

# Intensive Care

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## Are Long-Term-Care Facilities Residential Real Property?

Whether a lease to a long-term-care (LTC) facility should constitute residential or nonresidential property can be a critical issue in bankruptcy, as it might impact issues of timing, cash flow and, ultimately, reorganization options. The Bankruptcy Code treats leases for nonresidential real property differently than leases for residential real property. For example, a debtor in possession (DIP) must assume or reject a lease for nonresidential real property within 120 days of the commencement of the case, while leases for residential real property can be assumed or rejected at any time up to confirmation of a reorganization plan.

LTC facilities, which cover skilled-nursing facilities (SNF), intermediate-care facilities (ICF) and assisted-living facilities (ALF), are an increasingly important part of the nation's health care delivery system. As of 2022, there were more than 15,000 SNFs nationally, providing care to more than 1.3 million patients. Moreover, the need for LTC facilities is going to increase, as estimates show that among people who reach age 65, 46 percent will spend time in a nursing home during their lives, and, driven by the Baby Boom generation, the number of Americans aged 65 and older is projected to increase from 58 million in 2022 to 82 million by 2050. Unfortunately, the LTC industry is financially challenged, increasing the likelihood of more bankruptcies involving an LTC facility.<sup>1</sup>

Whether LTC facilities are characterized as residential or nonresidential is in dispute, so attorneys advising would-be debtors, landlords and lenders in the LTC industry must consider this important issue. The Bankruptcy Code does not define "residential real property," and bankruptcy judges disagree on whether LTC facilities are residential or nonresidential property for purposes of § 365(d)(2). This article concludes that the better view is that leases should be treated as nonresidential; decisions that find otherwise misconstrue the nature of the relationship between the patients of an LTC facility and the debtor/operator of the LTC facility, and courts

that have found such leases to be for residential real property should reevaluate this issue.

### The LTC Industry

LTC services generally include a broad range of medical, personal care and supportive services that meet the needs of older adults and others who need assistance because of a chronic illness or injury, physical, cognitive or mental disability, or other health-related conditions. While all SNFs, ICFs and ALFs provide medical and supportive care, the key difference is the level of care being provided.

SNFs are licensed health care facilities that offer a high level of post-acute medical and rehabilitative long- and short-term care for individuals who need rehabilitation services or who suffer from serious or persistent health issues, such as Alzheimer's disease, that are too complicated to be tended to at home or at an ALF. SNFs must have certain skilled-nursing and rehabilitation personnel, including registered nurses, licensed practical and vocational nurses, licensed physical and occupational therapists, speech language pathologists and audiologists present, and can be paid for short-term stays by the Medicare program.

The contract that "residents" typically enter into when entering an SNF describes the health care purposes for the patient during the stay at an SNF. It also typically includes, among other things, language to the effect that the facility "is committed to the goal of providing high-quality care and treatment of all of its residents."

An ICF provides residential care with skilled-nursing supervision and support for individuals who do not require continuous, intensive nursing care but need more assistance than is available in an ALF, including specialized care for people with developmental disabilities. ICFs provide a bridge between hospitalization and long-term care, or they help seniors manage chronic conditions with supportive services.

An ALF provides housing, meals and personal care support for people who need some help with daily activities but do not require extensive, full-time medical care. These facilities offer private or shared-living spaces and a variety of services (e.g., help with bathing, dressing, medication management, housekeeping and social activities). One final — but significant — fact about LTC facilities:



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<sup>1</sup> See Louis E. Robichaux IV & Russell A. Perry, "What's Happening with Long-Term Skilled Nursing Providers? Headwinds, Headaches and Help Wanted!," XXXVI *ABI Journal* 7, 30-31, 64-65, July 2017, [abi.org/abi-journal/what%E2%80%99s-happening-with-long-term-skilled-nursing-providers-headwinds-headaches-and-help](http://abi.org/abi-journal/what%E2%80%99s-happening-with-long-term-skilled-nursing-providers-headwinds-headaches-and-help); Christine Tobin-Presser, Jennifer Byrne & Rick Arrowsmith, "No Place Like Home: Treatment of SNF Leases Under § 365," XL *ABI Journal* 7, 28-29, 50-51, July 2021, [abi.org/abi-journal/no-place-like-home-treatment-of-snf-leases-under-365](http://abi.org/abi-journal/no-place-like-home-treatment-of-snf-leases-under-365) (unless otherwise specified, all links in this article were last visited on Jan. 21, 2026).

although the length of stay in an LTC will vary significantly based on the patient's individual needs (often based on the severity of their condition and their recovery progress), the average length of stay in an SNF is approximately 28 days, while the average length of stay in an ICF is 485 days.

## The Treatment of Residential Real Property Leases in Bankruptcy

The treatment of executory contracts and unexpired leases in a bankruptcy case is governed by § 365 of the Bankruptcy Code. Subject to bankruptcy court approval, a DIP may assume or reject an unexpired lease of residential real property at any time during the case.<sup>2</sup> However, the treatment of unexpired leases of nonresidential real property is different. If an unexpired lease of nonresidential real property is not assumed by the DIP within 120 days after commencement of bankruptcy case, the lease is deemed rejected and the subject property must be surrendered.<sup>3</sup> Thus, how long a debtor operating an LTC will have to make a decision regarding its real property lease is dependent on whether the bankruptcy court will treat it as residential or nonresidential real property.

Timing is not the only difference in treatment between residential and nonresidential real property leases, however. The Code requires the debtor to timely perform all obligations under a nonresidential real property lease from the date of commencement of the bankruptcy case until such lease is assumed or rejected.<sup>4</sup> Courts have interpreted this provision to require a debtor to begin making lease payments beginning in the first full month of the bankruptcy case. This interpretation means that if an LTC facility is treated as residential, it might avoid making some rent payments.

## What Is “Residential” Real Property?

Because the Bankruptcy Code does not define the term “residential,” it should be given its ordinary meaning.<sup>5</sup> In determining the ordinary meaning, courts have frequently looked to definitions in dictionaries. The *Cambridge Dictionary* defines “residential” as “of or relating to houses where people live rather than places where people work.”

In addition, rules of statutory construction suggest that if a statute deals with a technical or specialized subject, as here with real estate, the words in the statute might have meanings that differ from their ordinary usage. In such circumstances, courts may interpret the text dealing with a technical or specialized subject in a manner consistent with the way those words are used in the relevant industry or community. In this context, references define the term “residential” as “commonly used to signify an owner-occupied residence, even though a rental house is technically a residential property” and, “[f]or tax purposes, any rental property in which at least 80 percent of the income is from dwelling units.”<sup>6</sup>

Finally, we can draw some inferences from other federal laws using the term “residential.”<sup>7</sup> According to federal law dealing with federal savings associations' ability to make residential real property loans,<sup>8</sup> the phrases “residential real property” and “residential real estate” refer to “leaseholds, homes (including condominiums and cooperatives ...) and, combinations of homes or dwelling units and business property, involving only minor or incidental business use, or property to be improved by construction of such structures.”

**The difference between residential and nonresidential is obvious when considering the costs of renting a residence and the costs of living in [a skilled-nursing facility].**

## How Do Courts Evaluate LTC Facilities as Residential Real Property or Not?

Bankruptcy courts have grappled with whether LTC facilities are residential or nonresidential real property and are split on how to analyze the issue raised by the statute addressing a “lease of nonresidential real property” rather than a “nonresidential lease.” Most bankruptcy courts have held that the nature of the property rather than the nature of the lease control makes this determination; this has been referred to as the “property test” instead of the “lease test.”

In other words, even if the LTC facility is clearly operating with a commercial lease, bankruptcy courts have considered whether people “reside” on the property when determining how to treat the lease. Basically, these courts have held that because people stay in LTC facilities for long periods of time, they “reside” there, rendering the facility “residential.”

For example, the bankruptcy court in *In re Guardian Elder Care at Johnstown LLC*<sup>9</sup> ultimately decided that for purposes of § 365(d) of the Bankruptcy Code, that lease “does not constitute a ‘nonresidential’ lease” because the facility “fit[s] within” the “plain and commonly understood meaning” of “residence” as “a temporary or permanent dwelling place, abode, or habitation to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.”<sup>10</sup>

Similarly, the bankruptcy courts in *In re PNW Healthcare Holdings LLC*,<sup>11</sup> *In re Care Givers Inc.*<sup>12</sup> and *In re Texas Health Enterprises Inc.*<sup>13</sup> concluded that SNFs qualified as residential real property. In *Care Givers*, the bankruptcy court's reasoning could not be more clear: “The debtor is the lessee. The lease is of real property.... *People live on the*

7 *Shaw v. United States*, 137 S. Ct. 462, 467 (2016) (Court refers to analogous statutes when interpreting legislation).

8 12 U.S.C. § 1464(c)(6)(A).

9 *In re Guardian Elder Care at Johnstown LLC*, 665 B.R. 270 (Bankr. W.D. Pa. 2024).

10 *Id.* at 274.

11 *In re PNW Healthcare Holdings LLC*, 617 B.R. 354 (Bankr. W.D. Wash. 2020).

12 *In re Care Givers Inc.*, 113 B.R. 263 (Bankr. N.D. Tex. 1989).

13 *In re Texas Health Enters. Inc.*, 255 B.R. 181 (Bankr. E.D. Tex. 2000).

2 11 U.S.C. § 365(d)(2).

3 11 U.S.C. § 365(d)(4).

4 11 U.S.C. § 365(d)(3)(A).

5 See, e.g., *Perrin v. United States*, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).

6 Denise L. Evans & O. William Evans, *The Complete Real Estate Encyclopedia* (McGraw-Hill 2007).

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*real property*. The lease is therefore partially residential, and hence not ‘nonresidential.’”<sup>14</sup> The court rejected the argument that the nature of the lease controlled the outcome.

However, there is also authority in which bankruptcy courts arrived at exactly the opposite conclusion. For example, in *In re Sonora Convalescent Hospital Inc.*,<sup>15</sup> the court concluded that the property was nonresidential, stating: “It is clear that the lease contemplated a commercial use of the property. Both the Wilsons and the debtor expected that the debtor would utilize the property to establish a convalescent home, which would take care of patients on a paying basis. This is a commercial use of the property, despite the fact that patients actually do reside on the property, and warrants a nonresidential classification of the property.”

## Are Courts Missing the Essential Nature of the Relationship of LTC “Residents”?

Because it seems that courts are missing the actual nature of the relationship between the “resident” of an SNF and the SNF operator, there is another approach to resolving this issue. Even under the property test, people do not “reside” in an SNF. Courts that find that people “live” or “reside” in an SNF are misjudging the relationship between the resident/patient and the facility. For example, despite that the “average” patient at a general acute care hospital stays overnight for almost a week, there is no dispute that a hospital patient is not “residing” in a hospital.

Similarly, patients on long-term life support can stay in long-term acute-care hospitals (LTACHs), which specialize in treating complex, critically ill patients who need extended hospital-level care, on average for 25-30 days — virtually identical to the average length of stay for a patient in an SNF. Nonetheless, courts would almost certainly not hold that a person “lives” or “resides” in an LTACH.

Thus, the real analysis of the nature of the facility has been misguided if the court focuses on whether someone stays overnight, even for extended periods of time, in a building, as opposed to the nature of the relationship between the patient and the operator of the facility. In an LTC, as in a hospital, the nature of the relationship is not residential; rather, the person is present to receive medical care, or care with the requirements of everyday life, and the fact that they

also stay overnight is merely incidental to the medical care or other assistance provided. Because the medical care or other care is commercial in nature, so is the relationship of the person to the facility (*i.e.*, the relationship of the “resident” is not residential but rather is commercial).

## Conclusion

The difference between residential and nonresidential is obvious when considering the costs of renting a residence and the costs of living in an SNF. According to a 2024 “cost of care” survey, the nationwide median cost in a nursing home for a semi-private room was \$9,277 per month or \$111,325 per year, and a private room was \$10,645.83 per month or \$127,750 per year. By comparison, the median rent in the U.S. in 2024 was \$1,712 per month or \$20,544 per year. In other words, a person in an SNF pays more than six times the amount that a person renting an apartment pays. This differential is because people are in LTC facilities, especially SNFs, for medical care — not because they reside there as a dwelling.

This difference is also apparent when examining the definition of “residence” or “residential.” Applying the dictionary definition, no one would confuse an SNF with a “house ... where people live rather than places where people work.” Even applying a more specialized definition of “residential,” would anyone suggest that an SNF is “an owner-occupied residence” or a “property in which at least 80 percent of the income is from dwelling units” when it is clear that the income derived from an SNF is primarily for medical care?

Finally, when considering other federal legislation that includes the phrases “residential real property” or “residential real estate,” would anyone suggest that an SNF is a “home” or a “combination of dwelling units” or even a “business property, involving only minor or incidental business use?” The answer to all these questions is undoubtedly “no.”

Granted, there are gradations of care in LTC facilities, with SNFs being at one end and ALFs being at the other. Perhaps in some ALFs, people really are paying for a place to live and only receiving assistance with some daily tasks, making those ALFs more like residences than an SNF would be. However, counsel and courts were urged to take a fresh look at whether LTC facilities, and SNFs in particular, are really “residences where people live” as opposed to medical facilities where people stay while receiving medical care, regardless of whether they stay one night or more than one year. **abi**

<sup>14</sup> *In re Care Givers Inc.* at 266 (emphasis added).

<sup>15</sup> *Hospital Inc. v. Sonora Convalescent Hosp. Inc.* (*In re Sonora Convalescent Hosp. Inc.*), 69 B.R. 134 (Bankr. E.D. Cal. 1986).

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