As for damages, the results of substandard care for ALF residents may be less drastic medically than those of skilled nursing facility residents. Nonetheless, the losses ALF residents suffer can be every bit as substantial.

While a resident may survive an injury that heals, it could require an otherwise unnecessary move to a skilled nursing environment. This results in a loss of privacy (single rooms are uncommon in nursing homes), disruption of marital relationships (spouses frequently live together with their own furniture in ALFs), and an overall lifetime sentence to a more restrictive, institutional setting.

The resident bargained for adequate, consistent care to address his or her needs as determined by a knowledgeable and skilled caregiver. The laudable goals of dignity, a homelike environment, and individual autonomy must be secondary to health and safety.

Also, damages due to increased private payments or the accrual of governmental liens for Medicare/Medicaid payments can create “boardable” special damages that can be presented to the jury for repayment at the end of trial. Under the right set of facts, plaintiff lawyers should consider pressing for punitive damages against companies that focus on profits to residents’ detriment.

The same corporate players often provide both skilled nursing and ALF levels of care, although they may do so under a different name or corporate guise. Since many of the major ALF players remain publicly traded,
financial data can be obtained independent of discovery.

Senior citizens often must leave their homes for supervised care because of increasing physical or mental infirmities. If they receive careful attention and reasonable scrutiny by well-informed caregivers, an assisted living placement can raise the quality of life for the entire family. But assisted living residents’ inevitably increasing fragility and vulnerability require constant vigilance by facility staff. When this vigilance is lacking and a resident is injured, plaintiff lawyers need to know how to hold the facility accountable.

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NOTES
2. See AssistedLivingInfo, Paying for Care, www.assistedlivinginfo.com/Paying-for-Care/Overview.
3. For a complete list and description of the assisted living regulations in all states, see National Center for Assisted Living, Assisted Living Regulations, 2012 Assisted Living State Regulatory Review, www.ahcanal.org/ncal/resources/Pages/AssistedLivingRegulations.aspx.
4. For example, in Pennsylvania the regulations now separate “personal care homes” from “assisted living facilities,” with the latter having greater service, documentation, and care requirements. See Pa. Code tit. 55, §2600, 2800 (2010).
5. For example, Manor Care, Inc.’s policy of “negotiated risk agreements” (obtained in one client’s case) states: “A negotiated risk agreement is completed by the executive director during move-in or during a resident’s stay when a family’s/resident’s behavior or preferences puts the facility and/or the resident at risk. The form acknowledges that discussion of a particular risk(s) has taken place with the family/responsible party and that mutual understanding and agreement on the approach was reached.”

Litigation Tips
In many cases, the dispute involves a pure contract interpretation issue. If the policy language is not clear, other evidence may be helpful in ascertaining the parties’ intent.

State departments of insurance may require insurers to submit advertising materials or outlines of coverage for approval before making them available to insureds.

Also, you may be able to gauge the insurer’s intent by obtaining its communications with the department of insurance when it sought approval to sell the policy form or requested a premium increase. The insurer may have made representations regarding the scope of coverage that may be useful in your case.

Claims manuals, guidelines, and training materials are also relevant. Because many insurers have changed their approach to policy interpretation, it is helpful to obtain historical manuals and guidelines as well.

Discovery of other disputes involving the same issue may yield valuable evidence. For example, there has been extensive litigation involving premium increases imposed by long-term care insurers. There has also been litigation regarding the insurer’s “alternate plan of care” provisions.2

Finally, you may be able to use a “conformity with state statutes” provision to bring the policy in line with current state statutes. Under this emerging theory, some courts have treated the annual insurance policy renewal as a new policy, which must conform to current state statutes that provide greater protection to insureds under long-term care contracts.3

Depending on the state, available remedies may include contract benefits and extracontractual remedies that are typically available in claims disputes. It may also be helpful to consult state statutes for enhanced remedies that may be available for the elderly.

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NOTES
2. See Roland v. Transamerica Life Ins. Co., 570 F. Supp. 2d 871 (N.D. Tex. 2008) (court upheld an insurer’s denial of benefits under an “alternate plan of care” provision on grounds that the alternate plan of care had not been mutually agreed on between the insurer and the insured).