DO INDEPENDENT AND ASSISTED LIVING COMMUNITIES VIOLATE THE FAIR HOUSING AMENDMENTS ACT AND THE AMERICANS WITH DISABILITIES ACT?

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As the elderly population increases in America, finding and maintaining adequate housing for them also becomes an increasing concern. More than half of elderly Americans suffer from physical or mental disabilities, and these disabilities both limit their capacity to advocate for themselves, and make them the targets of discrimination. In response to these concerns, Congress passed the Fair Housing Amendments Act and the Americans with Disabilities Act. In this note, Erin Ziaja analyzes and critiques the protection these statutes afford for the elderly in the housing context, and traces the varying degrees of success elders have had in enforcing these rights. Ms. Ziaja discovers numerous barriers, within the statutes themselves and also from the reality of the lives of the elderly, that inhibit valid discrimination claims from being litigated. This note concludes with recommending class action suits as a means of enforcing the civil rights guaranteed to all elderly Americans.

I. Introduction

Congress's concern regarding treatment of the disabled is found in two significant antidiscrimination laws—the

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Americans with Disabilities Act (ADA)[1] and the Fair Housing Amendments Act (FHAA).[2] In hearings prior to the passage of both Acts, Congress found that prejudicial attitudes toward the disabled resulted in "discrimination against individuals with disabilities . . . [in] employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services[.]"[3] To stem this discrimination, the FHAA, enacted in 1988, expanded the protections provided by the Fair Housing Act (FHA) to include the mentally and physically disabled.[4] The main objectives of the FHAA were to integrate the disabled into mainstream housing and increase the ability of the disabled to enjoy their current living arrangements by allowing for reasonable alterations of their environment.[5] Four years later, Congress enacted the ADA to provide clear guidelines addressing discrimination as well as to provide "a national mandate for the elimination of discrimination against individuals with disabilities."[6]

One group that could benefit tremendously from the FHAA and the ADA is the elderly. With a rapidly growing elderly population, housing is becoming a national concern.[7] The importance of the FHAA in this context takes on further meaning when one recognizes that 52.5% of the elderly population has at least one disability as defined and protected by the Act.[8] Given the clear congressional mandate these Acts express and the large number of disabled older Americans, one would think that as new housing develops special care is used to ensure that reasonable accommodations are made to give

1. 42 U.S.C. § 12101 (1997).
2. 42 U.S.C. § 3601 (1994).
3. 42 U.S.C. § 12101(a)(3) (1997).
4. 42 U.S.C. § 3602(h)(1) (1994).
5. Susan B. Eisner, *There's No Place Like Home: Housing Discrimination Against Disabled Persons and the Concept of Reasonable Accommodation Under the Fair Housing Amendments Act of 1988*, 14 N.Y.L. SCH. J. HUM. RTS. 435, 438 (1998).
6. 42 U.S.C. § 12101(b). This section also proposed to ensure a critical role for the federal government in enforcing the Act and invoked Congress's commerce powers as the enforcement authority. *Id.*
7. 2 PAUL J. LANZIKOS & ANNE HARRINGTON, HOUSING OPTIONS FOR OLDER ADULTS AND YOUNGER DISABLED PEOPLE, ESTATE PLANNING FOR THE AGING OR INCAPACITATED CLIENT IN MASSACHUSETTS: PROTECTING LEGAL RIGHTS, PRESERVING RESOURCES AND PROVIDING HEALTH CARE OPTIONS § 16.1.1 (1998).
8. Am. Ass'n of Retired Persons, *A Profile of Older Americans* (1997), *at* http://www.research.aarp.org/general/profile99.pdf. Approximately 43,000,000 Americans have a physical or mental disability, and, as the population ages, this figure continues to increase. 42 U.S.C. § 12101(a)(1).

give disabled elderly the opportunity to enjoy the full range of available housing. Therefore, it is surprising to find that a brief phone call about the living arrangements for the elderly in any town is likely to be met with open discrimination. For example, a look through the local phonebook provided me with at least eight different "senior communities" advertising attractive benefits for the senior resident including everything from tennis courts to fine dining. However, a couple of phone calls made me realize that these "communities" were not open to all seniors. At least three were quick to explain that a senior in a wheelchair would not be welcome in their community. Another explained that their no-pets policy extended to seeing-eye dogs. Yet another explained that although a senior could get assistance with "light housekeeping," under no circumstances could a senior requiring nursing or personal care live at their facility. Several of these communities pointed out that although a senior requiring a wheelchair could not live at the "independent living facility," they would be able to live in the "assisted living center."

The FHAA prohibits actions that deny equal terms, conditions, or privileges of housing.[9] Therefore, on the surface, an independent living center's refusal to rent to seniors with disabilities, even when offering separate housing options at another facility, seems to be in violation of federal law. Yet, few cases exist where a senior sues an independent living center for discrimination. Even fewer examples exist of suits brought under the ADA.[10] A variety of possible explanations exist: communities may avoid the risk of embarrassing eviction litigation by settling; seniors are happy with the arrangements as they stand, and take no issue with moving to another facility at the point when they become disabled; or seniors may think that they waived their right to federal protections by signing leases agreeing to the independent living communities' conditions. Further, the ADA has additional legislative and administrative burdens that create a reluctance

9. 42 U.S.C. § 3604(f)(2)(A) (1994).

10. In fact, there are no cases of a senior suing an assisted or independent living facility under a theory of housing discrimination. The few examples of suits brought by seniors with disabilities that have alleged housing discrimination have arisen in the nursing home setting. Because nursing homes are designed to accommodate individuals with infirmity and physical disability, rarely do the cases concern removal of a structural barrier. Rather claims arise in a nursing home's refusals to make reasonable accommodations or denial of admission. *See* Elizabeth K. Schneider, *The ADA—A Little Used Tool to Remedy Nursing Home Discrimination*, 28 U. TOL. L. REV. 489, 508–10 (1997).

in attorneys to take cases, including low damage awards and a backlog of investigations.[11]

The purpose of this note, therefore, is to first discuss the protections provided by the FHAA, with a specific focus on the impact these protections have on the elderly population. To do so, this note will explore the housing patterns of the elderly and the factors that influence their housing choices. Also, because this note's purpose is to discuss housing protections for the elderly, the ADA will also be examined as an additional legislative remedy. Second, this note will review recent cases that reflect judicial attitudes toward the FHAA and ADA in the context of the disabled elderly residing in senior communities. Third, this note will explore the concept of reasonable accommodations to determine if requiring an independent living center to open its doors to the disabled goes beyond congressional intent of what a landlord is required to do to meet the needs of a tenant. Fourth, recognizing the unique needs of the elderly and the lack of litigation in this area, this note recommends using class action suits as a way of enforcing the civil rights guaranteed by the FHAA.

II. Background

In 1988, Congress passed the FHAA.[12] The Act prohibits discrimination in housing[13] on the basis of physical and mental disability.[14] Under the Act, "handicap" means "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment."[15] The definition of "handicap" applies to people unable to perform or limited in performing the activities of an average person in the general population.[16]

11. Ann C. Hodges, *Dispute Resolution Under the Americans with Disabilities Act: A Report to the Administrative Conference of the United States*, 9 ADMIN. L.J. AM. U. 1007, 1018–30 (1996).

12. 42 U.S.C. § 3601 (1994).

13. 42 U.S.C. § 3604(f)(1)(A) (making it unlawful to make a dwelling's availability contingent upon the absence of disabilities); *see also id.* § 3604(f)(2)(A) (making it unlawful to discriminate in the "terms, conditions, or privileges of sale or rental of a dwelling because of a disability").

14. The word "handicap" is used throughout the FHAA, and therefore, when quoting directly to the Act, "handicap" will be used. However, in all other instances the word "disability" will be used and is meant to be interchangeable with the term "handicap."

15. 42 U.S.C. § 3602(h).

16. Rusinov, 05-93-0517-1 H.U.D. (June 30, 1995).

"Major life activities" include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[17] Regulations have further expanded and clarified the definition of "handicap" to include any physical or mental impairment such as a psychological or mental disorder or condition, cosmetic disfigurement, or anatomical loss.[18]

Because the purpose of the FHAA was to integrate disabled Americans into mainstream housing and increase their housing options,[19] almost all multifamily dwellings are covered by the Act.[20] The Act applies to federally owned or operated dwellings,[21] dwellings that received a federally guaranteed loan,[22] dwellings that received federal aid,[23] and state or local governments that received urban renewal or slum clearance aid.[24] Private-sector housing is covered if the building is occupied by more than four families.[25]

17. 24 C.F.R. § 100.201(b) (2000).

18. *Id.* § 100.201 (2000). Handicap is defined as "a physical or mental impairment which substantially limits one or more major life activities; a record of such impairment; or being regarded as having such impairment. . . . This term does not include current, illegal use or addiction to a controlled substance." *Id.* "Physical or mental impairment includes any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculosketal; special sense organs; respiratory . . . ; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin or endocrine . . . ." *Id.* § 100.201(a)(1). Diseases which constitute a physical impairment include cancer, heart disease, orthopedic conditions and diabetes. *See id.* § 100.201(a)(2). Many of the diseases specifically listed disproportionately affect senior citizens, offering proof that this regulation is clearly adaptable to cover the elderly.

19. Eisner, *supra* note 5, at 438.

20. Robert J. Aalberts, *Suits to Void Discriminatory Evictions of Disabled Tenants Under the Fair Housing Amendments Act: An Emerging Conflict?*, 33 REAL PROP. PROB. & TR. J. 649, 655 (1999).

21. 42 U.S.C. § 3603(a)(1)(A) (1994). The prohibition against discrimination applies to "dwellings owned or operated by the Federal Government." *Id.*

22. *Id.* § 3603(a)(1)(C). The prohibition against discrimination applies to "dwellings provided in whole or in part by loans insured, guaranteed, or otherwise secured by the credit of the Federal Government, under agreements entered into after November 20, 1962." *Id.*

23. *Id.* § 3603(a)(1)(B). The prohibition against discrimination applies to "dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government, under agreements entered into after November 20, 1962, unless payment due thereon has been made in full prior to April 11, 1968." *Id.*

24. *Id.* § 3603(a)(1)(D). The prohibition against discrimination applies to "dwellings provided by the development or redevelopment of real property purchased, rented, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal." *Id.*

25. *Id.* § 3603(b)(2). An exemption is provided for "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more

In contrast, while the ADA offers more categories of protection, it is more limited in the cause of action available for housing discrimination. Passed in 1990 and effective in 1992, the ADA was enacted to fill the gap in antidiscrimination legislation left by the Rehabilitation Act of 1973.[26] The definition of disability is identical to that of the FHAA and was, in fact, modeled after that legislation.[27] Although not specifically defined in the statute, legislative history indicates that "physical or mental impairment" is regarded in the same way as the FHAA treats such language.[28] The ADA, although not directly stating that advanced age is itself an impairment, recognizes that with advanced age comes the increased likelihood of disability, and that various medical conditions associated with age are impairments.[29]

Three of the ADA's five titles are pertinent to this discussion.[30] Most relevant is Title III, which covers public accommodations that affect commerce.[31] "Public accommodations" are places owned, operated, or leased by a private entity and fall within one of the twelve categories listed in the Act.[32] The definition includes hotels, restaurants, transportation stations, schools, libraries, social service agencies,

than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." *Id.*

26. Hodges, *supra* note 11, at 1009–10. The gap was due to the fact that most private sector businesses were not subject to the Rehabilitation Act, which banned disability discrimination by the federal government and those receiving federal funds or contracts. *Id.*

27. 42 U.S.C. § 12102(2) (2000). The Act defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such impairment; or being regarded as having such an impairment." *Id.*

28. Hodges, *supra* note 11, at 1010 n.8. Legislative history defines impairments as "(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; neuromuscular; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine;" or "(2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities." *Id.*

29. Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 703–05 (1999). Regulations promulgated by the EEOC state that age is not an impairment unless the plaintiff can prove a "medically determinable disorder—such as age-related hearing loss or arthritis—that are due to the aging process." *Id.*

30. 42 U.S.C. §§ 12111–12117, §§ 12131–12165, §§ 12101–12189. Title I covers employment discrimination; Title II covers discrimination in public services; Title III covers discrimination in public accommodations and services run by private parties that affect interstate commerce. *Id.*

31. 42 U.S.C. § 12181(7) (1997).

32. *Id.*

and recreational facilities.[33] The owner, lessor, or operator cannot discriminate on the basis of a person's disability and must provide the individual with the opportunity to fully enjoy the accommodations in an integrated setting, unless the modifications would fundamentally alter the nature of the services or facility.[34] Unlike the FHAA, however, "the ADA does not cover strictly residential facilities."[35] Therefore, in order to make a claim under the ADA, the disabled senior must somehow fit the residential center into one of the categories recognized as "public accommodations" or the facility must affect commerce.[36]

"Independent Living Centers" (ILC) and "Assisted Living Centers" (ALC) are relatively new housing options and have grown in recent years to accommodate the housing needs of an increasing senior population.[37] ILCs differ from ALCs. The Assisted Living Facilities Association of America defines assisted living as any group residential program that is not licensed as a nursing home but provides personal care and support services "to people who need help with daily living activities as a result of physical or cognitive disabilities."[38] As such, an ALC will provide some sort of personal care and health support services to its residents, while an ILC requires that its residents live independently with only minimal aid.[39] Most ILCs restrict residency to seniors that are ambulatory and require only assistance with housekeeping efforts.[40]

Such restrictions have a substantial impact on the elderly population. Senior citizens[41] represented 12.4% of the population or ap-

33. *Id.*
34. *Id.* § 12182(b)(1)–(2).
35. Schneider, *supra* note 10, at 493.
36. 42 U.S.C. § 12181(7) (1994). The categories are broad and include restaurants, hotels, theaters, retail establishments, auditoriums, schools, museums, libraries, public transportation stations, service establishments, social service agencies, and recreational establishments. *Id.*
37. LANZIKOS & HARRINGTON, *supra* note 7, § 16.1.1 (noting that since the 1980's that the trend has been toward developing senior housing that provides some form of health care service).
38. Family Caregiver Alliance, *Fact Sheet: Assisted Living and Residential Care Facilities* (2001), *available at* http://www.caregiver.org/factsheets/assisted_livingC.html.
39. LANZIKOS & HARRINGTON, *supra* note 7, § 16.1.1.
40. *Id.*
41. For the purpose of this note, the term "senior citizen" refers to persons age sixty-five years old and older.

proximately thirty-five million people in 2000.[42] As the population continues to grow,[43] adequate housing has become an increasing concern. The importance of legislative bans on disability discrimination for the elderly population is significant because 52.5% of senior citizens have at least one disability that limits their ability to carry out activities of daily living (ADL) and instrumental activities of daily living (IADL).[44] More than four million seniors need assistance with ADL, which include personal care functions such as bathing, dressing, eating, and housekeeping.[45] Seniors who need assistance with these functions, although meeting the statutory qualifications of being disabled, would be denied residence at an independent living community.

This problem is further compounded by the fact that as a person ages, the frequency in which day-to-day activities are restricted because of injury or illness increases. The average number of days that a person over the age of sixty-five is incapable of performing ADL is thirty-five days,[46] fourteen of which are spent restricted to bed.[47] This further complicates the lines drawn by ILCs because it indicates that as a senior ages, there will be extended periods of time when that person qualifies as "disabled," followed by extended periods when the senior is fully capable of living without assistance.

Because the FHAA extends coverage to almost all multifamily dwellings, both ILCs and ALCs fall under the scope of the Act and are therefore in violation of the Act if the resident selection process considers the existence of a disability. Under the ADA, however, it is

42. Ass'n of Older Americans, *2000 Census Information* (June 29, 2001), *at* www.aoa.gov. Since 1900, the population of people over sixty-five has tripled. Am. Ass'n of Retired Persons, *supra* note 8. Further, the population is getting older. For example, in 1996, the number of persons sixty-five through seventy-four was eight times larger than in 1900, while the number of persons seventy-five through eighty-four was sixteen times larger, and the number of persons over eighty-five years old was thirty-one times larger. *Id.* Simply, people are living longer. Now, a person reaching age sixty-five has a life expectancy of an additional 17.6 years. *Id.*

43. Am. Ass'n of Retired Persons, *supra* note 8. The senior population is expected to grow to approximately seventy million, or 20% of the total population by the year 2030. *Id.*

44. *Id.* Most seniors are remaining in the community, rather than residing in nursing homes despite having one or more disabilities. *Id.* Sixty-seven percent of seniors live in a family setting, while only 4.2% live in nursing homes. *Id.*

45. *Id.* In contrast, "IADL" include "preparing meals, shopping, managing money, using the telephone, doing housework, and taking medication." *Id.*

46. *Id.*

47. *Id.*

unlikely that most ILCs or ALCs are covered. Because the ADA does not apply to strictly residential facilities, it will be difficult for a disabled senior to argue that a private apartment complex has the substantial relation to interstate commerce necessary to obtain the ADA's coverage.[48]

III. Analysis

A. How Can a Senior Make a Claim Under the FHAA?

There have been no reported cases of a senior filing suit against an ILC or ALC under the ADA, and it is unclear whether such a suit would be successful. In contrast, almost all ILCs or ALCs would be included in the FHAA protections. Despite what appears to be a clear violation of the FHAA, few cases have actually dealt with an elderly resident suing to remain in the ILC where he or she resides. Most cases involve state regulations placed on senior living centers that discriminate against its tenants.[49] Exploration into the courts' reasoning, however, shows a willingness to find a defendant in violation of the FHAA even when the regulation is for the protection of the residents.

In *United States v. Cisneros*,[50] the defendant, Forest Dale Apartments, received a loan from the Department of Housing and Urban Development (HUD) for the purpose of developing housing for the elderly.[51] In May 1981, the defendants submitted a copy of its "Occupancy Agreement" to HUD which stated that:

> [T]he physical facilities of Forest Dale and the services provided are designed for elderly persons who are physically independent . . . . The Owner may terminate this agreement . . . [w]here, in the good faith judgment of the Owner, a prolonged illness of the Tenant shall require special care or treatment and such care or treatment shall tend to disrupt the general atmosphere . . . of Forest Dale or render[] the Tenant to be "non-ambulatory."[52]

48. Commerce was formerly defined as "travel, trade, traffic, commerce, transportation, or communication among several states." 42 U.S.C. § 12181(1) (1994). This definition was sufficiently broad that an argument could be made that senior living centers owned or operated by a national corporation, for example the Sheraton Suites, had an impact on state commerce. However, the Supreme Court, in *United States v. Lopez*, 514 U.S. 549 (1995), held that Congress could only regulate channels of interstate commerce, instrumentalities of interstate commerce, and activities having a substantial relationship to interstate commerce. *Id.* at 558–59. Thus, "commerce" is now subjected to a much stricter interpretation.

49. *See, e.g.,* United States v. Cisneros, 818 F. Supp. 954 (N.D. Tex. 1993).

50. *Id.*

51. *Id.* at 958.

52. *Id*. at 959.

HUD responded that the regulations it promulgated were applicable to the defendant and did not allow for the exclusion of disabled persons who otherwise qualified for tenancy.[53] Further, a 1988 regulation required a landlord to permit a disabled person the opportunity to make reasonable modifications at his or her own expense.[54]

In 1989, the plaintiffs, Mr. and Mrs. Cooksey, applied for occupancy at Forest Dale Apartments.[55] The application was rejected due to Mr. Cooksey's disabilities.[56] It was clarified to Mrs. Cooksey that it was the policy of the apartments to rent only to ambulatory senior citizens.[57] Mrs. Cooksey filed a Housing Discrimination Complaint against the Apartments and HUD.[58] The court held that the FHAA did not permit landlords to exclude elderly applicants who were disabled.[59]

In *Cason v. Rochester Housing Authority*,[60] applicants brought a claim of discrimination on the basis of their disability and challenged the Rochester Housing Authority's (RHA) lease provision relating to the "ability to live independently."[61] The RHA's "Standards for Tenant Selection Criteria" based eligibility on an "applicant's ability to live independently, or to live independently with minimal aid."[62] The plaintiff, Cason, was rejected for housing on account of the "need for a wheelchair, because she was only able to walk short distances with the aid of a walker, because she [was] incontinent and relie[d] on adult diapers, and because she would require 10 hours of daily aide service."[63] The court found that the FHAA clearly applied to this

53. *Id.* at 960. HUD suggested that "capable of independent living" be replaced by a definition which focuses on an occupant "complying with all the obligations of occupancy . . . with supportive services provided by persons other than the recipient." *Id.* (citation omitted).
54. *Id.* at 961; *see also* 42 U.S.C. § 3604(f)(3)(A) (1994).
55. *See Cisneros*, 818 F. Supp. at 957.
56. *Id.*
57. *Id.* at 961.
58. *Id.*
59. *Id.* at 963.
60. 748 F. Supp. 1002 (W.D. N.Y. 1990).
61. *Id.* at 1004.
62. *Id.* The ability to live independently was defined as when
> an applicant is able to perform those basic functions of adult living for and by him/her self. These activities include: "ability to understand and sign contracts and legal agreements, ability to perform basic housekeeping and personal care; ability to perform necessary daily activities ability to understand and conform to applicable standards of safety [sic]." *Id.*

63. *Id.* at 1005.

situation because the plaintiff's disabilities fell under the Act's protection.[64]

The blatant discrimination shown in *Cisneros* and *Cason* are examples of discriminatory treatment prohibited by the FHAA.[65] However, courts have also struck down policies that are generally exclusive or paternalistically developed for the resident's protection.[66] Such policies tend to show disparate impact. To succeed under a disparate impact claim, the plaintiff needs only to show that the practice has a "greater impact on handicapped applicants than on non-handicapped ones."[67] This is significantly different than the ADA, which does not recognize disparate impact as a cause of action.[68]

Baggett v. Baird[69] represents a disparate impact claim. The plaintiffs challenged a state statute that, although designed for the protection of the elderly, discriminated against seniors in wheelchairs.[70] Under Georgia regulations, a personal care home assists residents with daily living activities, but does not provide residents with skilled nursing care.[71] Such a facility, however, is required to be licensed.[72] As part of the licensing requirement, state inspectors visited Caring Hands and found that the number of residents exceeded the six that the permit allowed.[73] Further, the inspectors determined that nineteen of the seniors were inappropriate for residence at the home.[74] The determination was based on state regulations that required that the residents be "ambulatory" and "able to perceive an emergency condition . . . and escape without human assistance."[75] When Caring Hands failed to relocate the residents, the State denied its permit.[76] The resi-

64. *Id*. at 1006.
65. *Id*. at 1007.
66. *See, e.g*., Baggett v. Baird, 1997 WL 151544 (N.D. Ga. Feb. 18, 1997).
67. *Cason*, 748 F. Supp. at 1007.
68. Schneider, *supra* note 10, at 503 (citing Alexander v. Choate, 469 U.S. 287, 308 (1985) (holding that Tennessee could reduce its Medicaid coverage from twenty-one to fourteen days even though disabled patients were more likely to require longer inpatient care because the state had a right to maintain the integrity of its programs)).
69. 1997 WL 151544 at 1.
70. *Id.*
71. *Id*. at 2.
72. *Id.*
73. *Id.*
74. *Id*. at 3.
75. *Id.*
76. *Id*.

dents then filed suit claiming that the state regulation violated the FHAA.[77]

The court began by recognizing that the Act represented "a clear pronouncement of a national commitment to end unnecessary exclusions of persons with handicaps."[78] It further noted that the Act does not require that a "dwelling be made available to an individual whose tenancy would constitute a direct threat to the health and safety of other individuals."[79] Yet the court found that the exception for safety should be narrowly construed to permit restrictions only when there is a justifiable safety concern.[80] After stating that the principles of the FHAA apply equally to state agencies and individuals alike, the court held that the state regulation requiring a nonambulatory person to reside in a nursing home was facially discriminatory and in violation of the Act.[81] The court found the defendant's argument that a personal care home could not meet the safety needs of the residents unpersuasive.[82] Specifically, the defendant failed to show that nursing homes needed more stringent requirements to meet an increased need of the disabled senior.[83]

Because the FHAA recognizes actions for disparate treatment and disparate impact, a disabled senior can prove that an ILC's or ALC's policy violates the Act in much the same way any civil rights litigation is brought: a senior who challenges a policy that applies dif-

77. *Id.*
78. *Id*. at 5.
79. *Id*.; *see also* 24 C.F.R. § 100.202(a) (2000). The regulation makes it "unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny a dwelling to any buyer or renter because of a handicap." *Id.* Further, the regulation makes it unlawful to discriminate "in the provision of services or facilities in connection with such dwelling, because of a handicap." *Id.* § 100.202(b). Also, it is "unlawful to make an inquiry to determine whether an applicant for a dwelling . . . or any person associated with that person, has a handicap or to make inquiry into the nature or severity of a handicap of such a person." *Id.* § 100.202(c). The Code goes on to list that it is acceptable to make inquires into "an applicant's ability to meet the requirements of ownership . . . ; to determine whether an applicant is qualified for a dwelling available only to persons with handicaps . . . ; whether an applicant is qualified for priority available to persons with handicaps . . . ; or whether an applicant . . . is a current illegal abuser or addict of a controlled substance." *Id.*
80. *Baggett*, 1997 WL 151544 at 5 (noting that "[t]he narrow interpretation honors Congress' mandate that '[g]eneralized perceptions about disabilities and unfounded speculations about threats to safety are specifically excluded as grounds to justify exclusion.'").
81. *Id*. at 16.
82. *Id*. at 14.
83. *Id*.

ferent rules to a senior with a disability states a claim of disparate treatment.[84] In the case of disparate treatment, the senior does not need to show that the policy is motivated by malice or animus.[85] The disabled senior needs only to show that he or she has been subjected to differential treatment.[86] Once the disabled senior shows that the policy is discriminatory, the burden shifts to the living center to justify its classification.[87] The living center must show that the challenged regulation is warranted by the unique and specific needs and abilities of the senior.[88]

An ILC or ALC may have difficulty proving that the discriminatory practice is either essential to the nature of the facility or warranted. Facilities will frequently try to position their discriminatory policy so that it appears to be for the benefit or safety of the residents. Courts both at the state and federal level tend to see through these self-serving descriptions and recognize the discriminatory impact.[89] For example, the Colorado Court of Appeals found that the desire to promote a healthy, lively environment did not constitute a necessity and was an insufficient policy justification.[90]

B. What Remedies Are Available to a Disabled Senior?

The FHAA provides more remedies than the ADA. The FHAA allows a plaintiff to receive injunctive relief, compensatory damages, and unlimited punitive damages.[91] Seniors subjected to discrimination may also file suit under the ADA, however, injunctive relief is the

84. *See* Alliance for the Mentally Ill v. City of Naperville, 923 F. Supp. 1057 (N.D. Ill. 1996).
85. Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995).
86. *Id.*
87. Gamble v. City of Escondido, 104 F.3d 300, 305 (9th Cir. 1997).
88. *Bangerter*, 46 F.3d at 1503–04.
89. *See, e.g.*, Weinstein v. Cherry Oaks Ret. Cmty., 917 P.2d 336 (Colo. 1996).
90. *Id.* at 339. Cherry Oaks had a policy of transferring wheelchair patients from their chairs to regular seats in the dining room. *Id.* Management also stated that wheel chairs did not "look good" in the dining room and that they wanted to avoid an "atmosphere free from any semblances of a gloomy, septic hospital environment." *Id.* Obviously, these reasons did not represent a legitimate purpose for transferring residents into chairs. The court further noted that even if this was designed to gauge whether residents had physical capabilities that were less than the facility could provide for, conditioning dining room privileges on whether a person could move without a wheelchair or walker was an arbitrary testing method with no rational link to properly determining if the resident could stay at the facility. *Id.*
91. 42 U.S.C. § 3613(c)(1) (1994).

only remedy.[92] Injunctive relief is available to alter the facility, modify policies, or provide the requested service in an alternative method.[93] The fact that injunctive relief is the only available remedy may contribute to the relatively nonexistent litigation in the area of disabled seniors and housing.

The FHAA also allows for an injunction to prevent the removal of a resident no longer meeting community guidelines. In *O'Neal v. Alabama Department of Public Health*,[94] the state administrative code governing ALCs stated that to qualify for residency at such centers a patient "must be fully aware of his/her medication . . . and must not need special care for mental illness and must not display symptoms of severe senility."[95] The plaintiffs suffered from Alzheimer's Disease.[96] In 1990, the Alabama Department of Health inspected the plaintiffs' residence and found that one plaintiff, Sue O'Neal, was confused and would be unable to exit the building in an emergency.[97] The Department refused to renew the center's license until all the patients exhibiting Alzheimer's Disease were evicted.[98] The center refused to comply, noting that the plaintiffs' symptoms frequently varied in severity,[99] making them generally eligible to live in the center and that some had nowhere to go. According to the center's staff, the Department's response was that the plaintiff should go "wherever confused, wheelchair-bound people live."[100]

The plaintiffs brought suit alleging discrimination under the FHAA.[101] The state responded by arguing that the regulations were designed to protect the health and safety of other residents, however, the court found this argument unpersuasive.[102] Further, the defendant put on no specific findings of an increased safety risk.[103] The court stated that for a successful claim, all the plaintiffs must show was that the discrimination was intentional, not that the discrimination was

92. *Id.* § 12188(a).
93. *Id.*
94. 826 F. Supp. 1368 (M.D. Ala. 1993).
95. *Id.* at 1370 (citing ALA. ADMIN. CODE 420-5-4.08).
96. *Id.* at 1369.
97. *Id.* at 1370.
98. *See id.* at 1370, 1372.
99. *See id.* at 1372.
100. *Id.* at 1374.
101. *Id.* at 1368.
102. *Id.* at 1370.
103. *Id.* at 1375.

based in malice.[104] The plaintiffs likely had done this by showing a lack of necessity for the policy. In support of this conclusion, the court cited *Marbrunak, Inc. v. City of Stow*,[105] which held that a city violated the FHAA by requiring that homes for mentally disabled residents be equipped with special safety equipment found unnecessary for its residents.[106]

Overall, there have been significantly fewer cases of housing discrimination among the elderly disabled filed under the ADA than the FHAA. Although there is a concern that lack of suits filed may lead to diminished effectiveness of the Act, a greater problem seems to be that the Justice Department, charged with enforcing the ADA, is backlogged with claims.[107] In 1996, the Justice Department had only seventy-five attorneys handling claims under Titles I, II, and III, of the ADA.[108] As of 1997, 5480 complaints had been filed just under Title II.[109] Even though the ADA does not require the exhaustion of remedies prior to bringing suit, the effectiveness of the statute is reduced by long delays in the investigatory process.[110] These delays have a pronounced effect on the elderly who are more likely to be poor or unable to afford a private attorney due to a fixed income.[111]

One proposed solution is to model the ADA after the FHAA's dispute resolution program.[112] The FHAA system uses internal administrative litigation as a means of enforcing the Act.[113] Under the FHAA, a party can opt for administrative or judicial litigation.[114]

104. *See id.* at 1374.
105. 974 F.2d 43, 47–48 (6th Cir. 1992) (noting concern that the regulations were based upon "false and over protective assumptions about the needs of handicapped people.").
106. *Id.*
107. Hodges, *supra* note 11, at 1028–30.
108. *Id.* at 1028.
109. Nat'l Ctr. for the Dissemination of Disability Research, *Report of the December 1998 ISDS Meeting* (1998), *available at* http://www.ncddr.org/icdr/isds/12_9_98.html. The Justice Department was the investigating agency for 1326 of the complaints. Hodges, *supra* note 11, at 1028. Under Title III, 2796 complaints were filed, of which the Justice Department was responsible for investigating 1634. *Id.* As of September 1994, the Justice Department had only completed 300 investigations of Title III claims since the ADA enactment. *Id.* at 1029. To hasten resolutions of cases, the Justice Department has made increasing efforts to settle cases through informal negotiations. *Id.*
110. Hodges, *supra* note 11, at 1028–30.
111. *See id.*
112. *Id.* (advocating for increased mechanisms for alternative dispute resolution and the creation of a joint voluntary mediation program).
113. *Id.* at 1037.
114. *Id.*

Complaints are filed with the Secretary of Housing and Urban Development, who investigates and determines whether a violation has occurred.[115] If there is reasonable cause to believe discrimination has occurred, then a formal charge is issued.[116] At that point, an individual chooses whether to have the case adjudicated in federal court by the Attorney General or to proceed to an administrative hearing before the administrative law judge.[117] In either case, decisions may be appealed to the court of appeals.[118] There is no requirement for the exhaustion of administrative action, leaving a party free to file a private suit.[119] Approximately sixty percent of the FHAA cases showing cause are litigated in federal court.[120]

C. What Are the Obligations of the ILC?

Under both Acts, housing or accommodation providers are required to make reasonable accommodations for the disabled.[121] This requirement makes it unlawful "for any person to refuse to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford a person with a disability equal opportunity *to use and enjoy* a dwelling unit, including public and common use areas."[122] The FHAA, however, does not re-

115. *Id.*
116. *Id.*
117. *Id.* Cases brought before the administrative law judge proceed pursuant to the Administrative Procedures Act. *Id.* The parties are HUD and the respondent. *Id.* The statute requires that the process be quick and inexpensive, producing a more informal proceeding than federal court. *Id.*
118. *Id.*
119. *Id.* Attorney Generals are still free to bring cases that they feel rise to level of public importance. *Id.* This is similar to the Attorney General's authority under Title III of the ADA. *Id.* In general, these procedures, amended in 1988, have met with mixed reviews. Similar to the ADA, there are a backlog of cases in the investigation stage. *Id.* However, about 6000 cases are filed with HUD every year, a substantially larger number than under the ADA. *Id.* at 1038–39.
120. *Id.* at 1037.
121. *See infra* notes 122–26 and accompanying text.
122. 24 C.F.R. § 100.204(a) (2000). "It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas." *Id.* This regulation also provides examples illustrating what constitutes a refusal of a reasonable accommodation. Although not directly geared to a disabled senior, it is easily adaptable to an elderly resident that is mobility impaired. For instance, Example (2) says that if a senior resident in an apartment complex is mobility impaired, requiring the use of a walker, the residence would be required to provide the senior with a parking space closer to the building. Without such a parking space, the senior might have difficulty getting to and from her apartment

quire that supportive services, such as medical or counseling services, be provided to the resident by the housing provider.[123] An accommodation will not be considered reasonable if "the landlord is either unduly burdened or shoulders undue hardship, and the principal goal of the requirement at issue is undermined."[124] Also, although the obligation does not require a "fundamental alteration of the nature of the program, it may require a reasonable modification."[125] Lastly, reasonable accommodations "may require landlords to assume reasonable financial burdens in accommodating handicapped residents."[126]

D. What Are Reasonable Accommodations Under the FHAA?

There are two types of cases that frequently fall under the FHAA's failure to accommodate provisions: initial failure to accommodate needs and evictions.[127] Recently, a third type of case has increased in frequency: governmental restrictions on the ability of an operator to provide certain types of housing.[128] These regulations impose neutral rules on health, safety, and land-use that disproportionately discriminate against the elderly disabled.[129] Most stem from state paternalism and unsubstantiated concerns about difficulties that seniors may face.[130] These types of cases typically arise in zoning laws and may include special-use permits or limitations on the number of elderly persons in a home.[131] Restrictive covenants are also prohibited if they restrict where a disabled person can live.[132]

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and car which could limit her enjoyment. The accommodation would be reasonable because "it is feasible and practical under the circumstances." *Id.* § 100.204(b)(2).

123. *Id.* § 100.202(a).

124. Eisner, *supra* note 5, at 446.

125. Assisted Living Assocs. of Moorestown, L.L.C. v. Moorestown Township, 996 F. Supp. 409, 435 (D.N.J. 1998).

126. United States v. California Mobile Home Park Mgmt. Co., 29 F.3d 1413, 1416–17 (9th Cir. 1994).

127. Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 953–54 (1994).

128. *Id.* at 958.

129. *Id.*

130. *Id.*

131. *Id.* at 958–59.

132. *Id.* at 959. HUD's regulations do not specifically address zoning laws. *Id.* However, legislative history clearly indicates that to be valid, a local law must apply equally to all residents. *Id.* Regulations that appear neutral but have the effect of restricting housing options for the disabled are also prohibited. *Id.*

States may also have requirements that reasonable accommodations be made.[133] In *Weinstein v. Cherry Oaks Retirement Community*,[134] Cherry Oaks Retirement Community was designated a "personal care boarding home" under Colorado law.[135] Its resident seniors, though not completely capable of independent living, did not need constant medical supervision.[136] Cherry Oaks required that residents transfer from their wheelchairs and walkers and sit in ordinary chairs when eating in the dining room.[137]

The plaintiff moved to Cherry Oaks when he was ambulatory and required infrequent use of his wheelchair.[138] Later that year, due to the onset of Lou Gehrig's disease, transferring from his wheelchair became increasingly painful.[139] Although Cherry Oaks allowed the plaintiff to remain in his wheelchair, he was required to sit at a table by himself.[140] Ultimately, Cherry Oaks required that the plaintiff transfer to a regular chair.[141] When Cherry Oaks refused to allow the plaintiff to eat in his wheelchair, the plaintiff started taking meals in his apartment.[142] The plaintiff filed suit under the Colorado equivalent of the FHAA alleging that the policy constituted discrimination, unfair housing practices and failed to allow for reasonable accommodations.[143] The court found for the plaintiff.[144]

Although the FHAA makes it clear that disabled seniors cannot be discriminated against in housing, the requirement that accommodations be "reasonable" may actually offer an ILC the opportunity to avoid renting to the disabled elderly. First, an ILC does not have to make accommodation if it would be unduly burdened by admitting disabled tenants into its complexes. This undue burden may arise because compliance, specifically making accommodations, has a substantial cost. Because seniors represent the greatest number of dis-

133. *See infra* notes 134–44 and accompanying text.
134. 917 P.2d 336 (Colo. Ct. App. 1996).
135. *Id.* at 337.
136. *Id.*
137. *Id.* The resident home stated that the purpose of the policy was to provide the staff the "opportunity to observe residents regularly and to ensure that they were physically appropriate to remain at the boarding home." *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 337.
142. *Id.* at 338.
143. *Id.*
144. *Id.* at 339.

abled Americans, an ILC may be able to argue that reasonable accommodations are more than simply altering a common area and one apartment. Rather, because of the unique tenants each unit or the entire complex, would have to be modified.

The disabled senior may respond to such claims by making a reasonable modification at his or her own expense. The FHAA provides a disabled individual the right to make "reasonable modifications" to the unit after receiving an owner's approval.[145] Reasonable modifications differ from reasonable accommodations in that modifications are assumed at the expense of the tenant.[146] Reasonable modifications, however, can pose a significant deterrent to a disabled senior citizen, thus serving to limit their housing choices. Because the cost of reasonable modifications are assumed by the tenant, a fixed-income senior is unlikely to be able to afford to make the necessary changes. In 1998, approximately 3.4 million elderly persons fell below the poverty level.[147] An additional 2.1 million were classified as near-poor.[148] For example, in 1998 the median income for an elderly male was $18,166.[149] For an elderly female, the median income was $10,054.[150] Approximately one in seven family households headed by

145. 42 U.S.C. § 3604(f)(3)(A) (1994).

146. *Id.* Discrimination includes

> a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

Id. The Code of Federal Regulations also provides examples of acceptable modifications of which the landlord could not ask for restoration because the modification would not substantially alter the presentation of the apartment. The examples provided in the regulations are easily adapted to show how the reasonable modification requirement may assist a senior. For example, a wheelchair-bound senior may want to expand the size of the doorway leading into the bathroom or add a specialty bathtub. Although the landlord is not required to make such alterations, he could not refuse to permit a senior to make such changes. Further, the landlord could not require that the senior pay for the doorway to be narrowed because "a wider doorway will not interfere with the landlord's or the next tenant's use and enjoyment of the premises." 24 C.F.R. § 100.203(c) (2000).

147. 24 C.F.R. § 100.203(c).

148. *Id.*

149. Am. Ass'n of Retired Persons, *supra* note 8.

150. *Id.*

an elderly person reported less than $15,000.[151] Seniors living in rental property had a lower median income of $10,867.[152] Therefore, any cost of modification may be more than a senior could financially bear.

Further, landlords do not have to rent to all disabled individuals. The FHAA makes an exception so that a landlord does not have to grant residency to a senior whose disability proves threatening to other residents or the property.[153] This does not create a presumption that individuals with mental or physical disabilities pose a greater threat to the population than the nondisabled.[154] Rather, it was added recognizing that some people may erroneously believe that a certain unusual characteristic associated with a disability may pose a danger when it does not.[155] Therefore, the burden is on the landlord to show the potential danger posed by the tenant.

IV. Discriminatory Admissions Policy Under the ADA

Although the FHAA provides greater options for a disabled senior who has been discriminated against, the ADA has not been ineffective in all areas. Specifically, success has been shown with claims against nursing homes.[156] "Nursing homes" are "skilled nursing or intermediate care facilities . . . [that provide] housing, social services, nursing, medical and rehabilitative care for residents who need institutional care" but do not require hospitalization.[157]

Nursing homes differ from an ILC or ALC in that a nursing home is likely to fall under either Titles II or III of the ADA.[158] Title II protects disabled individuals from discrimination in services, pro-

151. *Id.* Households headed by people over sixty-five reported a median income of $31,568 in 1998. *Id.* This figure dropped to $22,102 for African American households and $21,935 for Hispanic households. *Id.*

152. *Id.* Out of 20.9 million elderly persons classified as head-of-household, twenty-one percent rented. *Id.*

153. 42 U.S.C. § 3604(f)(9) (1994). The Act states "[n]othing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." *Id.*

154. Kanter, *supra* note 127, at 953–54.

155. *Id.* Specifically, it was added "to allay fears of those who believe that the nondiscrimination provisions of [the] Act could force landlords and owners to rent or sell to persons whose tenancies could pose such a risk." *Id.* (citing H.R. REP. NO. 711, at 28 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2189).

156. *See infra* notes 164–72 and accompanying text.

157. Schneider, *supra* note 10, at 491.

158. 42 U.S.C. §§ 12131, 12181(7) (1994).

grams, and activities provided by state and local governments.[159] Therefore, if the nursing home is run by a governmental agency it will be covered. Also, because Medicaid is a state-operated program, nursing homes that accept Medicaid payments would also be subject to the provisions of Title II.[160] A nursing home may also be covered by Title III, which is applicable to public accommodations.[161] Although a substantial connection to interstate commerce is necessary to be classified as a public accommodation, a nursing home can be analogized to a restaurant in that it receives out-of-state goods. Because the Supreme Court held a restaurant affects interstate commerce, so could a nursing home, thus satisfying the requirement of a substantial connection to interstate commerce.[162] Also, because nursing homes provide social services and medical care, the facility should be covered by Title III, though not specifically mentioned as an example of a public accommodation.[163]

The leading case supporting this premise is *Wagner v. Fair Acres Geriatric Center*.[164] In *Wagner*, the plaintiff was refused admission to a nursing home because she suffered from Alzheimer's disease.[165] The home had determined the plaintiff was combative and posed a threat to others.[166] Its policy was to refuse admission to such a patient.[167] The plaintiff's medical records reflected that she was physically abusive and frequently exhibited socially inappropriate or disruptive behavior.[168] The district court found in favor of the nursing home, holding that the plaintiff was not rejected because of her Alzheimer's disease, but because of her combative behavior, and that the decision of the nursing home was one of medical treatment.[169] The court of appeals, overruled the district court and resolved the issue by analyzing

159. *Id*. §§ 12131, 12132.
160. Schneider, *supra* note 10, at 491. This is distinguishable from an independent living center which receives private funds.
161. 42 U.S.C. § 12181(7).
162. Schneider, *supra* note 10, at 492. The Supreme Court in *Katzenbach v. McClung*, 379 U.S. 294 (1964), held that a restaurant had a substantial affect on interstate commerce. *Id.* at 299–301.
163. Schneider, *supra* note 10, at 493. This is further supported by the fact that The American Health Care Associations classifies nursing homes as medical care facilities under the ADA. *See id.*
164. 49 F.3d 1002 (3d Cir. 1995).
165. *Id*. at 1006.
166. *Id*. at 1005.
167. *Id*. at 1006.
168. *Id*. at 1007.
169. *Id*. at 1009.

whether the plaintiff would have been qualified if reasonable accommodations were made for her.[170] The plaintiff's expert was successful in convincing the court that the plaintiff's agitated behavior could be controlled.[171] Further, the nursing home failed to produce any evidence that calming techniques could not be employed or that doing so would impose an undue burden.[172]

The *Wagner* decision highlights the fine line between refusing admission because a facility is unable to treat the disease and a facility refusing admission because of the disease or disability.[173] However, the case indicates that a nursing home must fully evaluate the patient's conditions as well as its ability to meet the specific needs of that patient before denying admission. Blanket policies are not sufficient. The ADA does not prohibit a nursing home from establishing a separate unit to facilitate care when an integrated setting is not feasible.[174] However, the expectation is that every attempt should be made to place the disabled senior in the most integrated setting available.[175]

V. The ADA and Commonness of Disabilities

A potential barrier to a senior's success in a discrimination suit against a housing provider is whether the ADA covers common disabilities related to the normal aging process. Recently, some courts have begun to interpret the term "impairment" as including only conditions or disorders that are uncommon.[176] This issue was first raised in *Daley v. Koch*, where the court held that a disabling personality trait was not an impairment because it was too common.[177] Although there

170. *Id.* at 1015–16.
171. *Id.* at 1017.
172. *Id.*
173. Schneider, *supra* note 10, at 512.
174. *Id.*
175. *Id.* at 513. Problems sometimes arise when one nursing home resident's rights under the ADA conflict with another's under the Residents' Bill of Rights. *See* 42 C.F.R. § 483.10 (2000). The provisions state that a resident has the right to choose activities of their interest; make choices about living within the facility; to participate in religious, social, and community activities as long as they do not interfere with other residents; and to receive services made with reasonable accommodations of individual needs. *Id.* Therefore, the nursing home is left with the responsibility of trying to balance these sometimes competing interests.
176. Crossley, *supra* note 29, at 702.
177. 892 F.2d 212 (2d Cir. 1989).

is no FHAA litigation on point, and little ADA litigation,[178] there are potential implications for age-related disabilities.

The ADA's legislative findings recognize that age and disability are correlated.[179] Interpretative guidelines of the various agencies enforcing the ADA also recognize that age itself is not a disability, but various medical conditions associated with age might be classified as such.[180] However, the courts that have held that an impairment must be unusual do not base those decisions on anything from the text of the ADA.[181] Rather, it is based on the judge's nonlegal understanding of the term.[182] Therefore, a risk is present that an elderly plaintiff who suffers from arthritis and requires the use of a wheelchair may be found to be suffering from a "normal" by-product of aging rather than an impairment worthy of civil rights protections. The subtext is whether, for the purposes of the FHAA and the ADA, there should be "an age-relative understanding of impairment and disability for the purpose of disability discrimination law."[183]

Some disabilities studies scholars say yes.[184] Their argument rests on a distinction between "natural" barriers due to age and the "unnatural" societal barriers placed on the young disabled.[185] The argument also seems to have a subtext that the older disabled will not require the same protection because they simply will not be doing the same things as a younger person. These scholars place emphasis on when the claimed discrimination occurs.[186] For example, a senior suffering from hearing loss may have a claim against a drive-up restaurant because the restaurant has not provided electronic assistance to help the senior place her order.[187] However, a senior would not have a claim against the restaurant for not providing an attendant to help her walk from her car into the restaurant.[188] In the first situation we have a social structure that prevents the senior from participation, in the latter we have a biological process called aging.[189] This theory is

178. Crossley, *supra* note 29, at 703.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 704.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 705.
188. *Id.*
189. *Id.*

weakened when placed in the context of an independent living center that excludes residents from senior communities, designed to promote active living among the elderly, because of disabilities stemming from the "natural aging process." If it was as "natural" as some scholars would argue then there would be no reason for these communities to exclude. Rather, age-related disabilities continue to be viewed as an infirmity and, therefore, need to be sequestered from the population at-large—namely, healthy seniors. Because this is exactly the type of stereotype the FHAA and ADA were designed to debunk, it makes sense for coverage of the Act to apply to senior residence communities.

VI. Recommendation

Case law indicates the willingness of courts to enforce FHAA provisions in favor of a senior citizen. FHAA violations can be enforced by private parties,[190] the U.S. Attorney General,[191] U.S. Department of Housing and Urban Development,[192] or equivalent state agencies.[193] Seniors who bring suit under the FHAA have both legal and equitable remedies with no limit on punitive damages.[194] Although damage awards received from the administrative law judges under

190. 42 U.S.C. § 3613 (1994). The Code states that a senior who has been discriminated against has two years from the time of the discrimination to bring suit. *Id.* The senior can also have an attorney appointed for him or her to have the fees waived if the court determines that they are unable to afford the cost of litigation. *Id.* Further, the Attorney General may intervene if it is determined that the case is of general public importance. *Id.*

191. *Id.* § 3614. The Code specifically allows for the enforcement by the Attorney General

> [w]henever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance.

Id. § 3614(a).

192. *Id.* § 3610 (providing administrative procedures and guidelines for an aggrieved person to file a complaint with the Secretary of Housing).

193. *Id.* § 3610.

194. 42 U.S.C. § 3613(c) (2000).

> In a civil action . . . if the court finds that discrimination has occurred or is about to occur, the court may award the plaintiff actual and punitive damages, and . . . may grant . . . any permanent or temporary injunction, temporary restraining order or other order . . . enjoining defendant from such practice . . . as may be appropriate.

Id.

the FHAA are comparable to those brought by the Department of Justice, the largest awards come from private actions.[195]

Despite the willingness of courts to enforce the provisions of the FHAA, few seniors litigate the merits of ILCs' ambulatory-only policy. Although a variety of other reasons may explain this occurrence, one likely reason involves the economic limitations of most seniors in American society—which may lead to legal limitations.[196] There is also the possibility that the institutionalized senior may have issues of diminished capacity, which affect his or her ability to recognize violations and to provide this information to his or her attorney.[197] Third, a senior may have limited access to legal services or rely heavily on family input.[198] Limited access may be due to isolation that frequently accompanies aging, poverty, or chronic illness.[199] Therefore, to better utilize the protections of the FHAA and to capitalize on the available remedies, attorneys should use class action litigation as a mechanism of enforcement against an ILC's discriminatory policies.

Federal Rule of Civil Procedure 23 sets forth the requirements for establishing a class action in federal court.[200] Rule 23(a) states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[201]

To qualify as a class action, the class must meet all the criteria of subsection (a) and at least one criterion of subsection (b).[202] Particularly applicable to the discussion of class action for the elderly disabled are subsections (b)(2) and (3) which state:

> [T]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appro-

195. Hodges, *supra* note 11, at 1040.

196. *See* Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1074 (1994) (discussing how arm's-length transactions may make seniors, who look more for a familial relationship in their dealings, uncomfortable).

197. *Id.*

198. *See id.* at 1076.

199. *Id.* at 1077.

200. FED. R. CIV. P. 23.

201. FED. R. CIV. P. 23(a).

202. Noah D. Lebowitz, *An Amendment to Rule 23: Encouraging Class Action in Section 504 and ADA Employment Discrimination Cases*, 30 U.S.F. L. REV. 477, 486 (1996).

> priate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the question of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[203]

The elderly disabled turned away from an ILC fall within the statutory language of 23(a). For example, seniors who require the use of a wheelchair are a large group that would be unable to reside at an independent living center with an ambulatory-only policy. Further, these seniors would be likely to seek an injunction to allow them to live at the center or seek compensatory damages. Given that the elderly traditionally have limited resources and are underrepresented, the class action mechanism would remedy the inherent disadvantage that discourages disabled seniors from bringing suit. Further, it would minimize and defray the costs associated with litigation.

Because the Supreme Court has held that 23(b)(2) actions are subject to "a rigorous analysis" for Rule 23(a) prerequisites,[204] a problem may arise with the commonality requirements under Rule 23(a).[205] The question becomes whether the determination of the existence of a disability is an individual inquiry or whether a class can be established by recognizing disability in the general sense.[206] For example, the possibility of establishing a class action can be negated if each senior in the class is required to prove on a case-by-case basis that her disability is covered by the FHAA.[207] Thus, requiring the individualized inquiry defeats the use of class action, because a factual inquiry into a senior's disability status destroys the basis of the common question of law or fact required by Rule 23(a)(2).[208]

Although the commonality requirement has defeated class action claims under Section 504 of the Rehabilitation Act,[209] it is unlikely that the same would result under the FHAA. First, the FHAA is specific in its requirement that a multi-unit housing complex cannot refuse to rent to a person with a disability on the basis of his or her dis-

203. FED. R. CIV. P. 23 (b)(2), (b)(3).
204. Lebowitz, *supra* note 202, at 487.
205. *Id.*
206. Chandler v. City of Dallas, 2 F.3d 1385, 1396 (5th Cir. 1993) (holding that "determinations of whether an individual is handicapped or 'otherwise qualified' are necessarily individualized inquiries").
207. *See* Lebowitz, *supra* note 202, at 494.
208. *Id.*
209. *See Chandler*, 2 F.3d at 1385.

ability.[210] This is distinguishable from Section 504 cases that allege failure to provide reasonable accommodations. Reasonable accommodation is a fact-intensive inquiry. Thus, the fact that each disability may require a different accommodation explains why a court may be reluctant to group all plaintiffs in one class. In the case of an ILC, however, the policy is to refuse to rent to nonambulatory seniors. The ILC, in essence, has defined the class. Also, unlike relief being sought for the reasonable accommodation of each plaintiff, the relief would simply be to remove a clause from the lease and maintain housing facilities consistent with the requirements of the FHAA.

VII. Conclusion

The FHAA, and to a lesser extent the ADA, provide protection against housing discrimination for the disabled elderly. Congress has said that "Americans with disabilities are uniquely underprivileged and disadvantaged. They are much poorer, much less well educated and have much less social life, have fewer amenities and have a lower level of self-satisfaction than other Americans."[211] This disadvantage is perhaps felt greatest by the elderly, who endure not only the economic hardship and societal prejudice that accompanies a disability, but also the negative attitudes toward aging. Therefore, class action litigation should be utilized to encourage seniors to enforce their civil rights, minimize the expense associated with litigation, maximize court efficiency when ruling on discriminatory housing practices, and lend support to disabled seniors who may otherwise be disenfranchised from the justice system.

210. *See supra* Part II.A.
211. Lebowitz, *supra* note 202, at 482 (citation omitted).