagrees. Both parties argue that principles of statutory construction, discussed further below, support their position. The court analyzes both statutes, the parties' arguments, and how to harmonize the statutes.

A. The Statutes at Issue

1. The Security Deposit Statute

The Security Deposit Statute governs several aspects of the landlord-tenant relationship in Massachusetts, including the amounts that a landlord may charge at the outset of a tenancy, and how those funds must be treated by the landlord. G.L. c. 186, § 15B. By enacting a statute that restricted the freedom of contract between landlord and tenant, the legislature manifested concern for the welfare of residential tenants who are generally in inferior bargaining positions

and find unhelpful the traditional avenues of redress—for instance, the legal expense of chasing a security deposit might exceed the amount of the deposit. *Mellor v. Berman*, 390 Mass. 275, 282 (1983), citing *Goes v. Feldman*, 8 Mass. App. Ct. 84, 91 (1979). Section 15B(1)(b) strictly limits the amount that a landlord may demand of a tenant at the outset of a tenancy to: first month's rent, one additional month's rent, the cost to buy and install a key and lock, and "a security deposit equal to the first month's rent provided that the security deposit is deposited [as required by the statute] and the tenant is given the statement of condition [as required by the statute]." G.L. c. 186, § 15B(1)(b). Section 15B(3) then requires that the security deposit be held in a separate interest-bearing account, and that the landlord furnish to the tenant a receipt disclosing its banking location, among other requirements. And Section 15B(2) requires, among other things, that a tenant receive "a separate written statement of the present condition of the premises to be leased or rented." *Id.* § 15B(2)(c). Other provisions of Section 15B limit the ability of the landlord to enter the premises before the end of the lease (§ 15B(1)); require recordkeeping with respect to damage to the premises and application of security deposits to repair damage (§ 15B(2)(d) & (4)); and provide the remedy of treble damages and attorneys' fees when a landlord fails to properly deposit or return security deposits (§ 15B(7)).

The provisions of Section 15B apply to "lessors" and "tenants" and residential "lease" arrangements. *See* G.L. c. 186, § 15B. Chapter 186, in which Section 15B appears, governs many aspects of the landlord-tenant relationship, from lease termination and eviction (§§ 11-13) to provision of utilities (§ 14) to security deposits (§ 15B). *See, e.g.*, G.L. c. 186. Courts apply Section 15B broadly to a variety of landlord-tenant relationships. *See, e.g.*, *Hermida v. Archstone*, 826 F.Supp.2d 380, 384 (D. Mass. 2011) (Section 15B is unambiguous and applied strictly). Courts also have forbade landlords from avoiding the Security Deposit Statute by

inventing new fees or giving new labels to monies that are required as a condition of tenancy. *See Hermida*, 826 F.Supp.2d at 384 (D. Mass. 2011) (amenity fees, for use of pool, gym and grill, violated statute); *Perry v. Equitable Resid. Mgt., LLC*, 2014 WL 4198850, at *4 (D. Mass. 2014) (application fee, amenity fee, community fee, and up-front pet fees all violated statute).

2. *Chapter 19D*

More than twenty years after the Security Deposit Statute, in 1995 the Legislature enacted Chapter 19D, governing Assisted Living Residences ("ALR's"). The Legislature sought to promote this then-new type of living arrangement, which authorized and regulated facilities that provide seniors room and board, together with services that support daily living activities, a level of services less intensive than that associated with nursing homes. *See ATP Asset Mgt., Inc. v. Board of Appeals of Melrose*, 50 Mass. App. Ct. 133, 134-35 (describing legislative purpose set forth in act establishing assisted living facilities). Chapter 19D does not employ the terms "lessor," "tenant" and "lease" as Section 15B does. Chapter 19D instead defines "ALR" and "Resident." G.L. c. 19D, § 1. An ALR is:

> An entity, however organized, whether conducted for profit or not-for-profit, which meets all of the following criteria:
>
> 1. Provides room and board; and
>
> 2. Provides, directly by employees of the entity or through arrangements with another organization which the entity may or may not control or own, assistance with activities of daily living for three or more adult residents who are not related by consanguinity or affinity to their care provider; and
>
> 3. Collects payments or third party reimbursements from or on behalf of residents to pay for the provision of assistance with the activities of daily living or arranges for the same.

G.L. c 19D, § 1. A "Resident" is "an adult who resides in an Assisted Living Residence and who receives housing and personal services and . . . such individual's legal representative." *Id.*

"Assistance with activities for daily living," as defined, includes "physical support, aid or assistance with bathing, dressing/grooming, ambulation, eating, toileting or other similar tasks." *Id.* And, "assistance with instrumental activities of daily living" means to provide "support, aid, assistance, prompting, guidance, or observations of meal preparation, housekeeping, clothes laundering, shopping for food and other items, telephoning, use of transportation, and other similar tasks." *Id.*

Chapter 19D is explicit that an ALR is obligated to provide residents not only a place to live, but services. The ALR's provision of daily living services is not optional: Every ALR "shall . . . provide services to residents in accordance with service plans" developed by the ALR and resident, which account for the resident's needs. G.L. c. 19D, § 2 (v) & (vi). Section 10 of chapter 19D identifies certain resident services that ALR's must provide or arrange for, including meals, housekeeping, timely response to emergency needs, self-administered medication management when appropriate, and assistance with bathing, dressing, and ambulation. *Id.* § 10.[2] Section 12 further describes "individualized plans for residents," which the ALR must "develop and maintain" for each resident. *Id.* § 12. The individualized plan is to describe "in lay terms" the personal services needs of the resident, who will provide the services, and the frequency and duration of such personal services. *Id.* § 12(a). All service plans must be periodically reviewed and reassessed to account for changes in a resident's health or functional status, and the ALR must designate a qualified service coordinator to implement and periodically reassess each plan. *Id.* § 12(b) & (c).

[2] Section 10 also identifies services that an ALR *may* provide or arrange for, such as barber/beauty services, amenities, local transportation for medical and recreational purposes, and assistance with instrumental activities of daily living (meal preparation, shopping, housekeeping, laundering). *Id.* § 10. The latter services contrast to assistance with daily living (bathing, dressing, eating, toileting) which is not optional. *See id.* §§ 1, 10(a)(2), 12.

Chapter 19D requires ALRs to be certified by the Executive Office of Elder Affairs ("EOEA"), subject to renewal every two years. *Id.* §§ 3, 4. An ALR's application of certification must include an operating plan which, among other things, must identify the number of ALR units and residents, base fees to be charged, the number of staff to be employed, and "the services to be offered and arrangements for providing such services, including linkages with hospital and nursing facilities, if any." *Id.* § 4, fifth para. Beyond initial and renewed certification, the administrative regime for ALRs established by Chapter 19D contains typical regulatory features: EOEA is authorized to promulgate regulations to implement chapter 19D (id., §§ 4-6), to review ALRs every two years (§ 5), to deny, suspend or revoke a certification (§6), and use the EOEA ombudsman to mediate ALR resident complaints (§ 7). The EOEA has promulgated regulations at 651 C.M.R. §§ 12.01-12.14, which in large measure track the statute.

Chapter 19D also codifies several aspects of the relationship between ALR and resident, in Section 9, "Resident rights." Section 9(a) identifies eighteen resident rights, including by way of illustration, the right to: a safe and habitable unit, privacy within their unit, private communications, to contract with health care providers of their choice, manage their financial affairs, present grievances, and privacy during medical treatment. *Id.* § 9(a). The eighteenth enumerated resident right is "to not be evicted from the [ALR] except in accordance with the provisions of landlord tenant law as established by [c. 186 or c. 239]." *Id.* § 9(a)(18). Further, Section 14 requires that the ALR and resident sign a written residency agreement, which must set forth the ALR's agreement to provide personal services, lodging and meals; the charges for each; a grievance procedure, and the ALR's "covenant to comply with applicable federal and state laws and regulations regarding consumer protection and [elder protection]." *Id.* § 14. And finally, Section 16 establishes "Residence requirements." All ALRs "shall meet the

requirements of all applicable federal and state laws and regulations, including but not limited to, the state sanitary code, state building and fire safety codes and regulations, and laws and regulations governing handicapped accessibility." *Id.* § 16.[3] Section 16 also limits ALRs to single or double-occupancy units, and requires that new ALRs provide a private bath in each unit. *See id.*

B. Interpretation and Harmonization of the Two Statutes

Ryan's claims must be evaluated against this statutory backdrop. Ryan alleges Heritage violated the Security Deposit Statute by charging Ryan's mother $2,800 community fee which it did not treat in conformance with the Security Deposit Statute. Ryan argues that the Security Deposit Statute applies to ALRs and that harmonization of the two statutes is easy. He relies heavily on two provisions of chapter 19D. First, Section 18(a) exempts ALRs from certain statutes, namely, G.L. c. 111, §§ 25B-25H, 51, and 70E-73B, and G.L. c. 40A, § 9, seventh para., but does not exempt ALRs from the Security Deposit Statute. Second, in two places chapter 19D requires ALRs to comply with otherwise applicable federal and state laws: Section 16 requires compliance with all applicable state and federal law, including without limitation, sanitary and fire safety codes; and Section 14 mandates written residency agreements that must promise compliance with federal and state laws regarding consumer protection. Because the Security Deposit Statute predates chapter 19D and the Legislature did not list it among the statutes from which ALRs are explicitly exempt, Ryan contends, this court cannot hold ALRs exempt. To do so, Ryan argues, would be to add language to chapter 19D that the Legislature did not include.

[33] Neither party has identified or provided the compilation of laws referenced in the second sentence of the first paragraph of Section 16, to be made available by EOEA in consultation with DHCD and the Executive Office of Public Safety, and the court's research on the Massachusetts government website did not reveal such a list.

Provencal v. Commonwealth Health Ins. Connector Auth., 456 Mass. 506, 516 (2010)(court may not read into a statute language "which the Legislature did not see fit to put there").

Ryan's argument has technical appeal; the Legislature could have included the Security Deposit Statute in Section 18 but did not. However, by focusing on the exemption clause (§ 18) and the "otherwise applicable law" clause (§ 16), Ryan's interpretation avoids the broader context, namely, that in chapter 19D the Legislature established a new statutory facility—the Assisted Living Residence. Whether the Legislature intended the existing Security Deposit Statute to apply to ALRs requires analysis of not only Sections 18 and 16 but the statute as a whole. *See Commonwealth v. Woods Hole, Martha's Vineyard & Nantucket S.S. Auth.*, 352 Mass. 617, 618 (1967) ("None of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute, so that the enactment considered as a whole shall constitute a consistent and harmonious statutory provision capable of effectuating the presumed intention of the Legislature."). Considering both statutes and all of chapter 19D, the court determines that the Legislature did not intend ALRs established and regulated under chapter 19D to be subject to the Security Deposit Statute, as discussed below.

First, chapter 19D does not use the terms "lease," "lessor" or "tenant" employed in c. 186, § 15B. Chapter 19D instead defines "Assisted Living Residence" and "Resident" and uses those terms throughout the statute. But the distinction between these living arrangements goes well beyond the labels applied by the Legislature. The landlord-tenant relationship applies to the lease of residential property, and the Security Deposit Statute applies broadly to such relationships. In contrast, the ALR-resident relationship does not concern lodging alone; it concerns a combination of lodging and services. Chapter 19D throughout makes clear that

ALR's *must* provide lodging, meals and personal services—namely, assistance with activities of daily living such as bathing, dressing/grooming, ambulation, eating and toileting. *See* G.L. c. 19D, §§ 1, 2, 4, 10, 12, discussed *supra*. This makes the ALR-resident relationship substantively different from the landlord-tenant relationship; it is statutorily unique. The Legislature did not use the familiar lessor-tenant terminology; it used the new terms of "ALR" and "resident."[4] This reflects not an oversight but the distinction between ALRs and other living arrangements, whether landlord-tenant relationships or nursing homes. *See City of Worcester v. College Hill Properties, LLC*, 465 Mass. 134, 139 (2013)(legislature presumed to know prior statutes and case law).

The prominence of personal services in the ALR-resident relationship, as well as the statutory mandate to provide those services, distinguishes Heritage from lessors who unsuccessfully have sought to avoid the Security Deposit Statute by creating new labels for up-front fees. *See, e.g., Hermida*, 826 F.Supp.2d at 384 (D. Mass. 2011) ("amenity fees" for condo common areas). The fees in those cases were closely related to the leased property. *Id.*; *Perry*, 2014 WL 4198850, at *4. The lessor was not charging for providing personal services, let alone services mandated by statute. *See id.*

Here, Heritage was obligated by statute to provide an individualized service plan for Ms. Ryan at the outset of her residency, and that was one of the services funded by the community fee. Under Ryan's interpretation, Heritage may not charge for generating the service plan it is obligated to provide. But chapter 19D does not so restrict charges for that required plan, or

[4] The distinction between the ALR-resident relationship and a housing-only relationship is reflected elsewhere in chapter 19D. Section 3 exempts from ALR certification requirements "elderly housing." Section 1 defines "elderly housing" as "any residential premises available for **lease** by elderly or disabled individuals which is financed or subsidized by state or federal housing programs established primarily **to furnish housing rather than housing and personal services** . . . ." G.L. c. 19D, §§ 1, 3 (emphasis supplied). These provisions show that the Legislature purposely distinguished ALR's from housing-only arrangements and leases for such housing.

provide that those costs must be incorporated into monthly rent. The EOEA, which administers chapter 19D, is aware of fees, like the community fee here, charged at the outset of an ALR tenancy, as it advises consumers of these fees and the ability to shop and compare.[5]

The prominent role of services in the ALR-resident relationship make it different from the lessor-tenant relationship to which the Security Deposit Statute applies. Although the two statutes can be reconciled based on language in chapter 19D, as discussed immediately below, even if they could not, the more general Security Deposit Statute would yield to chapter 19D—which is a more specific statute governing a particular type of living arrangement. *See Alliance to Protect Nantucket Sound v. Dept. Pub. Utilities*, 461 Mass. 166, 184 (2011) ("If a general statute and a specific statute cannot be reconciled, the general statute must yield to the specific statute. This is particularly true if the specific statute was enacted after the general statute.").

Second, Sections 16 and 18 of chapter 19D are not the only provisions relevant to harmonizing the two statutes. It is true that ALRs are not explicitly exempted from landlord-tenant law in Section 18(a) and that Section 16 requires ALR's to comply with otherwise applicable law. Read in the context of the entire statute, those provisions serve particular purposes. The statutes identified in Section 18(a) all concern state regulatory regimes governing hospitals, nursing homes, rehabilitation hospitals, and skilled nursing facilities.[6] Section 18(a) makes clear that ALR's are different from those facilities and need not comply with the same

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[5] The EOEA publishes a Consumer Guide to Assisted Living in Massachusetts, which contains a discussion of "initial fees." *See* Exh. C to Heritage's Motion, at 5 ("These initial fees may be called 'entrance fees' or 'community fees.' They can range from a hundred to thousands of dollars and are usually not refundable.").

The court's interpretation of the two relevant statutes in this decision relies on the statutes themselves and not the EOEA regulations or Consumer Guide. In any event, the regulations do not directly answer the question of the interplay between chapter 19D and the Security Deposit Statute; they say no more than chapter 19D itself on that question. The EOEA, of course, must exercise its regulatory authority in a manner consistent with the governing statute. *See South St. Nominee Trust v. Board of Assessors of Carlisle*, 70 Mass. App. Ct. 853, 859 (2007) (declining to defer to agency interpretation that is inconsistent with statute).

[6] Section 18 also exempts ALRs from special permit requirements, by reference to G.L. c. 40A, § 9.

regulatory regimes (ALRs must instead comply with chapter 19D). Section 16, "Residence requirements," by its plain language is concerned with the physical plant of the ALR. That section requires single- or double-occupancy units only, a private bathroom in newly constructed ALRs, and a kitchenette or access to cooking facilities. *Id.* § 16. In that context, the section requires compliance with all applicable federal or state laws and regulations including sanitary and fire codes and regulations governing handicapped accessibility. Section 16 does not necessarily incorporate all other laws, but instead concerns laws relevant to the ALR's physical facility. The EOEA so interprets Section 16, as that section's requirements appear in the "physical requirements" section of the EOEA regulations on "General Requirements for [ALRs]." *See* 651 C.M.R. 12.04(1).

More to the point, elsewhere in chapter 19D the Legislature explicitly considered the applicability of landlord-tenant law found in chapter 186. G.L. c. 19D, § 9(a)(18) provides that no resident may be evicted from an ALR "except in accordance with the provision of landlord tenant law as established by chapter [186] or [239]."[7] The ALR statute thus expressly incorporated the protections of landlord tenant law and chapter 186 with respect to evictions.[8] If, as Ryan contends, all the protections of c. 186 apply to the ALR-resident relationship, then the text in Section 9(a)(18) would be superfluous. *Commonwealth v. Maher,* 408 Mass. 34, 37 (1990) (courts avoid a construction that would "make statutory language meaningless"); *Commonwealth v. Woods Hole, Martha's Vineyard & Nantucket S.S. Auth.,* 352 Mass. 617, 618

[7] Chapter 239 established the summary process for eviction of residential tenants.

[8] Ryan has urged the court to reach the same conclusion that the Superior Court (Salinger, J.) did in *Gowen v. Benchmark Senior Living LLC*, No. 1684cv03972 (BLS-1), denying an ALR's motion to dismiss a class action alleging violation of the Security Deposit Statute. This court's decision focuses on chapter 19D's partial incorporation of c. 186's protections in Section 9(a)(18), and its impact on interpreting the whole of chapter 19D, in a manner that the *Gowen* decision did not.

(1967) ("none of the words of a statute is to be regarded as superfluous"). The better interpretation is that the Legislature made clear that landlord-tenant law applied to ALRs only insofar as chapter 19D incorporated chapter 186's protections against eviction.[9] The Legislature elected not to incorporate the rest of chapter 186, and the statements regarding "otherwise applicable laws" in Sections 16 and 14 do not overcome this legislative expression on the applicability of landlord-tenant law.[10]

This conclusion is bolstered by the fact that chapter 19D provides a comprehensive set of protections to residents in ALRs. Chapter 19D does not displace landlord-tenant law and leave residents to fend for themselves. It provides a comprehensive list of resident rights which, generally speaking, demand fairness in the ALR-resident relationship. These rights include privacy rights, use of personal property in the living area and eviction protections—concerns otherwise within the scope of landlord-tenant law. G.L. c. 19D, § 9. Residents also are statutorily entitled to a written residency agreement and an individualized plan for services. *Id.* §§ 14, 12. And importantly, the Legislature gave the EOEA authority to regulate and to oversee implementation of the statute.

Construing the statute as a whole, the Legislature did not intend to apply the Security Deposit Statute to ALRs when it enacted chapter 19D.

Third, although the court's decision turns on construction of the two statutes and not EOEA regulations under chapter 19D, the EOEA, the agency charged with implementing chapter

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[9] For additional evidence of the limited incorporation of c. 186 and the Security Deposit Statute, the first clause of that statute strictly limits when a landlord may enter a tenant's premises before the end of the tenancy. G.L. c. 186, § 15B(1)(a). In contrast, chapter 19D allows the ALR to adopt rules allowing entrance into a resident's unit for reason of promoting health, safety or welfare of residents. G.L. c. 19D, § 9(3).

[10] Section 14 requires that ALRs in their residency agreements promise to comply with applicable federal and state consumer protection laws. The Security Deposit Statute is a state consumer protection law. *See* 940 C.M.R. 3.16, .17. However, in light of the court's interpretation of chapter 19D, particularly the statute's explicit incorporation of the eviction provisions of c. 186, the Security Deposit Statute is not an *applicable* state consumer protection law.

19D, does not share Ryan's view that ALRs are prohibited from charging up-front fees because of the Security Deposit Statute. EOEA regulations do not expressly address application of the Security Deposit Statute. Like chapter 19D, the only explicit reference to chapter 186 in the regulations concerns the resident's right not to be evicted except in accordance with landlord-tenant law in chapters 186 and 239, including an eviction notice and court proceedings when required. 651 C.M.R. 12.08(1)(r); 12.08(2)(f). But in EOEA's Consumer Guide to Assisted Living Facilities, the agency demonstrates that it does not apply the Security Deposit Statute in the manner urged by Ryan. Among the questions EOEA suggests that consumers ask of a prospective ALR is: "Does the ALR require an initial entrance fee, application fee or deposit up front? *You should ask for an explanation of any up-front fees in writing. Depending on the circumstances, it may be possible to negotiate these fees.*" Consumer Guide, at 3 (emphasis in original); *see also* p. 13. To the extent the EOEA has considered the issue raised by Heritage's motion, the agency does not apply the Security Deposit Statute to ALRs.[11]

Finally, courts in other jurisdictions facing a similar question—whether generally applicable landlord-tenant law applied to a more recently authorized living arrangement—have declined to apply the landlord-tenant law. No Massachusetts appellate case has considered the question. In the different context of a zoning appeal, the Appeals Court acknowledged the differences between an ALR and a typical landlord-tenant relationship:

> The relationship between a tenant and a landlord in a multi-family dwelling is substantially different from the relationship between a resident and the care provider in an assisted living facility. . . [T]here is a measure of "care" which residents in an assisted living facility can expect, beyond and different from the reasonable expectations of tenants in a multi-family dwelling. The reasonable expectation of some measure of care is inherent in the very definition of an [ALR] provided by chapter 19D, which requires that assistance with activities of daily living will be provided by a "care provider."

[11] "In general, [courts] give deference to an agency's interpretation of those statutes which it is charged with enforcing." *Providence and Worcester R.R. Co. v. Energy Facilities Siting Bd.*, 453 Mass. 135, 141 (2009).

APT Asset Mgt., Inc. v. Board of Appeals of Melrose, 50 Mass. App. 133, 137 (2000). The Appeals Court's evaluation of ALRs *Melrose* is consistent with the discussion in this decision concerning the prominence of services in the ALR relationship. *See id.* at 142 ("these services cannot be separated from the residential purpose of an assisted living residence: If the services are not provided, the facility is not an assisted living residence."). Heritage has identified one case outside Massachusetts that declined to apply a security deposit statute to a new statutorily-authorized living arrangement. In *Jackim v. CC-Lake, Inc.*, 363 Ill. App. 3d 759, 765-69 (2005), the court declined to apply Illinois' security deposit statute to a life care provider, which held a permit under the Illinois Life Care Facilities Act, because the services provided by the facility distinguished it from a lessor/lessee relationship. *Id.* at 765-69; *but see M&I First Natl. Bank v. Episcopal Homes Mgt., Inc.*, 195 Wisc. 2d 485, 500-01, 508-10 (applying Wisconsin security deposit statute to entry fee assessed by elderly housing facility).[12] Other identified cases distinguish between lodging-only arrangements and lodging-and-services arrangements. They are instructive, like the *Melrose* case, but do not concern an effort, like Ryan's, to apply a security deposit statute to a new statutory living arrangement. *See Starns v. American Baptist Estates of Red Bank*, 352 N.J. Super. 327, 334-337 (2002) (distinguishing between continuing care retirement community and residential rentals); *Sunrise Group Homes, Inc. v. Ferguson*, 55 Wash. App. 285, 287-89 (1989) (declining to apply the eviction provisions of landlord-tenant statute to congregate living facility for disabled resident, because facility provided services not only lodging). At least the Illinois decision in *Jackim* supports the conclusion that generally

[12] Although the elderly housing facility at issue in *M&I* was designed to promote independent living, it did not provide personal services to residents, nor was it authorized by statute or regulated by an administrative agency, all of which distinguish the facility from Heritage. *M&I First Natl. Bank*, 195 Wisc. 2d at 508-10.

applicable landlord-tenant law can be displaced by a new, more specific regulatory regime governing a particular type of residential arrangement.

For all these reasons, the proper interpretation of chapter 19D, and harmonization of that statute with the Security Deposit Statute, is that the Security Deposit Statute does not apply to ALRs established and regulated under chapter 19D. The Security Deposit Statute thus does not prohibit Heritage's collection of the up-front "community fee" at issue in Ryan's complaint. Ryan's claim for violation of the Security Deposit Act is dismissed for failure to state a claim under Mass. R. Civ. P. 12(b)(6). Because Ryan's chapter 93A claim relies entirely on the alleged violation of the Security Deposit Statute, it is also dismissed.

CONCLUSION

For the reasons set forth above, Heritage's motion to dismiss is **allowed**. Ryan's complaint is dismissed with prejudice.

Christopher K. Barry-Smith
Justice of the Superior Court

DATE: January 9, 2018

Notice Sent 5/8/17 (SM)
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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT.
1684CV03972-BLS2

ADRIENNE GOWEN, through her legal guardian Scott Gowen
and on behalf of herself and all others similarly situated

v.

BENCHMARK SENIOR LIVING LLC

MEMORANDUM AND ORDER DENYING CROSS-MOTIONS TO DISMISS

Adrienne Gowen lives in an assisted living facility that is now managed by Benchmark Senior Living LLC. Gowen claims that Benchmark's predecessor assessed and collected some unlawful charges when Gowen first moved in. Benchmark, in turn, claims that Gowen has failed to pay what she owes for living in the Benchmark facility and receiving assisted-living services from Benchmark.

Gowen alleges that Benchmark's predecessor violated Massachusetts residential landlord/tenant law in two ways: by charging her a $2500 "community fee" at the inception of her lease even though such a fee is not authorized by G.L. c. 186, § 15B(1)(b); and by charging $5500 for last month's rent that in realty was a security deposit, and not complying with the legal requirements for assessing a security deposit (such as holding it in a separate interest-bearing account and paying Gowen interest on her deposit each year). Gowen alleges that Benchmark is liable for prior and ongoing misconduct with respect to each of these two charges. She asserts claims for violations of G.L. c. 186, § 15B, and G.L. c. 93A and for negligent misrepresentation, intentional fraud, and unjust enrichment.

Benchmark alleges that Gowen and her guardian have failed to pay what they owe for Gowen's residency and the services she has been receiving at the facility. Benchmark asserts counterclaims for breach of contract and unjust enrichment.

Both sides have moved to dismiss all claims and counterclaims against them under Mass. R. Civ. P. 12(b)(6). The Court will allow Benchmark's motion in part with respect to Gowen's claim under G.L. c. 93A concerning the "community fee" and with respect to all of her claims for negligent misrepresentation and intentional fraud. It will deny the rest of Benchmark's motion. It will also deny Gowen's motion to dismiss the counterclaims against her.

1. Legal Standards. To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege facts that, if true, would "plausibly suggest[] ... an entitlement to relief." *Lopez* v. *Commonwealth*, 463 Mass. 696, 701 (2012), quoting *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). For the purpose of deciding the pending motions to dismiss, the Court must assume that the factual allegations in the complaint and any reasonable inferences that may be drawn in Plaintiffs' favor from the facts alleged are true. See *Golchin* v. *Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011). In so doing, however, it must "look beyond the conclusory allegations in the complaint and focus on whether the factual allegations plausibly suggest an entitlement to relief." *Maling* v. *Finnegan, Henderson, Farabow, Garrett & Dunner, LLP*, 473 Mass. 336, 339 (2015), quoting *Curtis* v. *Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011).

2. Claims against Benchmark.

2.1. Community Fee claims.

2.1.1. G.L. c. 186, § 15B. Gowen states a viable claim in Count I that it was illegal for Benchmark's predecessor to make Gowen pay a $2500 "community fee" and that it is therefore illegal for Benchmark to retain that community fee. Chapter 186 governs the renting of residential living space. It provides in relevant part that "no lessor may require a tenant or prospective tenant," at or before commencement of a residential tenancy, "to pay any amount in excess of" first and last months' rent, a security deposit equal to first month's rent, and a charge for the cost of installing a new lock and providing a key. See G.L. c. 186, § 15B(1)(b).

Benchmark's assertion that assisted living facilities are not subject to c. 186, § 15B, because they are regulated by the Executive Office of Elder Affairs under G.L. c. 19D, is without merit. Assisted living facilities provide their residents with a combination of a place to live and an array of supportive services. The "Residence and Service Agreement" that Gowen says she executed specifies that Gowen is entitled to receive not only living accommodations but also personal assistance and care (including assistance with bathing and grooming), housekeeping services, monitoring of her health needs, and social and recreational activities. The additional services beyond a mere residential tenancy are governed by c. 19D. But nothing in that statute

supersedes, either expressly or by necessary implication, the legal protections that § 15B provides to all residential tenants in Massachusetts.

Nothing in c. 19D expressly exempts assisted living facilities from the requirements imposed by c. 186. Although the Legislature expressly exempted such facilities from having to comply with certain statutes that regulate health care facilities and from any zoning requirement that cluster developments obtain a special permit, it did not exempt such facilities from the fee limitations and security deposit requirements that apply to all residential tenancies. See. G.L. c. 19D, § 18. The Court may not "read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose." *Provencal* v. *Commonwealth Health Ins. Connector Auth.*, 456 Mass. 506, 516 (2010), quoting *General Elec. Co.* v. *Department of Envtl. Protection*, 429 Mass. 798, 803 (1999).

Nor does c. 19D implicitly supersede c. 186. To the contrary, the Legislature directed that assisted living facilities "shall meet the requirements of all applicable federal and state laws and regulations[.]" G.L. c. 19D, § 16. This makes clear that c. 19D is not intended to be an exhaustive regulatory scheme that governs all aspects of assisted living operations. And it also makes clear that Benchmark must comply with all laws that govern residential tenancies to the extent they apply to its facility.

Assisted living facilities can easily comply with both statutory schemes, providing supportive services in accord with c. 19D to a resident whose tenancy is also governed by § 15B. Courts must therefore construe and apply these two statutes in a manner that gives "meaning and purpose to both ... 'so that the policies underlying both may be honored.' " *Alliance to Protect Nantucket Sound, Inc.* v. *Energy Facilities Siting Bd.*, 457 Mass. 663, 673 (2010), quoting *Commonwealth* v. *Harris*, 443 Mass. 714, 725 (2005).

Benchmark's further argument that it is permitted to charge an upfront "community fee" to cover the cost of activities and other services that are provided in additional to a resident's tenancy seems correct in the abstract. The statutory limitation on fees imposed by residential landlords only governs fees charged for a "tenancy." See c. 186, § 15B(1)(b). To the extent that Benchmark or another assisted living facility operator provides its residents with services that are beyond the scope

of a typical residential tenancy, it is entitled to charge for those services and may do so without running afoul of § 15B.

But Ms. Gowen alleges facts plausibly suggesting that the "community fee" she was required to pay was assessed at least in part as a charge for her residential tenancy, and not for separate activities or services. Gowen alleges that she executed a contract providing that Gowen's $2500 community fee "covers up front admission staff administrative costs, your initial services coordination plan and move-in assistance, and establishes a replacement reserve for building improvements." It may be that Benchmark's predecessor could lawfully charge a reasonable fee for preparing a service coordination plan for and providing move-in assistance to Ms. Gowen. But costs for processing an admission application and contributions to a capital reserve appear to be costs that are associated with any residential tenancy, and which would mean they cannot be assessed in an up-front fee. See G.L. c. 186, § 15B(1)(b).

In addition, Ms. Gowen alleges facts plausibly suggesting that Benchmark can be held liable as the successor-in-interest to Gowen's original landlord if continued retention of the community fee would violate § 15B. Gowen alleges that Benchmark adopted all of the residence agreements executed by the prior operator, is acting as Gowen's residential landlord pursuant to the residence agreement she previously executed, and received Gowen's $2500 community fee payment from the prior operator. Benchmark admits the further allegation that Gowen has not signed a new residence agreement since Benchmark took over the facility. Taken together, these allegations plausibly suggest that Benchmark "impliedly assume[d] liability of the predecessor" with respect to its alleged retention of the community fee payment. See generally *Guzman* v. *MRM/Elgin*, 409 Mass. 563, 566 (1991).

As a result, Ms. Gowen has stated a viable claim that the community fee, or at least part of it, violates c. 186, § 15B, and that Benchmark is therefore liable under the statute for retaining Gowen's community fee payment.

2.1.2. G.L. c. 93A. Gowen claims in Count II that Benchmark can be held liable under G.L. c. 93A because the prior landlord committed an unfair trade practice by charging Gowen the community fee. It is an unfair trade practice in violation of c. 93A for a residential landlord to "require a tenant" to make a payment

at or before the commencement of a tenancy that is not allowed by c. 186, § 15B. See 940 C.M.R. § 3.17(4)(a). As a result, Gowen may have a viable claim under c. 93A against the prior landlord.

But Gowen has not alleged any facts plausibly suggesting that Benchmark can be held liable for an alleged c. 93A violation by the prior operator of the facility where Gowen lives. As the Supreme Judicial Court has explained and held:

> [T]he liabilities of a selling predecessor corporation are not imposed upon the successor corporation which purchases its assets, unless (1) the successor expressly or impliedly assumes liability of the predecessor, (2) the transaction is a de facto merger or consolidation, (3) the successor is a mere continuation of the predecessor, or (4) the transaction is a fraudulent effort to avoid liabilities of the predecessor."

Guzman, 409 Mass. at 566. Gowen does not allege that there was a de facto merger between the prior operator and Benchmark, as a result of which Benchmark would be liable for conduct by its predecessor in violation of c. 93A. Contrast *Bump* v. *Robbins*, 24 Mass. App. Ct. 296, 314 (1987). Nor does she allege any facts plausibly suggesting that Benchmark implicitly assumed any liability of its predecessor under c. 93A, or that Benchmark can be held liable as the successor corporation under any other theory. The allegation that Gowen's community fee payment was transferred to Benchmark does not plausibly suggest that Benchmark itself committed any unfair trade practice or that it has succeeded to any such liability of the prior landlord.

2.1.3. Negligent Misrepresentation and Fraud. In Counts III and IV, Gowen asserts claims for negligent misrepresentation and intentional fraud with respect to the original assessment of the community fee.

These counts fail to state viable claims because the facts alleged do not plausibly suggest that Benchmark assumed any liability on this score from the prior landlord. The alleged misstatements were made at or about the time that Gowen was charged the community fee, before Benchmark had anything to do with Gowen's tenancy. The allegations that Benchmark now runs the facility and holds Gowen's community fee payment do not plausibly suggest that Benchmark can be held liable for alleged misrepresentations or fraud by the prior facility operator. Cf. *Guzman*, 409 Mass. at 566-571 (company that takes over manufacture of particular product line from predecessor is not liable for torts committed by predecessor).

2.1.4. Unjust Enrichment. Gowen claims in Count V that Benchmark is liable under an unjust enrichment theory for retaining Gowen's community fee payment.

This claim is not time barred. Claims like this one, brought "to recoup money paid to the defendant under conditions ... giving rise to an obligation in equity and good conscience to refund" the payment, are quasi-contractual claims that are subject to a six year limitations period under G.L. c. 260, § 2. *City of New Bedford* v. *Lloyd Inv. Associates, Inc.*, 363 Mass. 112, 118-119 (1973); accord *Suffolk Const. Co.* v. *Benchmark Mechanical Sys., Inc.*, 475 Mass. 150, 156 (2016). This action was filed less than four years after Gowen paid the community fee she now seeks to challenge.

This claim for unjust enrichment appears to be redundant of Gowen's statutory claim under G.L. c. 186, § 15B. Gowen claims that Benchmark's alleged retention of the community fee is unjust because doing so violates § 15B. Since Gowen has an adequate remedy at law under that statute, it appears that the separate unjust enrichment claim is improper. See *Santagate* v. *Tower*, 64 Mass. App. Ct. 324, 329 (2005) ("An equitable remedy for unjust enrichment is not available to a party with an adequate remedy at law."); *Reed* v. *Zipcar, Inc.*, 883 F.Supp.2d 329, 334 (D.Mass. 2012) (Gorton, J.), aff'd, 527 Fed. Appx. 20 (1st Cir. 2013) (dismissing claim for unjust enrichment because statutory claim for unfair trade practices under G.L. c. 93A provided adequate remedy at law).

But Benchmark has not moved to dismiss Count V on this basis. And it seems unlikely that it will make any practical difference, for example with respect to the scope of discovery or any trial, whether this claim is dismissed or not. The Court therefore declines to dismiss this claim for unjust enrichment *sua sponte* on this basis that Gowen has an adequate remedy under the statute.

2.2. Last Month's Rent claims.

2.2.1. G.L. c. 186, § 15B. Gowen states a viable claim in Count VI that her upfront payment of a last month's rent was actually a security deposit, and that Benchmark is therefore liable for not complying with the legal requirements for residential landlords who hold a security deposit. The residency agreement that Gowen alleges she signed provides that the landlord may deduct from her last

month's rent payment an amount equal to the cost to repair any damage to her apartment not caused by normal wear and tear or to repair any other property of the landlord. Gowen therefore has a viable claim that her payment of $5500 as "last month's rent" is subject to the statutory requirements imposed on landlords who collect security deposits. As discussed above, Benchmark's argument that assisted living facility operators need not comply with G.L. c. 186, § 15B, is without merit.

By statute, Benchmark is the legal successor-in-interest to Gowen's prior landlord with respect to the continued holding of any security deposit or any last month's rent. See G.L. c. 186, § 15B(5) & (7A).

Benchmark therefore has a legal obligation to hold any security deposit paid by Gowen in a separate interest bearing account and to pay Gowen annual interest on that deposit. See G.L. c. 186, § 15B(3)(a) & (b). The complaint plausibly suggests that Benchmark has breached these statutory obligations.

2.2.2. G.L. c. 93A. Count VII states a viable claim against Benchmark under G.L. c. 93A. Gowen alleges that Benchmark has failed to pay interest each year on her security deposit and failed to hold that deposit in a separate interest bearing account. Such conduct, if proved, would constitute an unfair trade practice in violation of c. 93A. See 940 C.M.R. § 3.17(4)(c)-(d).

2.2.3. Negligent Misrepresentation and Fraud. In Counts VIII and IX, Gowen asserts claims for negligent misrepresentation and intentional fraud with respect to the original assessment of the alleged security deposit. For the reasons discussed above, the facts alleged in the complaint do not plausibly suggest that Benchmark can be held liable for alleged misrepresentations or fraud by Gowen's previous landlord. The Court will therefore dismiss these claims.

2.2.4. Unjust Enrichment. Gowen claims in Count X that Benchmark is liable under an unjust enrichment theory for retaining Gowen's alleged security deposit. For the reasons discuss above, Benchmark's argument that this claim is barred by the statute of limitations is without merit.

2.3. Class Allegations. Gowen asserts claims on behalf of herself and a putative class consisting of former, current, and prospective tenants of this assisted

living facility who have paid any fee not allowed under G.L. c. 186, § 15B(1)(b) or an amount subject to regulation as a security deposit under c. 186, § 15B(4).

Benchmark has moved to "dismiss" these class allegations. Benchmark has not moved to deny class certification based upon an appropriate factual showing. That is unsurprising, as Gowen has not even had the opportunity to conduct discovery that may be necessary to address class certification issues. Instead, Benchmark seeks to strike the class allegations at the outset without giving Gowen any opportunity to muster evidence to support a motion for class certification (or to oppose a motion to deny class certification).

The Court denies this request. Class allegations are not subject to being dismissed under Mass. R. Civ. P. 12(b)(6) if the underlying claims are legally viable.

3. Counterclaims against Gowen. Benchmark asserts counterclaims for breach of contract and unjust enrichment, based on its allegations that Ms. Gowen has stopped paying what she owes for her residency and the services provided to her at the Benchmark facility. Gowen has moved to dismiss these counterclaims on three grounds, none of which has merit.

First, the counterclaims are not barred by res judicata. It is undisputed that Benchmark previously brought a summary process action seeking to evict Gowen, and that the district court entered final judgment in Gowen's favor. But the district court issued an order stating that it was dismissing the action because Ms. Gowen was "not properly served with a Notice to Quit as required" and her guardian was not a proper party to the action in his individual capacity. The prior judgment has no claim preclusive effect because the case was not decided on the merits. See *Custody of a Minor*, 375 Mass. 733, 741-742 (1978); *Miller* v. *Campello Co-operative Bank*, 344 Mass. 76, 79 (1962). The Court cannot view the district court judgment in isolation, without considering the order stating that the case was being dismissed without any decision on the merits. See *Custody of a Minor*, *supra* at 742.

Second, Gowen's argument that Benchmark has not alleged the basis for its contractual claims "with particularity" and "specificity" misses the mark. A contract claim does not need to be alleged with particularity. See Mass. R. Civ. P. 8(a), 9(b). Benchmark's allegations plausibly suggest that Gowen is living in Benchmark's

facility and receiving assisted living services, that Gowen has either an express or an implied contractual obligation to pay for her residency and services, and that Gowen has not done so. Benchmark is not required to provide more factual detail the terms of the alleged contract, what amounts Gowen has paid, and what amount Benchmark claims it is still owed. See, e.g., *Lopez* v. *Commonwealth*, 463 Mass. 696, 701 (2012) ("detailed factual allegations are not required").

Third, Gowen's assertion that Benchmark's counterclaims are an impermissible attempt to circumvent the requirements of summary process is also without merit. It is true that Benchmark cannot evict Ms. Gowen except by bringing a summary process action under G.L. c. 239 in District Court. See G.L. c. 184, § 18 ("No person shall attempt to recover possession of land or tenements in any manner other than through an action brought pursuant to [G.L. c. 239] or such other proceedings authorized by law."); *Attorney General* v. *Dime Sav. Bank of New York, FSB*, 413 Mass. 284 (1992) (mortgagee who forecloses on real property may not bring trespass action against holdover tenant or mortgagor in actual possession of foreclosed premises because exclusive remedy to obtain possession is provided by summary process statute). But Benchmark does not seek to evict Gowen in this proceeding. If a landlord does bring a summary process eviction action, it may also bring a separate action for rent. See G.L. c. 239, § 2 ("Failure to claim rent and use and occupation in the action shall not bar a subsequent action therefor."). Benchmark is similarly free to sue Gowen seeking unpaid rent without asserting such a claim as part of a summary process action.

ORDER

The motion by Benchmark Senior Living LLC to dismiss all claims against it is ALLOWED IN PART with respect to Counts II, III, IV, VIII, and IX of Plaintiff's complaint and DENIED IN PART with respect to Counts I, V through VII, and X and with respect to the allegations regarding a putative class action. The motion by Adrienne Gowen to dismiss all counterclaims against her is DENIED.

5 May 2017

Kenneth W. Salinger
Justice of the Superior Court

Notify

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT.
1784CV04215-BLS2

CLAIRE HENNESSY, on behalf of herself and all others similarly situated

v.

BROOKDALE SENIOR LIVING COMMUNITIES, INC., and EMERITUS CORPORATION

Notice sent
8/01/2018
J. R. Y.
Y. & Y.
B. Mc.
THE LAW
OFFS.OF
PIP C.,LLC
J.M.D.
J. A.
M. M.

(sc)

MEMORANDUM AND ORDER DENY DEFENDANTS' MOTIONS TO DISMISS OR TO STRIKE CLASS ALLEGATIONS AND TO REPORT THE MATTER

Claire Hennessy lives in an assisted living facility in Dedham, Massachusetts. She has lived there since 2014, when she entered into a "Resident Agreement" with Emeritus Corporation, which at that time operated the facility. Brookdale Senior Living Communications, Inc., now manages the facility.

Hennessy claims that Emeritus violated Massachusetts residential landlord/tenant law by charging her a $4,250 "community fee" at the inception of her lease even though such a fee is not authorized by G.L. c. 186, § 15B(1)(b), and that Brookdale received Hennessey's community fee payment when it acquired or began to manage the facility. She asserts personal and putative class claims under G.L. c. 186 and c. 93A and for negligent misrepresentation, unjust enrichment, and declaratory judgment with respect to this community fee.

Hennessy also claims that Brookdale has been charging her for services that it never provided. She asserts personal and putative class claims against Brookdale for negligent misrepresentation, fraud, and unjust enrichment, and also under c. 93A, with respect to the alleged overcharges.

Defendants have moved to dismiss all claims or, in the alternative, to strike the class allegations. The Court will dismiss the claim of intentional fraud but otherwise deny this motion. Defendants have also asked the Court to report its decision for interlocutory appellate review. The Court will deny that request.

1. Motion to Dismiss Claims. Defendants ask the Court to dismiss all of Hennessey's claims pursuant to Mass. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege facts that, if true, would "plausibly suggest[] ... an entitlement to relief." *Lopez* v. *Commonwealth*, 463 Mass.

696, 701 (2012), quoting *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). For the purpose of deciding the pending motions to dismiss, the Court must assume that the factual allegations in the complaint and any reasonable inferences that may be drawn in Plaintiffs' favor from the facts alleged are true. See *Golchin* v. *Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011). In so doing, however, it must "look beyond the conclusory allegations in the complaint and focus on whether the factual allegations plausibly suggest an entitlement to relief." *Maling* v. *Finnegan, Henderson, Farabow, Garrett & Dunner, LLP*, 473 Mass. 336, 339 (2015), quoting *Curtis* v. *Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011).

1.1. Community Fee Claims. Hennessey states viable claims that it was illegal for Emeritus to charge and for Brookdale to retain a $4,250 "community fee" that was used at least in part to prepare her apartment for occupancy. General Laws c. 186, § 15B, defines some of "the rights and duties of a residential landlord and tenant." *Taylor* v. *Beaudry*, 82 Mass. App. Ct. 105, 116 (2012). It provides in part that no lessor of residential real property "may require a tenant or prospective tenant," at or before commencement of a residential tenancy, "to pay any amount in excess of" first and last months' rent, a security deposit equal to first month's rent, and a charge for the cost of installing a new lock and providing a key. See G.L. c. 186, § 15B(1)(b).

The resident agreement between Hennessy and Defendants is in part a residential lease and is therefore, to that extent, subject to § 15B.[1] Under Massachusetts common law, "[a] tenancy at will arises out of an agreement, express or implied, by which one uses and occupies the premises of another for a consideration—usually the payment of rent." *Williams* v. *Seder*, 306 Mass. 134, 136 (1940). The tenancy is residential, of course, if it involves the lease of residential property. The contract in this case gives Hennessy the legal right to live in an apartment within the residential facility, in exchange for paying a monthly fee. It is a month-to-month lease of an apartment. Though the landlord has the right to move

[1] The Court respectfully disagrees with the contrary ruling in *Ryan* v. *Maryann Morse Healthcare Corp., d/b/a Heritage at Framingham*, Middlesex Superior Court no. 1681CV02433-A (January 9, 2018) (Barry-Smith, J.).

Hennessy to a substitute apartment, the contract expressly gives Hennessy the right to exclusive occupancy of whichever apartment she is living in, in consideration for her monthly payment. The "resident agreement" therefore creates a residential tenancy and is subject to § 15B.

Since Hennessy contracted to live in an assisted living facility, and not just any residential apartment, by law Defendants were required to offer and provide a variety of personal care services in addition to Hennessy's right to exclusive occupancy of a residential apartment. See G.L. c. 19D, § 2(v) & § 10(a). The Legislature enacted c. 19D to establish minimum standards that all "assisted living residences" must meet in providing support and services in additional to residential tenancies.

Defendants argue that c. 19D supersedes c. 186, and exempts assisted living facilities from complying with any of the statutory obligations imposed upon other residential landlords, because c. 19D is a more specific statute and was enacted more recently than c. 186. The Court is not convinced.

"[A] statute is not to be deemed to repeal or supersede a prior statute in whole or in part in the absence of express words to that effect or of clear implication." *George* v. *National Water Main Cleaning Co.*, 477 Mass. 371, 378 (2017), quoting *Commonwealth* v. *Hayes*, 372 Mas. 505, 512 (1977). "Where two statutes appear to be in conflict, we do not mechanically determine 'that the more "recent" or more "specific" statute ... trumps the other.' " *Id.*, quoting *Commonwealth* v. *Harris*, 443 Mass. 714, 725 (2005). "Instead, we 'endeavor to harmonize the two statutes so that the policies underlying both may be honored.' " *Id.*, quoting *Harris*, *supra*; accord, e.g., *Alliance to Protect Nantucket Sound, Inc.* v. *Energy Facilities Siting Board*, 457 Mass. 663, 673 (2010).

Nothing in c. 19D expressly exempts assisted living facilities from the requirements imposed by c. 186. Although the Legislature expressly exempted such facilities from having to comply with certain statutes that regulate health care facilities and from any zoning requirement that cluster developments obtain a special permit, it did not exempt such facilities from the fee limitations and security deposit requirements that apply to all residential tenancies. See. G.L. c. 19D, § 18. The Court may not "read into the statute a provision which the Legislature did not see fit to put

there, whether the omission came from inadvertence or of set purpose." *Provencal* v. *Commonwealth Health Ins. Connector Auth.*, 456 Mass. 506, 516 (2010), quoting *General Elec. Co.* v. *Department of Envtl. Protection*, 429 Mass. 798, 803 (1999).

Nor does c. 19D implicitly supersede c. 186. Assisted living facilities can easily comply with both statutory schemes, providing supportive services in accord with c. 19D to a resident whose tenancy is also governed by § 15B. And the Legislature directed that assisted living facilities "shall meet the requirements of all applicable federal and state laws and regulations[.]" G.L. c. 19D, § 16. This makes clear that c. 19D is not intended to be an exhaustive regulatory scheme that governs all aspects of assisted living operations. And it also makes clear that Defendants must comply with all laws that govern residential tenancies to the extent they apply to their facilities.

Defendants argue that the security deposit and other requirements of G.L. c. 186, § 15B, cannot be applied to assisted living facilities because that would make one small part of G.L. c. 19D superfluous. In establishing the statutory framework that governs assisted living facilities, the Legislature provided that no resident of such a facility may "be evicted ... except in accordance with the provisions of landlord tenant law as established by" G.L. c. 189 or c. 239. See G.L. c. 19D, § 9(a)(18). Defendants assert that this reference to the eviction protections of c. 186 would be unnecessary and therefore superfluous if all of the protections afforded to residential tenants under c. 186 applied in assisted living facilities. Cf. *Shirley Wayside Ltd. Partnership* v. *Board of Appeals of Shirley*, 461 Mass. 469, 477 (2012) (courts should try to "interpret a statute to give effect to all its provisions, so that no part will be inoperative or superfluous") (quoting *Connors* v. *Annino*, 460 Mass. 790, 796 (2011) (internal quotation marks omitted)).

Although Defendants are correct that the eviction provision in c. 19D, § 9(a)(18), was in a technical sense redundant and unnecessary, the Legislature's decision to clarify that the eviction provisions of c. 186 protect residents of assisted living facilities does not mean that we can ignore the plain meaning of c. 186, §15B. "Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, ... a court must give effect to

both." *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253 (1992), quoting *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842). Statutory "provisions that, although 'technically unnecessary,' are sometimes 'inserted out of an abundance of caution—a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti cautela*).' " *Smith* v. *City of Jackson, Miss.*, 544 U.S. 228, 252 (2005) (Scalia, J., concurring in part and concurring in the judgment), quoting *Fort Stewart Schools* v. *Federal Labor Relations Auth.*, 495 U.S. 641, 646 (1990); see, e.g., *Commonwealth* v. *Hughes*, 364 Mass. 426, 430 n.4 (1973); *Braman* v. *Perry*, 29 Mass. (12 Pick.) 118, 123-124 (1831).

A statutory phrase is not superfluous if the legislature "simply intended to remove any doubt" about an issue, or make sure that a legal rule is not overlooked by repeating it in several relevant statutes. *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008); accord *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 383-384 (2013). The Legislature "could sensibly have seen some practical value in the redundancy." *Corley* v. *United States*, 556 U.S. 303, 325 (2009), quoting *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 445-446 (1995) (Souter, J., dissenting).

It would not be appropriate to ignore the plain meaning and scope of G.L. c. 186, § 15B, just to give G.L. c. 19D, § 9(a)(18) some independent meaning. Like all statutory canons of construction, the principal that statutes should not be read in a manner that makes some provision superfluous is "no more than [a] rule of thumb." *Connecticut Nat. Bank*, 503 U.S. at 253. When "interpreting a statute a court should always turn first to one, cardinal canon before all others. ... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* at 253-254.

Defendants also argue that § 9(a)(18) implicates a second maxim of statutory instruction, that "a statutory expression of one thing is an implied exclusion of other things omitted from the statute." See, e.g., *Construction Industries of Massachusetts* v. *Commissioner of Labor and Industries*, 406 Mass. 162, 169 (1989).[2] They say that

[2] In days of old courts referred to this principal using the Latin equivalent, "*expressio unius est exclusion alterius*."

the express statement in c. 19D that the c. 186 eviction provisions apply to residents in assisted living facilities necessarily implies that no other provisions of c. 186 apply.

This argument is unavailing. This maxim "should not be applied where to do so would frustrate the general beneficial purpose of the legislation." *Bank of America, N.A.* v. *Rosa*, 466 Mass. 613, 619-620 (2013). The statutory construction favored by Defendants would frustrate the general beneficial purpose of G.L. c. 186, § 15B.

Finally, Defendants' insistence that G.L. c. 186, § 15B, could not possibly apply here, because it limits a landlord's right to enter leased residential premises and thus would prevent an assisted living facility from providing personal care services, is also unavailing. Nothing in § 15B bars a tenant from contracting with a landlord to come to the apartment to provide housekeeping services, meals, and other personal care services in addition to provide a residential tenancy. If a tenant did so, the landlord would have a contractual right and obligation to enter the apartment. Doing so would not violate § 15B. In any case, if there were any need to do so one could easily harmonize the two statutes. If in fact § 15B somehow barred a landlord from providing personal care services (which it does not), that part of the statute would not apply to facilities governed by § 19D that are authorized and indeed required to offer and provide such services.

1.2. Negligent Misrepresentation and Fraud Claims. Defendant seek dismissal of the two claims for negligent misrepresentation (Counts III and V) and the one claim for intentional fraud (Count VI) on the ground that they are not pleaded with sufficient particularity.

Under Mass. R. Civ. P. 9(b), a plaintiff must "at a minimum" support their claim for fraud by specifically alleging "the identity of the person(s) making the" allegedly fraudulent "representation, the contents of the misrepresentation, and where and when it took place," and must also "specify the materiality of the misrepresentation, [his] reliance thereon, and resulting harm." *Equipment & Systems for Industry, Inc.* v. *NorthMeadows Constr. Co., Inc.*, 59 Mass. App. Ct. 931, 931-932 (2003) (rescript).

The claims for negligent misrepresentation are not subject to Rule 9(b) and need not be stated with particularity. See, e.g., See *DeWolfe* v. *Hingham Centre, Ltd.*,

464 Mass. 795, 798 n.8 (2013) (construing complaint that alleged "material misrepresentation" as stating claim for negligent misrepresentation because "fraud has not been pleaded with sufficient particularity to state a claim for intentional or reckless misrepresentation").

In contrast, the claim against Brookdale for intentional fraud must be dismissed without prejudice because Hennessy fails to identify any fraudulent statements with particularity. See *Equipment & Systems for Industry*, 59 Mass. App. Ct. at 931-932 (intentional fraud claim must be stated with particularity). The complaint does not specify what statements by Brookdale were allegedly false, who made them, when they were made, or any of the other details required by Rule 9(b). Indeed, in her opposition memorandum Hennessy did not state any reason why her fraud claim could survive dismissal.

1.3. Unjust Enrichment Claims. Defendants correctly note that Hennessey's claims for unjust enrichment in Counts IV and VII are essentially duplicative of her statutory claims for recovery under G.L. c. 186 and G.L. c. 93A. If Hennessey has an "adequate remedy at law" under either statute then she will not also be able to recover under an unjust enrichment theory. See *Santagate* v. *Tower*, 64 Mass. App. Ct. 324, 329 (2005).

But Hennessey is entitled to seek relief and assert claims based on different legal theories "in the alternative." Mass. R. Civ. P. 8(a). "A party may ... state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds." Mass. R. Civ. P. 8(e)(2).

It would therefore be inappropriate to dismiss her unjust enrichment claim as duplicative because that would "presuppose" that she can prevail on her other claims. *Zelby Holdings, Inc.* v. *Videogenix, Inc.*, 92 Mass. App. Ct. 86, 93 (2017) (reversing dismissal). Although a plaintiff cannot recover damages for the same alleged injury under a legal theory and also under an equitable claim for unjust enrichment, "it is accepted practice to pursue both theories at the pleading stage." *Id.*, quoting *Lass* v. *Bank of America, N.A.*, 695 F.3d 129, 140 (1st Cir. 2012).

1.4. "Overcharge" Claims. Brookdale asserts in its motion to dismiss that the unjust enrichment and c. 93A claims regarding the allegations that

Brookdale charged for services it never provided, in Counts VII and VIII, should be dismissed because paragraph 221 of the amended complaint "confirms that [the] alleged overcharges were reimbursed." It is not clear whether Brookdale is pressing this point, as it is not supported by any argument in its memorandum of law, as required by Superior Court Rule 9A(a)(1).

Assuming that Brookdale has not waived this point, it is based on an incorrect reading of the amended complaint. In fact, paragraph 221 states that "Brookdale reimbursed Hennessy $5,277.00 as partial reimbursement for its overcharges."

The allegation that Brookdale made a "partial reimbursement," meaning that it repaid some but not all of the alleged overcharges, does not establish that Hennessey's overcharge claims are moot.

2. Motion to Strike Class Allegations. Defendants have also moved to strike the class allegations in the amended complaint if any of Hennessy's claims survive the motion to dismiss, which most have. Defendants argue that Hennessy to assert claims on behalf of residents at Brookdale facilities other than the one in Dedham where she lives. They also argue that Hennessy cannot meet the requirements for class certification under Mass. R. Civ. P. 23 or G.L. c. 93A. The Court is not convinced.

A motion to strike class allegations from a complaint, before a plaintiff has had any opportunity to seek discovery of information relevant to the merits of class certification, should be granted only when "it is obvious from the pleadings that the proceeding cannot possibly move forward on a class-wide basis." See *Manning* v. *Boston Medical Center Corp.*, 725 F.3d 34, 59 (1st. Cir. 2013) (vacating order striking class and collective action allegations pursuant to Fed. R. Civ. P. 12(f)).[3]

2.1. Standing as to Other Facilities. The amended complaint seeks certification of a class that would include prospective, current, or former tenants at

[3] Although *Manning* was decided under the federal rules of civil procedure, the same principles apply here. See generally *Smaland Beach Ass'n, Inc.* v. *Genova*, 461 Mass. 214, 228 (2012) (judicial construction of federal rules of civil procedure applies to parallel Massachusetts rules, "absent compelling reasons to the contrary or significant differences in content" (quoting *Strom* v. *American Honda Motor Co.*, 423 Mass. 330, 335 (1996), and *Rollins Envtl. Servs., Inc.*, v. *Superior Court*, 368 Mass. 174, 180 (1975)).

any assisted living facilities in Massachusetts that are owned or operated by Brookdale or Emeritus.

Defendants' assertion that Hennessy cannot possibly represent tenants who lived at facilities other than the Dedham location where Hennessy now resides is without merit.

The Supreme Judicial Court rejected a very similar argument in *Salvas* v. *Wal-Mart Stores, Inc.*, 452 Mass. 337, 369-370 (2008). In *Salvas*, two individual plaintiffs "sought to represent a class of approximately 67,500 current and former Wal-Mart hourly employees who worked at fort-seven Wal-Marts in Massachusetts during the class period" *Id.* at 346-347. Although the class was initially certified, a judge later decertified the class in part on the ground that the named plaintiffs had not worked at all forty-seven stores and could not muster testimony from competent witnesses in each of the forty-seven stores. *Id.* at 369. The SJC held that this was reversible error because the plaintiffs claimed and then produced evidence that all class members "were subject to the identical terms and conditions" as a matter of company policy. *Id.* at 370. The SJC held that the judge abused his discretion in decertifying the class, and ordered recertification. *Id.* at 372 & 378.

Just as in *Salvas*, class certification cannot be denied—and the class allegations therefore should not be stricken—merely because Hennessy seeks to represent people who live or have lived at other facilities. With respect to the community fee claims, Hennessy alleges that all residents have been subjected to these practices as a matter of uniform policy. With respect to the overcharging claims, there is nothing on the face of the complaint that suggests that the alleged overcharging was limited to the Dedham facility, or that any overcharging at other facilities raises such distinct legal or factual issues that they could not be heard a s a class action encompassing the claims of residents at different facilities.

2.2. Timing of Certification Decision. Defendants' other challenges to class certification are based on allegations of fact outside the complaint, and therefore cannot be raised in a motion to strike the class allegations. See *Manning*, 725 F.3d at 60. Since "the dispute concerning class certification is factual in nature and discovery is needed to determine whether a class should be certified, [the] motion to

strike the class allegations at the pleading state is premature." *Buonomo* v. *Optimum Outcomes, Inc.*, 301 F.R.D. 292, 295 (N.D. Ill. 2014) (internal quotation marks omitted); accord, e.g., *Reynolds* v. *Lifewatch, Inc.*, 136 F.Supp.3d 503, 515 (S.D.N.Y. 2015). Once all necessary discovery has been completed, Defendants will be in a position to raise these arguments either in opposing a motion by Hennessy for class certification, or by bring their own motion to deny class certification.

3. Motion to Report. Defendants have also asked the Court, if it denies the motion to dismiss, to report its decision to the Appeals Court under Mass. R. Civ. P. 64(a) and to "stay all proceedings in the trial court" pending that appeal. They argue that the question of whether assisted living facilities are governed by landlord-tenant law is an important but unsettled question that merits prompt review by an appellate court, that the issue is being raised on appeal in another Superior Court case, and that it makes more sense to allow an interlocutory appeal in this action than to proceed with potentially "lengthy and costly discovery."

Hennessy opposes this motion, in part on the ground that she is more than sixty-five years old and therefore is entitled by statute to a "speedy trial so that" this matter "may be heard and determined" in the trial court "with as little delay as possible." See G.L. c. 231, § 59F.[4]

"The decision whether to report an interlocutory ruling in accordance with Mass. R. Civ. P. 64(a) is highly discretionary." *McMenimen* v. *Passatempo*, 452 Mass. 178, 189 (2008).

The Court concludes, in the exercise of its discretion, that under these circumstances it is not appropriate to report this decision to the Appeals Court on an interlocutory basis. Interrupting this case while awaiting an appeal that could take a year or two to be resolved seems inconsistent with the Legislature's directive that

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[4] The Court accepts this representation by counsel even though it is not supported by an affidavit. Brookdale's staff knows Ms. Hennessy—since she currently lives and receives services at Brookdale's facility—and Brookdale does not question whether Hennessy is actually over 65 years old. Cf. *Menard* v. *McCarthy*, 410 Mass. 125, 127 (1991) (accepting as true counsel's representation as to procedural history, where fact was known to both sides and opposing party did not controvert the representation); *City of Leominster* v. *International Broth. of Police Officers, Local 338*, 33 Mass. App. Ct. 121, 123 (1992) (same).

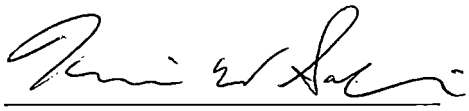
Notice sent
8/01/2018

older civil litigants are entitled to a prompt resolution of their claims at the trial court level. Furthermore, the community fee claims that the Defendants seek to challenge in an interlocutory appeal are only part of this case; Defendants have not made any showing that an interlocutory appeal would be appropriate as to overcharging claims. Finally, since the legal issue that Defendants wish to have reported is already on appeal in another case, there is no apparent need to report this decision on an interlocutory basis, as the issue will be decided on appeal in that other matter. (sc)

ORDER

Defendants' motion to dismiss or to strike the class allegations is ALLOWED IN PART. It is allowed with respect to dismissal of the claim for intentional fraud in Count VI of the amended complaint, which is hereby dismissed without prejudice. This motion is denied with respect to Defendants' request to dismiss the remaining claims and with respect to their alternative request to strike the class allegations in the complaint.

Defendants' motion to report its decision on the motion to dismiss to the Appeals Court is DENIED.



Kenneth W. Salinger
Justice of the Superior Court

27 July 2018

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 19D ASSISTED LIVING

Section 14 WRITTEN RESIDENCY AGREEMENT

Section 14. The sponsor shall enter into a written residency agreement with each resident clearly describing the rights and responsibilities of the resident and the sponsor, including all requirements in section two of this chapter. The residency agreement shall be signed by the sponsor or the sponsor's authorized agent and by the resident and shall include the agreement of the sponsor to provide personal services and other services and goods, lodging and meals, the charges, expenses and other assessments for personal services, lodging and meals, the agreement of the resident to make payment of such charges, expenses and other assessments and the arrangements for such payment, a grievance procedure, the sponsor's covenant to comply with applicable federal and state laws and regulations regarding consumer protection and protection from abuse, neglect and financial exploitation of the elderly and disabled, the conditions under which the agreement may be terminated by either party, reasonable rules for conduct and behavior, and such other similar provisions as the department may reasonably require by regulation.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 19D ASSISTED LIVING

Section 16 RESIDENCE REQUIREMENTS

Section 16. Any assisted living residence shall meet the requirements of all applicable federal and state laws and regulations, including, but not limited to, the state sanitary code, state building and fire safety codes and regulations, and laws and regulations governing handicapped accessibility. In order to facilitate compliance with these laws and regulations, the department, in consultation with the department of housing and community development and the executive office of public safety, shall compile and make available a list of all such applicable laws and regulations.

In order to ensure the maximum residential setting possible, any assisted living residence shall provide only single or double living units with lockable doors on the entry door of each unit. All newly constructed assisted living residences shall provide a private bathroom for each living unit which is equipped with one lavatory, one toilet, and one bath tub or shower stall. All other assisted living residences shall provide at a minimum a private half bathroom for each living unit which is equipped

with one lavatory and one toilet, and shall provide at least one bathing facility for every three residents. All assisted living residences shall provide at a minimum either a kitchenette or access to cooking capacity for all living units. The secretary of elder affairs may, when the secretary determines that public necessity and convenience require and to prevent undue economic hardship, waive the requirements relative to bathrooms and the bathing facilities; provided, however, that the secretary finds that the residence will otherwise meet the purposes of assisted living to provide a home-like residential environment, which promotes privacy, dignity, choice, individuality and independence for its residents.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 19D ASSISTED LIVING

Section 18 CLASSIFICATION OF ASSISTED LIVING RESIDENCES

Section 18. (a) Assisted living residences shall not be subject to the provisions of sections twenty-five B to twenty-five H, inclusive, section fifty-one and sections seventy E to seventy-three B, inclusive, of chapter one hundred and eleven or the seventh full paragraph of section nine of chapter forty A of the General Laws.

(b) No person or residential facility offering, providing or arranging for the provision of assistance with or supervision of instrumental activities of daily living only shall be required to obtain certification under this chapter or a license pursuant to section seventy-one of chapter one hundred and eleven of the General Laws.

(c) For the purposes of this chapter, and any other general or special law classifying real estate property for the purpose of taxation, and notwithstanding the provisions of section twenty-seven C of chapter twenty-nine of the General Laws, a municipality shall classify the portion of any building operated as an assisted living residence in the same category as property held or used for human habitation.

(d) Regardless of the designation of an assisted living residence as a residential, institutional or other use under any zoning ordinance, assisted living residences certified under this chapter shall be regarded as residential uses for the purposes of the state building code and shall be so regarded by the building inspectors of each city and town in the commonwealth.

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title I TITLE TO REAL PROPERTY

Chapter 186 ESTATES FOR YEARS AND AT WILL

Section 15B ENTRANCE OF PREMISES PRIOR TO TERMINATION OF LEASE; PAYMENTS; RECEIPTS; INTEREST; RECORDS; SECURITY DEPOSITS

Section 15B. (1) (a) No lease relating to residential real property shall contain a provision that a lessor may, except to inspect the premises, to make repairs thereto or to show the same to a prospective tenant, purchaser, mortgagee or its agents, enter the premises before the termination date of such lease. A lessor may, however, enter such premises:

(i) in accordance with a court order;

(ii) if the premises appear to have been abandoned by the lessee; or

(iii) to inspect, within the last thirty days of the tenancy or after either party has given notice to the other of intention to terminate the tenancy, the premises for the purpose of determining the amount of damage, if any, to the premises which would be cause for deduction from any security deposit held by the lessor pursuant to this section.

(b) At or prior to the commencement of any tenancy, no lessor may require a tenant or prospective tenant to pay any amount in excess of the following:

(i) rent for the first full month of occupancy; and,

(ii) rent for the last full month of occupancy calculated at the same rate as the first month; and,

(iii) a security deposit equal to the first month's rent provided that such security deposit is deposited as required by subsection (3) and that the tenant is given the statement of condition as required by subsection (2); and,

(iv) the purchase and installation cost for a key and lock.

(c) No lease or other rental agreement shall impose any interest or penalty for failure to pay rent until thirty days after such rent shall have been due.

(d) No lessor or successor in interest shall at any time subsequent to the commencement of a tenancy demand rent in advance in excess of the current month's rent or a security deposit in excess of the amount allowed by this section. The payment in advance for occupancy pursuant to this section shall be binding upon all successors in interest.

(e) A security deposit shall continue to be the property of the tenant making such deposit, shall not be commingled with the assets of the lessor, and shall not be subject to the claims of any creditor of the lessor or of the lessor's successor in interest, including a foreclosing mortgagee or trustee in bankruptcy; provided, however, that the tenant shall be entitled to only such interest as is provided for in subsection (3)(b).

(2)(a) Any lessor or his agent who receives, at or prior to the commencement of a tenancy, rent in advance for the last month of the tenancy from a tenant or prospective tenant shall give to such tenant or prospective tenant at the time of such advance payment a receipt indicating the amount of such rent, the date on which it was received, its intended application as rent for the last month of the tenancy, the name of the person receiving it and, in the case of an agent, the name of the lessor for whom the rent is received, and a description of the rented or leased premises, and a statement indicating that the tenant is entitled to interest on said rent payment at the rate of five per cent per year or other such lesser amount of interest as has been received from the bank where the deposit has been held payable in accordance with the provisions of this clause, and a statement indicating that the tenant should provide the lessor with a forwarding address at the termination of the tenancy indicating where such interest may be given or sent.

Any lessor or his agent who receives said rent in advance for the last month of tenancy shall, beginning with the first day of tenancy, pay interest at the rate of five per cent per year or other such lesser amount of interest as has been received from the bank where the deposit has been held. Such interest shall be paid over to the tenant each year as provided in this clause; provided, however, that in the event that the tenancy is terminated before the anniversary date of such tenancy, the tenant shall receive all accrued interest within thirty days of such termination. Interest shall not accrue for the last month for which rent was paid in advance. At the end of each year of tenancy, such lessor shall give or send to the tenant from whom rent in advance was collected a statement which shall indicate the amount payable by such lessor to the tenant. The lessor shall at the same time give or send to such tenant the interest which is due or

shall notify the tenant that he may deduct the interest from the next rental payment of such tenant. If, after thirty days from the end of each year of the tenancy, the tenant has not received said interest due or said notice to deduct the interest from the next rental payment, the tenant may deduct from his next rent payment the interest due.

If the lessor fails to pay any interest to which the tenant is then entitled within thirty days after the termination of the tenancy, the tenant upon proof of the same in an action against the lessor shall be awarded damages in an amount equal to three times the amount of interest to which the tenant is entitled, together with court costs and reasonable attorneys fees.

(b) Any lessor or his agent who receives a security deposit from a tenant or prospective tenant shall give said tenant or prospective tenant at the time of receiving such security deposit a receipt indicating the amount of such security deposit, the name of the person receiving it and, in the case of an agent, the name of the lessor for whom such security deposit is received, the date on which it is received, and a description of the premises leased or rented. Said receipt shall be signed by the person receiving the security deposit.

(c) Any lessor of residential real property, or his agent, who accepts a security deposit from a tenant or prospective tenant shall, upon receipt of such security deposit, or within ten days after commencement of the tenancy, whichever is later, furnish to such tenant or prospective tenant a separate written statement of the present condition of the premises to be leased or rented. Such written statement shall also contain a comprehensive listing of any damage then existing in the premises, including, but not limited to, any violations of the state sanitary or state

building codes certified by a local board of health or building official or adjudicated by a court and then existing in the premises. Such statement shall be signed by the lessor or his agent and contain the following notice in twelve-point bold-face type at the top of the first page thereof:

"This is a statement of the condition of the premises you have leased or rented. You should read it carefully in order to see if it is correct. If it is correct you must sign it. This will show that you agree that the list is correct and complete. If it is not correct, you must attach a separate signed list of any damage which you believe exists in the premises. This statement must be returned to the lessor or his agent within fifteen days after you receive this list or within fifteen days after you move in, whichever is later. If you do not return this list, within the specified time period, a court may later view your failure to return the list as your agreement that the list is complete and correct in any suit which you may bring to recover the security deposit."

If the tenant submits to the lessor or his agent a separate list of damages, the lessor or his agent shall, within fifteen days of receiving said separate list, return a copy of said list to the tenant with either such lessor's signed agreement with the content thereof or a clear statement of disagreement attached.

(d) Every lessor who accepts a security deposit shall maintain a record of all such security deposits received which contains the following information:—

(i) a detailed description of any damage done to each of the dwelling units or premises for which a security deposit has been accepted, returned to any tenant thereof or for which the lessor has brought suit against any tenant;

(ii) the date upon which the occupancy of the tenant or tenants charged with such damage was terminated; and

(iii) whether repairs were performed to remedy such damage, the dates of said repairs, the cost thereof, and receipts therefor.

Said record shall also include copies of any receipt or statement of condition given to a tenant or prospective tenant as required by this section.

Said record shall be available for inspection upon request of a tenant or prospective tenant during normal business hours in the office of the lessor or his agent. Upon a wrongful failure by the lessor or his agent to make such record available for inspection by a tenant or prospective tenant, said tenant or prospective tenant shall be entitled to the immediate return of any amount paid in the form of a security deposit together with any interest which has accrued thereon.

The lessor or his agent shall maintain said record for each dwelling unit or premises for which a security deposit was accepted for a period of two years from the date of termination of the tenancy or occupancy upon which the security deposit was conditioned.

(3) (a) Any security deposit received by such lessor shall be held in a separate, interest-bearing account in a bank, located within the commonwealth under such terms as will place such deposit beyond the claim of creditors of the lessor, including a foreclosing mortgagee or trustee in bankruptcy, and as will provide for its transfer to a subsequent owner of said property. A receipt shall be given to the tenant within thirty days after such deposit is received by the lessor which receipt shall indicate the name and location of the bank in which the security deposit

has been deposited and the amount and account number of said deposit. Failure to comply with this paragraph shall entitle the tenant to immediate return of the security deposit.

(b) A lessor of residential real property who holds a security deposit pursuant to this section for a period of one year or longer from the commencement of the term of the tenancy shall, beginning with the first day of the tenancy, pay interest at the rate of five per cent per year, or other such lesser amount of interest as has been received from the bank where the deposit has been held payable to the tenant at the end of each year of the tenancy. Such interest shall be paid over to the tenant each year as provided in this clause, provided, however, that in the event that the tenancy is terminated before the anniversary date of the tenancy, the tenant shall receive all accrued interest within thirty days of such termination. Such interest shall be beyond the claims of such lessor, except as provided for in this section. At the end of each year of a tenancy, such lessor shall give or send to the tenant from whom a security deposit has been received a statement which shall indicate the name and address of the bank in which the security deposit has been placed, the amount of the deposit, the account number, and the amount of interest payable by such lessor to the tenant. The lessor shall at the same time give or send to each such tenant the interest which is due or shall include with the statement required by this clause a notification that the tenant may deduct the interest from the tenant's next rental payment. If, after thirty days from the end of each year of the tenancy, the tenant has not received such notice or payment, the tenant may deduct from his next rent payment the interest due.

(4) The lessor shall, within thirty days after the termination of occupancy under a tenancy-at-will or the end of the tenancy as specified in a valid written lease agreement, return to the tenant the security deposit or any balance thereof; provided, however, that the lessor may deduct from such security deposit for the following:

(i) any unpaid rent or water charges which have not been validly withheld or deducted pursuant to any general or special law

(ii) any unpaid increase in real estate taxes which the tenant is obligated to pay pursuant to a tax escalation clause which conforms to the requirements of section fifteen C; and

(iii) a reasonable amount necessary to repair any damage caused to the dwelling unit by the tenant or any person under the tenant's control or on the premises with the tenant's consent, reasonable wear and tear excluded. In the case of such damage, the lessor shall provide to the tenant within such thirty days an itemized list of damages, sworn to by the lessor or his agent under pains and penalties of perjury, itemizing in precise detail the nature of the damage and of the repairs necessary to correct such damage, and written evidence, such as estimates, bills, invoices or receipts, indicating the actual or estimated cost thereof. No amount shall be deducted from the security deposit for any damage to the dwelling unit which was listed in the separate written statement of the present condition of the premises which was required to be given to the tenant prior to the execution of the lease or creation of the tenancy pursuant to clause (c) of subsection (2) or any damages listed in any separate list submitted by the tenant and signed by the lessor or his agent pursuant to said clause (c), unless the lessor subsequently repaired or caused to be repaired said damage and can prove that the renewed

damage was unrelated to the prior damage and was caused by the tenant or by any person under the tenant's control or on the premises with the tenant's consent. Nothing in this section shall limit the right of a landlord to recover from a tenant, who wilfully or maliciously destroys or damages the real or personal property of said landlord, to the forfeiture of a security deposit, when the cost of repairing or replacing such property exceeds the amount of such security deposit.

No deduction may be made from the security deposit for any purpose other than those set forth in this section.

(5) Whenever a lessor who receives a security deposit transfers his interest in the dwelling unit for which the security deposit is held, whether by sale, assignment, death, appointment of a receiver or trustee in bankruptcy, or otherwise, the lessor shall transfer such security deposit together with any interest which has accrued thereon for the benefit of the tenant who made such security deposit to his successor in interest, and said successor in interest shall be liable for the retention and return of said security deposit in accordance with the provisions of this section from the date upon which said transfer is made; provided however, that the granting of a mortgage on such premises shall not be a transfer of interest. The successor in interest shall, within forty-five days from the date of said transfer, notify the tenant who made such security deposit that such security deposit was transferred to him and that he is holding said security deposit. Such notice shall also contain the lessor's name, business address, and business telephone number, and the name, business address, and business telephone number of his agent, if any. Said notice shall be in writing.

Upon such transfer, the lessor or his agent shall continue to be liable with respect to the provisions of this section until:

(a) there has been a transfer of the amount of the security deposit so held to the lessor's successor in interest and the tenant has been notified in writing of the transfer and of the successor in interest's name, business address, and business telephone number;

(b) there has been compliance with this clause by the successor in interest; or

(c) the security deposit has been returned to the tenant.

In the event that the lessor fails to transfer said security deposit to his successor in interest as required by this subsection the successor in interest shall, without regard to the nature of the transfer, assume liability for payment of the security deposit to the tenant in accordance with the provisions of this section; provided, however, that if the tenant still occupies the dwelling unit for which the security deposit was given, said successor in interest may satisfy such obligation by granting the tenant free use and occupancy of the dwelling unit for a period of time equivalent to that period of time for which the dwelling unit could be leased or occupied if the security deposit were deemed to be rent. The liability imposed by this paragraph shall not apply to a city or town which acquires title to property pursuant to chapter sixty or to a foreclosing mortgagee or a mortgagee in possession which is a financial institution chartered by the commonwealth or the United States. The term "rent", as used in the preceding sentence, shall mean the periodic sum paid by the tenant for the use and occupation of the dwelling unit in accordance with the terms of his lease or other rental agreement.

(6) The lessor shall forfeit his right to retain any portion of the security deposit for any reason, or, in any action by a tenant to recover a security deposit, to counterclaim for any damage to the premises if he:

(a) fails to deposit such funds in an account as required by subsection (3);

(b) fails to furnish to the tenant within thirty days after the termination of the occupancy the itemized list of damages, if any, in compliance with the provisions of this section;

(c) uses in any lease signed by the tenant any provision which conflicts with any provision of this section and attempts to enforce such provision or attempts to obtain from the tenant or prospective tenant a waiver of any provision of this section;

(d) fails to transfer such security deposit to his successor in interest or to otherwise comply with the provisions of subsection (5) after he has succeeded to an interest in residential real property; or,

(e) fails to return to the tenant the security deposit or balance thereof to which the tenant is entitled after deducting therefrom any sums in accordance with the provisions of this section, together with any interest thereon, within thirty days after termination of the tenancy.

(7) If the lessor or his agent fails to comply with clauses (a), (d), or (e) of subsection 6, the tenant shall be awarded damages in an amount equal to three times the amount of such security deposit or balance thereof to which the tenant is entitled plus interest at the rate of five per cent from the date when such payment became due, together with court costs and reasonable attorney's fees.

(7A) Whenever a lessor who receives rent in advance for the last month of tenancy transfers his interest in the dwelling unit for which the rental advance was received, whether by sale, assignment, death, appointment of a receiver or trustee in bankruptcy, or otherwise, the lessor shall credit an amount equal to such rental advance together with any interest which has accrued thereon for the benefit of the tenant who made such rental advance, to the successor in interest of such lessor, and said successor in interest shall be liable for crediting the tenant with such rental advance, and for paying all interest accrued thereon in accordance with the provisions of this section from the date upon which said transfer is made; provided, however, that the granting of a mortgage on such premises shall not be deemed a transfer of interest. The successor in interest shall, within forty-five days from the date of said transfer, notify the tenant who made such rental advance that such rental advance was so credited, and that such successor has assumed responsibility therefor pursuant to the foregoing provision. Such notice shall also contain the lessor's name, business address, and business telephone number, and the name, business address, and business telephone number of his agent, if any. Said notice shall be in writing.

Upon such transfer, the lessor or his agent shall continue to be liable with respect to the provisions of this section until:—(a) there has been a credit of the amount of the rental advance so held to the lessor's successor in interest and the tenant has been notified in writing of the transfer and of the successor in interest's name, business address, and business telephone number; (b) there has been compliance with this clause by the successor in interest; or (c) the rental advance has been credited to the tenant and all accrued interest has been paid thereon.

In the event that the lessor fails to credit said rental advance to his successor in interest as required by this subsection, the successor in interest shall, without regard to the nature of the transfer, assume liability for crediting of the rental advance, and payment of all interest thereon to the tenant in accordance with the provisions of this section; provided, however, that if the tenant still occupies the dwelling unit for which the rental advance was given, said successor in interest may satisfy such obligation by granting the tenant free use and occupancy of the dwelling unit for a period of time equivalent to the period of time covered by the rental advance. The liability imposed by this subsection shall not apply to a city or town which acquires title to property pursuant to chapter sixty or to a foreclosing mortgagee or a mortgagee in possession which is a financial institution chartered by the commonwealth or by the United States.

(8) Any provision of a lease which conflicts with any provision of this section and any waiver by a tenant or prospective tenant of any provision of this section shall be deemed to be against public policy and therefore void and unenforceable.

(9) The provisions of this section shall not apply to any lease, rental, occupancy or tenancy of one hundred days or less in duration which lease or rental is for a vacation or recreational purpose.

651 CMR 12.00: CERTIFICATION PROCEDURES AND STANDARDS FOR ASSISTED LIVING RESIDENCES

12.01: Scope and Purpose

651 CMR 12.00 sets forth the requirements for Certification, renewal of Certification and suitability for Applicants and Sponsors of Assisted Living Residences. The purpose of 651 CMR 12.00 is to: promote the availability of services for elderly or disabled persons in a residential environment; to promote dignity, individuality, and privacy to support and preserve decision-making ability of such persons and to promote their health, safety, and welfare; to promote the ability of Assisted Living Residents to age in place; and to promote continued improvement of Assisted Living Residences.

Although the provisions of St. 1994, c. 354 and 651 CMR 12.00 do not apply to the following entities and premises for the original facilities and services for which said entities and premises were originally licensed or organized to provide, if any such entity seeks to have all or part of its premises advertised, operated or maintained as an Assisted Living Residence it must apply to become Certified in accordance with 651 CMR 12.03:

(a) Convalescent homes, nursing homes, rest homes, charitable homes for the aged or intermediate care facilities for persons with developmental disabilities licensed pursuant to M.G.L. c. 111, § 71;

(b) Hospices licensed pursuant to the provisions of M.G.L. c. 111, § 57D;

(c) Facilities providing continuing care to residents as defined by M.G.L. c. 93, § 76;

(d) Congregate housing authorized by M.G.L. c. 121B, § 39;

(e) Group homes operating under contract with the Department of Mental Health or the Department of Developmental Services;

(f) Housing operated for only those duly ordained priests, or for the members of the religious orders of the Roman Catholic Church in their own locations, buildings, Assisted Living Residence or headquarters to provide care, shelter, treatment and medical assistance for any of the said duly ordained priests or members of the said religious orders. The provisions of St. 1994, c. 354, are not applicable to elderly housing as defined by 651 CMR 12.02.

12.14: Inapplicability of Certain Laws and Regulations to Assisted Living Residences

In accordance with M.G.L. c. 19D, § 18(a), premises or portions of premises Certified as Assisted Living Residence shall not be subject to the following laws:

(a) the determination of need process applicable to health care facilities in the Commonwealth as set forth in M.G.L. c. 111, §§ 25B through 25H;

(b) the licensing requirements for hospitals or institutions for unwed mothers or clinics set forth in M.G.L. c. 111, § 51;

(c) the patients and Residents rights requirements set forth in M.G.L. c. 111, § 70E;

(d) the HTLV-III testing, confidentiality and informed consent requirements applicable to a health care facility under M.G.L. c. 111, § 70F; however, physicians for health care providers to Assisted Living Residences are subject to these requirements;

(e) the licensing requirements for convalescent and nursing homes, rest homes, charitable homes for the aged, intermediate care facilities for the mentally retarded and infirmaries maintained in towns (long term care facilities) set forth in M.G.L. c. 111, § 71;

(f) the requirements for deposit of inpatient or Resident funds for a long term care facility as set forth in M.G.L. c. 111, § 71A;

(g) the requirements for classification of long term care facilities set forth in M.G.L. c. 111, § 72;

(h) the requirements for lighting and ventilation for convalescent or nursing homes set forth in M.G.L. c. 111, § 72C;

(i) the requirements for telephone access for long term care facilities set forth in M.G.L. c. 111, § 72D;

(j) the requirements for notices of violations, plans of correction, penalties and enforcement for long term care facilities set forth in M.G.L. c. 111, § 72E;

(k) the patient abuse reporting requirements applicable to long term care facilities under M.G.L. c. 111, §§ 72H through 72L;

(l) the receivership requirements for long term care facilities set forth in M.G.L. c. 111, §§ 72M through 72U;

(m) the requirements for storage space for long term care facility residents set forth in M.G.L. c. 111, § 72V;

(n) the requirements for long term care facility nurses aide training set forth in M.G.L. c. 111, § 72W;

(o) the requirements for no smoking areas in nursing homes as set forth in M.G.L. c. 111, § 72X;

(p) the requirements for nursing pool regulations for long term care facilities set forth in M.G.L. c. 111, § 72Y;

(q) the penalties regarding unlicensed operation of a long term care facility under M.G.L. c. 111, § 73;

(r) the exemption from Department of Public Health licensing or inspection rules regarding long term care facilities operated by the First Church of Christ, Scientist in Boston set forth in M.G.L. c. 111, § 73A;

(s) the requirements for long term care facilities operated for duly ordained priests, or for members of the religious orders of the Roman Catholic Church in their own locations, buildings, Assisted Living Residence or headquarters to provide care for such priests or members of said religious orders set forth in M.G.L. c. 111, § 73B;

12.14: continued

(t) the requirement for a special permit under local zoning by-laws for the use of structures as shared elderly housing upon the issuance of a special permit, and the six person occupancy, age and other conditions deemed necessary for such special permits to be granted as set forth in the seventh full paragraph of M.G.L. c. 40A, § 9.

REGULATORY AUTHORITY

651 CMR 12.00: M.G.L. c. 19A, § 6; St. 1994, c. 354, § 10.

3.17: Landlord-Tenant

(1) Conditions and Maintenance of a Dwelling Unit. It shall be an unfair or deceptive act or practice for an owner to:

(a) Rent a dwelling unit which, at the inception of the tenancy

1. contains a condition which amounts to a violation of law which may endanger or materially impair the health, safety, or well-being of the occupant; or
2. is unfit for human habitation;

(b) Fail, during the terms of the tenancy, after notice is provided in accordance with M.G.L. c. 111, § 127L, to

1. remedy a violation of law in a dwelling unit which may endanger or materially impair the health, safety, or well-being of the occupant, or
2. maintain the dwelling unit in a condition fit for human habitation; provided, however, that said violation of law was not caused by the occupant or others lawfully upon said dwelling unit;

(c) Fail to disclose to a prospective tenant the existence of any condition amounting to a violation of law within the dwelling unit of which the owner had knowledge or upon reasonable inspection could have acquired such knowledge at the commencement of the tenancy;

(d) Represent to a prospective tenant that a dwelling unit meets all requirements of law when, in fact, it contains violations of law;

(e) Fail within a reasonable time after receipt of notice from the tenant to make repairs in accordance with a pre-existing representation made to the tenant;

(f) Fail to provide services and/or supplies after the making of any representation or agreement, that such services would be provided during the term or any portion of the term of the tenancy agreement;

(g) Fail to reimburse the tenant within a reasonable or agreed time after notice, for the reasonable cost of repairs made or paid for, or supplies or services purchased by the tenant after any representation, that such reimbursement would be made;

(h) Fail to reimburse an occupant for reasonable sums expended to correct violations of law in a dwelling unit if the owner failed to make such corrections pursuant to the provisions of M.G.L. c. 111, § 127L, or after notice prescribed by an applicable law;

(i) Fail to comply with the State Sanitary Code or any other law applicable to the conditions of a dwelling unit within a reasonable time after notice of a violation of such code or law from the tenant or agency.

(2) Notices and Demands. It shall be an unfair or deceptive practice for an owner to:

(a) Send to a tenant any notice or paper which appears or purports to be an official or judicial document but which he knows is not;

(b) Fail or refuse to accept any notice sent to any address to which rent is customarily sent, or given to any person who customarily accepts on behalf of the owner, or sent to the person designated in the rental agreement in accordance with 940 CMR 3.17(3)(b)2.

3.17: continued

(c) Demand payment for increased real estate taxes during the term of the tenancy unless, prior to the inception of the tenancy, a valid agreement is made pursuant to which the tenant is obligated to pay such increase.

(3) Rental Agreements.

(a) It shall be unfair or deceptive act or practice for an owner to include in any rental agreement any term which:

1. Violates any law;

2. Fails to state clearly and conspicuously in the rental agreement the conditions upon which an automatic increase in rent shall be determined. Provided, however, that nothing contained in 940 CMR 3.17(3)(a)2. shall be deemed to invalidate an otherwise valid tax escalator clause;

3. Contains a penalty clause not in conformity with the provisions of M.G.L. c. 186, § 15B;

4. Contains a tax escalator clause not in conformity with the provisions of M.G.L. c. 186, § 15C;

(b) It shall be an unfair or deceptive practice for an owner to enter into a written rental agreement which fails to state fully and conspicuously, in simple and readily understandable language:

1. The names, addresses, and telephone numbers of the owner, and any other person who is responsible for the care, maintenance and repair of the property;

2. The name, address, and telephone number of the person authorized to receive notices of violations of law and to accept service of process on behalf of the owner;

3. The amount of the security deposit, if any; and that the owner must hold the security deposit in a separate, interest-bearing account and give to the tenant a receipt and notice of the bank and account number; that the owner must pay interest, at the end of each year of the tenancy, if the security deposit is held for one year or longer from the commencement of the tenancy; that the owner must submit to the tenant a separate written statement of the present condition of the premises, as required by law, and that, if the tenant disagrees with the owner's statement of condition, he/she must attach a separate list of any damage existing in the premises and return the statement to the owner; that the owner must, within thirty days after the end of the tenancy, return to the tenant the security deposit, with interest, less lawful deductions as provided in M.G.L. c. 186, § 15B; that if the owner deducts for damage to the premises, the owner shall provide to the tenant, an itemized list of such damage, and written evidence indicating the actual or estimated cost of repairs necessary to correct such damage; that no amount shall be deducted from the security deposit for any damage which was listed in the separate written statement of present condition or any damage listed in any separate list submitted by the tenant and signed by the owner or his agent; that, if the owner transfers the tenant's dwelling unit, the owner shall transfer the security deposit, with any accrued interest, to the owner's successor in interest for the benefit of the tenant.

(c) It shall be unfair and deceptive practice for an owner to fail to give the tenant an executed copy of any written rental agreement within 30 days of obtaining the signature of the tenant thereon.

(4) Security Deposits and Rent in Advance. It shall be an unfair or deceptive practice for an owner to:

(a) require a tenant or prospective tenant, at or prior to the commencement of any tenancy, to pay any amount in excess of the following:

1. rent for the first full month of occupancy; and

2. rent for the last full month of occupancy calculated at the same rate as the first month; and

3. a security deposit equal to the first month's rent; and,

4. the purchase and installation cost for a key and lock.

or, at any time subsequent to the commencement of a tenancy, demand rent in advance in excess of the current month's rent or a security deposit in excess of the amount allowed by 940 CMR 3.17(4)(a)3.

3.17: continued

(b) fail to give to the tenant a written receipt indicating the amount of rent in advance for the last month of occupancy, and a written receipt indicating the amount of the security deposit, if any, paid by the tenant, in accordance with M.G.L. c. 186, § 15B;
(c) fail to pay interest at the end of each year of the tenancy, on any security deposit held for a period of one year or longer from the commencement of the term of the tenancy, as required by M.G.L. c. 186, § 15B;
(d) fail to hold a security deposit in a separate interest-bearing account or provide notice to the tenant of the bank and account number, in accordance with M.G.L. c. 186, § 15B;
(e) fail to submit to the tenant upon receiving a security deposit or within ten days after commencement of the tenancy, whichever is later, a separate written statement of the present condition of the premises in accordance with M.G.L. c. 186, § 15B;
(f) fail to furnish to the tenant, within 30 days after the termination of occupancy under a tenancy-at-will or the end of the tenancy as specified in a valid written rental agreement, an itemized list of damage, if any, and written evidence indicating the actual or estimated cost of repairs necessary to correct such damage, in accordance with M.G.L. c. 186, § 15B;
(g) fail to return to the tenant the security deposit or balance thereof to which the tenant is entitled after deducting any sums in accordance with M.G.L. c. 186, § 15B, together with interest, within thirty days after termination of occupancy under a tenancy-at-will agreement or the end of the tenancy as specified in a valid written rental agreement;
(h) deduct from a security deposit for any damage which was listed in the separate written statement of present condition given to the tenant prior to execution of the rental agreement or creation of the tenancy, or any damages listed in any separate list submitted by the tenant and signed by the owner or his agent;
(i) fail, upon transfer of his interest in a dwelling unit for which a security deposit is held, to transfer such security deposit together with any accrued interest for the benefit of the tenant to his successor in interest, in accordance with M.G.L. c. 186, § 15B;
(j) fail, upon transfer to him of a dwelling unit for which a security deposit is held, to assume liability for the retention and return of such security deposit, regardless of whether the security deposit was, in fact, transferred to him by the transferor of the dwelling unit, in accordance with M.G.L. c. 186, § 15B; provided, that 940 CMR 3.17(4)(j) shall not apply to a city or town which acquires property pursuant to M.G.L. c. 60 or to a foreclosing mortgagee or a mortgagee in possession which is a financial institution chartered by the Commonwealth or the United States, or;
(k) otherwise fail to comply with the provisions of M.G.L. c. 186, § 15B.

940 CMR 3.00 shall not be deemed to limit any rights or remedies of any tenant or other person under M.G.L. c. 186, §§ 15B(6) or (7).

(5) Evictions and Termination of Tenancy. It shall be an unfair and deceptive practice for an owner to:
(a) Deprive a tenant of access to or full use of the dwelling unit or otherwise exclude him without first obtaining a valid writ of execution for possession of the premises as set forth in M.G.L. c. 239 or such other proceedings authorized by law;
(b) Commence summary process for possession of a dwelling unit before the time period designated in the notice to quit under M.G.L. c. 186, §§ 11 and 12, has expired; provided, however, nothing in 940 CMR 3.17 shall effect the rights and remedies contained in M.G.L. c. 239 § 1A.

(6) Miscellaneous. It shall be an unfair and deceptive practice for an owner to:
(a) Impose any interest or penalty for late payment or rent unless such payment is 30 days overdue;
(b) Retaliate or threaten to retaliate in any manner against a tenant for exercising or attempting to exercise any legal rights as set forth in M.G.L. c. 186, § 18;
(c) Retain as damages for a tenant's breach of lease, of the failure of a prospective tenant to enter into a written rental agreement after signing a rental application, any amount which exceeds the damages to which he is entitled under the law, or an amount which the parties have otherwise agreed as to the amount of the damages;

3.17: continued

(d) Require payment for rent for periods during which the tenant was not obligated to occupy and did not in fact occupy the dwelling unit unless otherwise agreed to in writing by the parties;

(e) Enter a dwelling unit other than (i) to inspect the premises, or (ii) to make repairs thereto, or (iii) to show the same to a prospective tenant, purchaser, mortgagee or its agents, or (iv) pursuant to a court order, or (v) if the premises appear to have been abandoned by the tenant, or (vi) to inspect, during the last 30 days of the tenancy or after either party has given notice to the other of intention to terminate the tenancy, for the purpose of determining the amount of damage, if any, to the premises which would be cause of reduction from any security deposit held by the owner.

(f) To violate willfully any provisions of M.G.L. c. 186, § 14.

(g) It shall be an unfair practice for any owner who is obligated by law or by the express or implied terms of any tenancy agreement to provide gas or electric service to an occupant:

1. To fail to provide such service; or

2. To expose such occupant to the risk of loss of such service by failing to pay gas or electric bills when they become due or by committing larceny or unauthorized use of such gas or electricity. For the purpose of this regulation a bill shall be deemed "due" only after the owner has had an opportunity to contest it at a Department of Public Utilities hearing or any appeal from such hearing during which termination of service has been stayed.

REGULATORY AUTHORITY

940 CMR 3.00: M.G.L. c. 93A, § 2(c).