

For the Rest of Their Lives: Seniors and the Fair Housing Act

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The phrase in the title preceding the colon is from *Hovson, Inc. v. Brick, N.J.*, 89 F.3d 1096, 1102 (3d Cir. 1996), which held that a nursing home for elderly persons was subject to the federal Fair Housing Act because it would "be their home, very often for the rest of their lives." *See infra* text accompanying note 166.

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INTRODUCTION

America's population is growing older. According to the 2000 census, more than 35 million people in the United States (12% of the total population) are over 65 years old.¹ These figures are expected to grow dramatically in the early decades of the twenty-first century as the "Baby Boom" generation reaches retirement age and as improvements in health care make it possible for more people to live to an advanced age.²

Providing housing for this segment of the American population is already a massive industry and one that will certainly grow as the number of older persons increases.³ One of the crucial issues facing this industry is compliance with the non-discrimination commands of the federal Fair Housing Act ("FHA").⁴ Originally passed in 1968, the FHA, as amended, now outlaws discrimination in most of America's housing based on race, disability, and five other criteria.⁵ Its provisions are also mirrored in scores of state and local fair housing laws.⁶ Most of the prohibitions of the FHA and its state and local counterparts apply to housing for older persons,⁷ although providers of such housing often seem oblivious to the mandates of these laws. The result has been a steady increase in FHA litigation involving housing for older persons, a trend that is likely to accelerate as the Baby Boom generation ages.

Three recent cases illustrate some of the emerging issues. In *United States v. Lorantffy Care Center*,⁸ the Justice Department sued a religiously affiliated assisted-living center for elderly Hungarian immigrants for

1. See *infra* note 16 and accompanying text.

2. See *infra* Part I.A.1.

3. See, e.g., Commission on Affordable Housing and Health Facility Needs for Seniors in the 21st Century, A Quiet Crisis in America: A Report to Congress app. G-1 (2002) ("The Housing Problems of the Future Elderly Population"), http://www.seniorscommission.gov/pages/final_report/pdf_Index.html (on file with the Iowa Law Review).

4. The federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968), Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (2000)).

5. See *infra* Part II.A.1.

6. In 2004, some thirty-five states and sixty-four localities had fair housing laws that were substantially equivalent in their substantive coverage to the FHA. For a list of these states and localities, see ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION app. C at C-1 to C-3 (2004).

7. See *infra* Part II.B. The FHA does contain an exemption for "housing for older persons," see 42 U.S.C. § 3607(b)(1) (2000), discussed *infra* Part II.B.2.a, but this exemption is only from the law's ban on "familial status" discrimination. See *infra* note 193 and accompanying text. For a state or local fair housing law to be substantially equivalent to the FHA, its substantive protections must be as extensive as the FHA's, see 42 U.S.C. § 3610(f)(3)(A)(i) (2000), which means that if such a law contains an exemption for housing for older persons, this exemption—like the FHA's—is not available in cases involving discrimination based on any factor other than familial status.

8. 999 F. Supp. 1037 (N.D. Ohio 1998). The *Lorantffy* case is also discussed *infra* note 199 and accompanying text.

violating the FHA by discriminating against African-American applicants. In *HUD v. Country Manor Apartments*,⁹ a nursing home for older persons was held to have violated the disability provisions of the FHA by requiring residents who used motorized wheelchairs to purchase liability insurance. In *United States v. Resurrection Retirement Community, Inc.*,¹⁰ a large retirement development settled a disability-based FHA suit for \$220,000 in monetary relief and an injunction barring it from, *inter alia*, imposing an “ability to live independently” requirement on its residents.

This Article analyzes the ways in which the FHA and other fair housing laws govern housing for older persons. Part I surveys the range of housing choices available to older persons and describes the demographic trends that will fuel the future demand for such housing as America’s population grows older. Part II reviews the FHA’s substantive provisions and exemptions in order to determine the extent to which this statute applies to the various types of housing for seniors. Finally, Part III identifies the key discrimination issues that are likely to arise in such housing and suggests how the FHA and related laws should be interpreted to deal with these issues.

Unless otherwise indicated, this Article uses age 65 as the demarcation point that distinguishes “older persons” and “seniors” from the rest of the population. We recognize that this is a somewhat arbitrary choice. Some people are “old” at 50 while others seem “young” at 80, and the Fair Housing Act itself refers to ages 55 and 62, but not 65, in defining “housing for older persons.”¹¹ Nevertheless, 65 is the age that American society has traditionally chosen to identify when retirement most typically occurs and therefore when people are most likely to be entering the phase of life associated with being in the older generation.¹²

9. 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,156 (HUD ALJ Sept. 20, 2001). The *Country Manor* case is further discussed *infra* note 312 and text accompanying note 437.

10. Consent order, *United States v. Resurrection Ret. Cmty., Inc.*, No. 02-CV-7453 (N.D. Ill. Oct. 17, 2002), at <http://www.usdoj.gov/crt/housing/documents/resurrectsettle.htm> (on file with the Iowa Law Review). The *Resurrection* case is further discussed *infra* text accompanying notes 333–35.

11. 42 U.S.C. § 3607(b)(2)(B), (C). These provisions are further discussed *infra* notes 187–88 and accompanying text.

12. See, e.g., LAWRENCE A. FROLIK, RESIDENCE OPTIONS FOR OLDER OR DISABLED CLIENTS § 1.01, at 1-2 (1997 & Supp. 2002). While the actual average retirement age in the United States is currently a little over 63, age 65 remains a standard demarcation point for several reasons. See *id.*, at 1-6. Age 65 is when full Social Security retirement benefits are available and when individuals become eligible for Medicare. See 20 C.F.R. § 404.409 (2003); 42 C.F.R. §§ 406.6(a), 406.11, 406.12 (2003). Also, mandatory retirement, though now abolished for most jobs by the 1986 amendments to the Age Discrimination in Employment Act, was in the not-too-distant past thought to be appropriate at age 65. See 29 U.S.C. § 631(a) (2000), codifying Pub. L. No. 99-592, § 2(c)(1), 100 Stat. 3342 (1986) (showing that the ADEA, as originally enacted in 1967, allowed mandatory retirement at age 65); see also 29 U.S.C. § 631(c)(1) (providing that the ADEA allows mandatory retirement at age 65 of executives and others in high policymaking positions); Pub. L. No. 90-202, § 12, 81 Stat. 607 (1967) (same). Age 65 is also commonly used

I. THE GROWING SENIOR POPULATION AND THEIR HOUSING OPTIONS

A. DEMOGRAPHICS OF AMERICA'S SENIOR POPULATION

1. The Current Senior Population and the Baby Boom Projections

America's senior population will grow dramatically in the coming years, both in absolute numbers and as a proportion of the overall national population. Increases in the senior population will start to accelerate in 2011, when the "Baby Boom" generation (those born from 1946 through 1964) begins to turn 65.¹³

Two primary factors will drive this demographic shift. First, the Baby Boom generation, which represented a surge in U.S. fertility rates in the post-World War II era, accounts for a disproportionate share of the overall American population.¹⁴ Second, improvements in health care have resulted in longer life expectancies in recent decades, so that as the Baby Boom generation ages, its susceptibility to early mortality due to heart disease, cancer, and other traditional obstacles to longevity has been substantially reduced compared to prior generations.¹⁵

In absolute numbers and as a percentage of the total population, the 65-and-over population is expected to rise from 35.0 million (12.4% of the total population) in 2000 to:

- 39.7 million (13.2%) in 2010;
- 53.7 million (16.5%) in 2020; and,
- 70.0 million (20.0%) in 2030.¹⁶

Thus, in the first three decades of the twenty-first century, the number of seniors will double, and this age group will come to account for one-fifth rather than one-eighth of the overall population. This proportion will be

by the Census Bureau as a demarcation point signifying an older demographic group. *See, e.g.*, sources cited *infra* notes 13, 15, and 16.

13. *See* LISA HETZEL & ANNETTA SMITH, U.S. DEP'T OF COMMERCE, THE 65 YEARS AND OVER POPULATION 3 (Oct. 2001) [hereinafter CENSUS 2000: 65 YEARS AND OVER], available at <http://www.census.gov/prod/2001pubs/c2kbr01-10.pdf> (on file with the Iowa Law Review).

14. *See, e.g.*, FRANK B. HOBBS & BONNIE L. DAMON, U.S. DEP'T OF COMMERCE, 65+ IN THE UNITED STATES 1-3 (Apr. 1996) [hereinafter 65+ IN THE UNITED STATES], available at <http://www.census.gov/prod/1/pop/p23-190/p23-190.pdf> (on file with the Iowa Law Review). More births coupled with more children living to adulthood resulted in a much larger population for this generation.

15. *See id.* at 1-3, 3-1.

16. *See* JULIE MEYER, U.S. DEP'T. OF COMMERCE, AGE: 2000, at 1 (Oct. 2001) [hereinafter CENSUS 2000: AGE], available at <http://www.census.gov/prod/2001pubs/c2kbr01-12.pdf> (on file with the Iowa Law Review); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, NATIONAL 2000 POPULATION PROJECTIONS, MIDDLE SERIES (2000) [collectively hereinafter 2000 PROJECTIONS], available at <http://www.census.gov/population/projections/nation/summary/np-t3-c.pdf> (results for 2006–2010); <http://www.census.gov/population/projections/nation/summary/np-t3-e.pdf> (results for 2016–2020); <http://www.census.gov/population/projections/nation/summary/np-t3-f.pdf> (results for 2025–2045).

maintained as the Baby Boom generation reaches advanced old age in 2050, when almost 82 million people (just over 20% of the overall population) will be 65-and-over, and 19.4 million of these (4.8% of the total) will be over age 85.¹⁷

These figures represent a dramatic and unprecedented aging of the nation's population.¹⁸ The ratio between old and young will be far higher than at any other time in U.S. history.¹⁹

2. The Senior Population and FHA-Relevant Divisions

In order to give some context to the discussion *infra* in Parts II and III about the Fair Housing Act's applicability to housing for older persons, we here provide some demographic information on divisions within the senior population reflecting the FHA's prohibitions of discrimination based on race, color, and national origin; sex; religion; and handicap. The FHA's ban on discrimination based on "familial status" (i.e., having a child under the age of 18 in the household) is not considered, because the FHA provides an exemption from this ban for "housing for older persons,"²⁰ and we assume for purposes of this Article that most housing of greatest interest to those over 65 will qualify for this exemption.²¹

With respect to race, color, and national origin issues, the current U.S. senior population is overwhelmingly white, with non-Hispanic Caucasians ("whites") representing 83.5% of the overall 65-and-over population; African-Americans accounting for 8.4% of this group; Hispanics 5.6%; and Asians and other ethnic groups the remaining 2.5%.²² This will change over time as the more diverse Baby Boom generation reaches old age. By 2030,

17. See 2000 PROJECTIONS, *supra* note 16. The growth of the 85-and-over age group will be an important component of the increase in America's older population in the first half of the twenty-first century. The 85-and-over population is expected to more than double between 2000 and 2030, from 4.2 million (1.5% of the total) to 8.9 million (2.5% of the total) and then more than double again by 2050 to 19.4 million (4.8% of the total) as Baby Boomers age. *Id.*

18. By way of historical contrast, in 1930 just over 3% of the U.S. population was over 65. See 65+ IN THE UNITED STATES, *supra* note 14, at 2-3.

19. The Census Bureau describes the transition to an older population in the coming decades as the change from pyramid to rectangle, a graphic reference of the demographic evolution from a large number of young people at the bottom of a population chart supporting a small number of older people at the top to a population chart whose base is not much wider than its top. See 65+ IN THE UNITED STATES, *supra* note 14, at 2-5 to 2-7.

20. See 42 U.S.C. § 3607(b)(1) (2000). Thus, even if an over-65 person lives with a child—an arrangement in which many hundreds of thousands of people live, see 65+ IN THE UNITED STATES, *supra* note 14, at 2-21—and such a senior is discriminated against for this reason by a development that qualifies for the "housing for older persons" exemption, that person could not invoke the FHA to challenge this type of discrimination. For a more detailed description of the FHA's "housing for older persons" exemption, see *infra* Part II.B.2.a.

21. See *infra* Part I.B.2 for a discussion of the types of housing available to older persons.

22. See 2000 PROJECTIONS, *supra* note 16.

the non-Hispanic white population will drop to 74% while the African-American and Hispanic populations will each rise to about 11%.²³

With respect to sex, 59% of the 65-and-over population in 2000 were women, and 41% were men.²⁴ This 3:2 ratio of women-to-men among seniors rises to 5:2 in the 85-and-over age group.²⁵ Higher female life expectancy, combined with the fact that women are generally younger than their spouses, contributes to the fact that women account for 79% of all seniors who live alone.²⁶ This proportion rises even higher at advanced ages, leading to females making up the bulk of the nursing home population in the United States.²⁷

Religious distinctions among the U.S. population are not reported by the Census Bureau,²⁸ but it does recognize four private research centers as prominent sources for religious information.²⁹ One of these identifies the American Religious Identity Survey of 2001 ("ARIS") as the largest, most comprehensive survey on religious affiliation among the U.S. adult population.³⁰ The ARIS data show the following divisions:

- Christian: 159.0 million (76.5% of the total of 207 million adults);
 - Catholic: 50.9 million (24.5%);
 - Baptist: 33.8 million (16.3%);
 - Methodist: 14.2 million (6.8%);

23. *Id.* The 85-and-over age group will see a corresponding increase in racial diversity, with whites dropping from 86% of the total in 2000 to 76% of the total in 2030. *Id.*

24. *See* CENSUS 2000: 65 YEARS AND OVER, *supra* note 13, at 3 (showing that of the total of 35.0 million persons age 65-and-over in 2000, 20.6 million were women, and 14.4 million were men).

25. *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, AGING IN THE UNITED STATES: PAST, PRESENT, AND FUTURE 3 (1997), <http://www.census.gov/ipc/prod/97agewc.pdf> [hereinafter AGING IN THE UNITED STATES] (on file with the Iowa Law Review).

26. *Id.* In 1995, the rates of those currently widowed were 33% for women aged 65–74 (versus 9% for men), 59% for women aged 75–84 (versus 18% for men), and 81% for women aged 85-and-over (versus 41% for men). *Id.*

27. *Id.* at 4. In 1990, four out of five residents of nursing homes were age 75-and-over, and about 70% of these were women. *Id.*

28. *See* 13 U.S.C. § 221(c) (2000). The Census Bureau did collect some religious information in 1906–1936, but is now prohibited by law from asking any mandatory questions about religious affiliation. *See* U.S. CENSUS BUREAU, RELIGION, <http://www.census.gov/prod/www/religion.htm> (on file with the Iowa Law Review).

29. *See* U.S. CENSUS BUREAU, RELIGION, *supra* note 28 (recommending Adherent Statistics and Religious Geography Citations and three other sources for current religious information about the U.S. population). For additional information concerning the populations of various religious denominations in the United States, see U.S. DEP'T OF COMMERCE, 2000 STATISTICAL ABSTRACT OF THE UNITED STATES tbls. 74–76 (2000), <http://www.census.gov/prod/2001pubs/statab/sec01.pdf> (on file with the Iowa Law Review).

30. *See* ADHERENTS.COM, LARGEST RELIGIOUS GROUPS IN THE UNITED STATES OF AMERICA 3, at http://www.adherents.com/rel_USA.html, (referring to the ARIS survey, which is available at http://www.gc.cuny.edu/studies/aris_idex.htm) (on file with the Iowa Law Review).

- o Lutheran: 9.6 million (4.6%);
- o Presbyterian: 6.0 million (2.7%);
- o Other Protestants: 44.5 million (21.6%);
- Judaism: 2.8 million (1.3%);
- Islam: 1.1 million (0.5%);
- Buddhism: 1.1 million (0.5%);
- Other beliefs: about 15 million (8%); and
- Nonreligious/Secular: 27.5 million (13.2%).³¹

Of all the FHA-relevant characteristics, disability status is the one most dramatically associated with old age. According to the 2000 Census, 49.7 million Americans have some type of “long lasting condition or disability,” which represents 19.3% of the relevant population studied (i.e., people who were age 5-and-older in the civilian non-institutionalized population).³² Not surprisingly, the census data show both that a disproportionate number of these disabled persons are elderly and that, as people grow older, they are increasingly likely to have a disability.³³

31. *Id.* at 3, 7. Other sources and surveys yield somewhat different figures, *id.* at 2–19, and there seem to be particular disputes as to the number of Jews and Muslims. *Id.* at 6–7 (citing other sources concluding that the number of Jews is 5.5 to 5.6 million and the number of Muslims is 2.8 to 4.1 million).

Whether these percentages hold true for the 65-and-over population and whether this age group is likely to reflect similar religious divisions in the future are issues about which we have been unable to find reliable sources.

32. See JUDITH WALDROP & SHARON M. STERN, U.S. DEP’T OF COMMERCE, DISABILITY STATUS: 2000, at 1 (Mar. 2003), <http://www.census.gov/prod/2003pubs/c2kbr-17.pdf> [hereinafter CENSUS 2000: DISABILITY STATUS] (on file with the Iowa Law Review).

The 2000 Census’s focus on a “long lasting condition or disability” differs somewhat from the FHA’s definition of “handicap,” *see infra* note 115, which, like other federal anti-discrimination laws dealing with disability, includes persons with “a physical or mental impairment which substantially limits one or more [of such person’s] major life activities.” See 29 U.S.C. § 705(9)(B) (2000) (providing the “disability” definition in the 1973 Rehabilitation Act); 42 U.S.C. § 12102(2) (2000) (providing the “disability” definition in the 1990 Americans with Disabilities Act). Thus, it might be thought that the 2000 Census figures overstate the number of persons who are protected from disability discrimination by the FHA, but in fact the opposite is probably true for two reasons.

First, shortly before publication of the 2000 Census reports on disability, the Census Bureau published a study, based on 1997 data, whose definition of disability was intended to closely track the definition of this term under the 1990 Americans with Disabilities Act (and therefore under the FHA). See JACK MCNEIL, U.S. DEP’T OF COMMERCE, AMERICANS WITH DISABILITIES: 1997 (Feb. 2001), <http://www.census.gov/prod/2001pubs/p70-73.pdf> [hereinafter 1997 DISABILITIES] (on file with the Iowa Law Review). This study produced figures that were similar to those reported in the 2000 Census. *See, e.g., id.* at 1 (stating that 52.6 million people (19.7% of the population) had some level of disability and 33.0 million (12.3% of the population) had a severe disability). Second, the class of persons protected by the FHA extends beyond those who have a disability to include also persons who have “a record of” being disabled or are “regarded as” being disabled, *see* 42 U.S.C. § 3602(h), and in addition to those who reside or are associated with a disabled buyer or renter. *See id.* 3604(f) (1), (2) (2000).

33. Indeed, the 2000 Census data probably understate the degree of disability in the elderly population, because they consider only non-institutionalized persons, *see* CENSUS 2000:

The 2000 Census identified five distinct types of non-work related disabilities.³⁴ For each of these, people 65-and-over were much more likely than those in the “working” age group (16–64) to have such a disability, as follows:³⁵

- sensory disability involving sight or hearing: 14.2% (of the 65-and-over population) vs. 2.3% (of the 16–64 age group);
- condition limiting basic physical activities such as walking: 28.6% vs. 6.2%;
- physical, mental, or emotional condition causing difficulty in learning, remembering, or concentrating: 10.8% vs. 3.8%;
- physical, mental, or emotional condition causing difficulty in dressing, bathing, or getting around inside the home: 9.5% vs. 1.8%; and,
- condition making it difficult to go outside the home to shop or visit a doctor: 20.4% vs. 6.4%.

Disabilities are common within the senior population and their incidence grows steadily with advancing age. According to the 2000 Census, 42% of those 65-and-over (almost 14 million persons) have a disability, whereas the comparable figure is 16% for the 5–64 age group.³⁶ The proportion of persons needing personal assistance also rises steadily with age, being:

- 5.9% for those in the 55–64 age group;
- 8.1% for those 65–69;
- 10.5% for those 70–74;
- 16.9% for those 75–79; and,
- 34.9% for those 80 years and over.³⁷

Thus, while old age is not per se a disability,³⁸ it is clear that the likelihood of having a disability rises as people grow more elderly and that surviving to an

DISABILITY STATUS, *supra* note 32, at 2, and a substantial number of the 65-and-over age group is institutionalized (over 1.5 million persons making up about 4.5% of this age group, *see* CENSUS 2000: 65 YEARS AND OVER, *supra* note 13, at tbl. 8), presumably mostly for health-related reasons.

34. These five disabilities and the number of persons and percentage of the population suffering such a disability were: (1) a sensory disability involving sight or hearing (9.3 million persons, amounting to 3.6% of the overall relevant population); (2) a condition limiting basic physical activities such as walking (21.2 million persons, or 8.2%); (3) a physical, mental, or emotional condition causing difficulty in learning, remembering, or concentrating (12.4 million persons, or 4.8%); (4) a physical, mental, or emotional condition causing difficulty in dressing, bathing, or getting around inside the home (6.8 million persons, or 2.6%); and (5) a condition making it difficult to go outside the home to shop or visit a doctor (18.2 million persons, or 8.6%). CENSUS 2000: DISABILITY STATUS, *supra* note 32, at 1–2. The figures add up to more than the total number of disabled persons, because some individuals have conditions that qualify for more than one of the categories.

35. *Id.* at 3–4.

36. *Id.* at 3; *see also* 1997 DISABILITIES, *supra* note 32, at 1.

37. 1997 DISABILITIES, *supra* note 32, at 4.

older and older age eventually guarantees that a person will develop one or more disabilities.³⁹

B. HOUSING CHOICES FOR OLDER PERSONS

1. Distinguishing Characteristics of Older Persons and Their Impact on Housing Needs

As the disability data in the preceding section show, older persons tend to suffer a decline in physical strength and mental acuity. Common types of physical deterioration include impairment of eyesight, hearing, and short-term memory, the onset of dementia, and other neurological problems.⁴⁰ These conditions have an obvious effect on the types of housing that seniors might prefer. For example, certain physical impairments may make the tasks of maintaining a house more difficult, and for people with Alzheimer's or other forms of dementia who need round-the-clock care, living alone may be impossible.⁴¹

In addition to these physical and mental problems, older people may face a variety of financial, social, and emotional challenges that are unique to their age group. While older persons generally have greater net worth than younger adults (often due to the appreciation in the value of their homes),⁴² many seniors experience a significant drop in income compared

38. See, e.g., *Caron v. Pawtucket*, 307 F. Supp. 2d 364, 368 (D.R.I. 2004); *Chiara v. Dizoglio*, 81 F. Supp. 2d 242, 246 (D. Mass. 2000), *aff'd*, 6 Fed. Appx. 20 (1st Cir. 2001); *Chiara v. Dizoglio*, 59 F. Supp. 2d 193, 197 (D. Mass. 1999). But see Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 704 (1999) (suggesting that there should be "an age-relative understanding of impairment and disability for purposes of disability discrimination law" (citing Ron Amundson, *Disability, Handicap, and the Environment*, J. SOC. PHIL., Spring 1992, at 105, 113)).

39. Disability status also correlates with certain other difficulties. For example, the poverty rate is over three times as high for individuals with a severe disability as for those with no disability. See 1997 DISABILITIES, *supra* note 32, at 1. Seniors who have a disability are also less likely to live in an independent household than their non-disabled counterparts. *Id.* at 5. In addition, disability status within the senior population varies according to race, with minorities having a higher incidence of disability. See CENSUS 2000: DISABILITY STATUS, *supra* note 32, at 5 (noting that 52.8% of blacks and 48.5% of Hispanics in the 65-and-over age group report having a disability, whereas the comparable figure for whites is 40.6%); see also 1997 DISABILITIES, *supra* note 32, at 2-3 (noting that in this age group, "non-Hispanic Whites had a considerably lower rate of severe disability than individuals in the other categories: 35.3 percent compared with 49.2 percent for Asians and Pacific Islanders, 47.0 percent for Hispanics, and 51.8 percent for Blacks").

40. FROLIK, *supra* note 12, § 1.02, at 1-3 to 1-4.

41. *Id.* at 1-3, 1-5. Alzheimer's accounts for half of all dementia. *Id.* at 1-5.

42. See AGING IN THE UNITED STATES, *supra* note 25, at 5 (stating that the median net worth of householders age 65-and-over in 1991 was more than fifteen times that of those under age 35). Indeed, poverty rates among seniors have declined substantially in recent decades. See 65+ IN THE UNITED STATES, *supra* note 14, at 4-8, 4-18. Among subgroups within the 65-and-over age group, however, large differences in poverty rates do exist. For example, in 1995, 9% of white people over age 65 were poor, as compared with 25% of blacks and 24% of Hispanics. AGING IN

to their pre-retirement years, and many find themselves without sufficient funds to cover even modest rental costs, let alone the costs of long-term care.⁴³ For those with assets, one key financial challenge is “how to convert the high value of the house into disposable income while maintaining a comfortable housing style.”⁴⁴ Also, for married couples and those in other types of long-term relationships, death or serious disability of one’s spouse/companion may accompany advancing age, which invariably causes financial and emotional disruptions and may require a different housing arrangement.⁴⁵ In addition to financial considerations, the main factors that influence housing choice among older persons are proximity to family, social and recreational opportunities, access to health care, and safety/security considerations.⁴⁶

In terms of estimating the age at which older people are most likely to move to housing with health care and other supportive services, it is useful to divide the senior population into three age-based sub-groups: 65–75; 75–85; and over-85.⁴⁷ Those in the 65–75 group typically have fewer of the physical and mental problems associated with old age; are relatively active and generally capable of living without assistance; have incomes similar to what they enjoyed in their pre-retirement years; and generally make housing choices based on climate and other “lifestyle” issues rather than health concerns.⁴⁸ Indeed, many do not move from their prior housing; less than 5% of those aged 65–75 move each year, a much smaller figure than the overall population.⁴⁹

THE UNITED STATES, *supra* note 25, at 5. Women over 65 had a higher poverty rate (15.7%) than men (8.9%). 65+ IN THE UNITED STATES, *supra* note 14, at 4-19. Seniors over 75 had a higher poverty rate (16.2%) than those aged 65–74 (less than 10.7%). *Id.* at 4-16.

43. See *infra* notes 57 and 94 and accompanying text.

44. FROLIK, *supra* note 12, § 1.02, at 1-8.

45. *Id.* §§ 1.03–.04 at 1-9 to 1-11.

46. *Id.* §§ 1.05–.06, at 1-14 to 1-16.

47. *Id.* § 1.04, at 1-11 to 1-12.

48. *Id.* § 1.04, at 1-11.

49. FROLIK, *supra* note 12, § 1.04, at 1-11; U.S. DEP’T OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, BUREAU OF THE CENSUS, GEOGRAPHICAL MOBILITY: 1995 TO 2000, at 2 (Sept. 2003) (stating that the annual moving rate for the overall U.S. population is just over 9%), available at <http://www.census.gov/population/www/cen2000/briefs.html> (on file with the Iowa Law Review); see also JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, THE STATE OF THE NATION’S HOUSING: 2004, at 35 (showing that in every year from 1993 through 2003, people who were 65–74 years old had the highest homeownership rate of any age group, rising from that of the 55–64 age group before falling for those over 75), available at <http://www.jchs.harvard.edu/publications/markets/son2004.pdf> (on file with the Iowa Law Review). But see Anusha Shrivastava, *A Perfect Home, Made Simple*, LEXINGTON HERALD-LEADER, Feb. 7, 2004, at C-2 (reporting recent trend indicating that a higher percentage of Baby Boomers intend to relocate after retirement).

For people over 75, “poor health, frailty, and concern about physical safety increase significantly.”⁵⁰ Thus, “individuals in this age group are likely to realize that they need a smaller housing unit—one without steps but with good security and low maintenance [and certain provided services].”⁵¹ These types of concerns tend to be even more prominent for people over 85. At this age, the key issue with respect to housing choice is often whether an individual needs assistance in daily life activities, such as dressing, bathing, and preparing meals, and, if so, whether a move to housing that offers personal-care assistance is required.⁵² Because of these special needs, many people over age 85, including those who had moved earlier into senior housing that offered only independent-living arrangements, find that they need to move again, possibly into assisted-living housing.⁵³

2. Basic Types of Housing Available to Older Persons

a. Overview

As seniors grow older, they have five basic types of residential options from which to choose. These options—remaining in place; other types of independent living; assisted living; nursing homes; and hospitals and institutional hospices—are described below and arrange themselves along a continuum based on the degree of medical and other personal services provided, from none in the first two categories through a very high degree of such services in the hospital-hospice category. A sixth option—retirement communities that provide some combination of independent living, assisted living, and nursing home units in a multi-building complex—is also available. As will be more fully explained later, the Fair Housing Act clearly applies to residences covered by the first three options (remaining in place, independent living, and assisted living); probably applies to the fourth option (nursing homes); does not apply to the fifth option (hospitals); and applies to most, if not all, of the units in the sixth option (multi-phase retirement communities).⁵⁴

50. FROLIK, *supra* note 12, § 1.04, at 1-12. The financial situation of persons over 75 may be less secure as well, as inflation begins to erode some of the value of their pensions and accelerating medical costs account for an increasing part of their disposable income. *Id.* With fewer dollars to spend on housing, people in this age group “may find themselves having to reduce the quality of their housing in order to meet other expenses or to ensure themselves a safe and physically comfortable environment.” *Id.*

51. *Id.* § 1.04, at 1-12.

52. *Id.* Safety concerns also increase in old age, so that housing choices that offer a secure environment while freeing residents from the burdens of maintenance and repair become more appealing. *Id.* Part of the appeal of such housing derives from the fact that fewer couples remain among persons over 85, as over 80% of the women and 40% of the men are widowed in this age group. *Id.*

53. *Id.* § 1.04, at 1-13.

54. *See infra* Part II.B.

While it is convenient to categorize an older person's housing choices based on the degree of medical services provided, it is rarely true that a particular type of unit is absolutely dictated by the state of an individual's health.⁵⁵ True, individuals whose mental or physical impairments make them unable to care for themselves without daily assistance have special service-related needs. These needs, however, do not necessarily dictate a particular housing choice, because they can generally be met in the individual's own home as well as in an assisted-living facility or a nursing home,⁵⁶ at least for people with sufficient resources.⁵⁷

b. Independent Living—Remaining in Place

The first option for older persons is to remain in the home where they lived in their pre-senior life. While a significant number of older persons may choose this option,⁵⁸ it is not a particularly interesting one for purposes of the FHA, because the statute applies to such housing regardless of the age of its inhabitants. For example, in *Dadian v. Wilmette*, an elderly couple won an FHA-based disability challenge to the defendant's land-use laws that had prevented the plaintiffs from adding a particular type of garage to their private residence, but this result and its underlying legal analysis would have

55. FROLIK, *supra* note 12, § 1.05, at 1-14.

56. *Id.* § 1.05, at 1-13 to 1-14; *see also* LAWRENCE A. FROLIK & MELISSA C. BROWN, ADVISING THE ELDERLY OR DISABLED CLIENT § 16.10 (2d ed. 2004). For similar reasons, "group homes" for persons with a particular disability do not constitute a separate category of housing choice. Some group homes involve virtually no medical or other supportive services—other than the therapeutic value of living with people who have a similar disability—and are therefore essentially independent-living situations. *See generally* FROLIK, *supra* note 12, § 10, at 10-1 to 10-84. Other group homes involve disabilities that require substantial support services and are therefore more akin to an assisted-living facility or even a nursing home. *Id.* Thus, it is the nature of the particular disability involved, rather than the label "group home," that determines the type of housing that is most appropriate for the individual residents.

57. This is one of a number of situations in which a senior's economic status might dictate the type of housing unit chosen. Another involves multi-phase retirement communities (*see infra* Part I.B.2.f), which often charge a substantial admissions fee and thus may be available only to reasonably well-off individuals. A third involves people with sufficiently modest means to qualify for Medicaid, a program that has an institutional bias in favor of funding stays in nursing homes versus other types of service-included residences. *See infra* note 88 and accompanying text. In other situations, however, the basic type of unit available would not depend on one's financial resources, as, for example, where persons of modest means are able to secure apartments in senior-only complexes financed under the section 202 housing assistance program, *see infra* note 64, that would be comparable in type, if not quality, to apartments in market-rate senior developments. Regardless of whether an individual's economic status dictates the type of housing unit chosen, that issue is generally not relevant to the question of whether the FHA applies in a particular case, because FHA coverage does not turn on the type or quality of the housing involved nor on the financial resources of its residents. *See infra* Part II.B. *But see infra* note 164.

58. *See, e.g.,* Motoko Rich, *Eviction Threat can Loom for Independent Elderly*, N.Y. TIMES, Feb. 15, 2004, at 1 (reporting recent AARP survey showing that 84% of persons 45 and older "preferred to stay in their current home as long as possible").

been the same even if the plaintiffs had been younger than 65.⁵⁹ Furthermore, the FHA's "housing for older persons" exemption would generally not be available in situations where older persons remain in their original home.⁶⁰ Thus, the housing units involved in the "remaining-in-place" option would be, as in *Dadian*, subject to the FHA in precisely the same way that all other, non-age-restricted housing would be.

c. Independent Living—Moving to a New Home

The second residential option available to older persons is to move to a different home, but one that is still characterized by "independent living;" that is, one that provides no special medical or other supportive services. Within this second category, the types of housing units available include all of those enjoyed by the general public (e.g., single-family houses; mobile and other "manufactured" homes;⁶¹ condominiums and cooperatives;⁶² and apartments). One key difference, however, between this option and the staying-in-place option is that, regardless of the type of unit involved, an individual who chooses to move might select a community that is restricted to older persons and therefore qualifies for the FHA's "housing for older persons" exemption.⁶³

Included in this category of independent-living housing would be apartments financed under "Section 202," a major federal housing-assistance program for older persons with limited resources.⁶⁴ Also included in this

59. 269 F.3d 831, 836–41 (7th Cir. 2001).

60. Because some young people are permitted to live in a housing complex that qualifies for the FHA's "housing for older persons" exemption under 42 U.S.C. § 3607(b)(2)(C) (2000), it is theoretically possible for such a person, after becoming a senior citizen, to "remain in place" in an age-restricted community covered by this exemption. Rarely would such a situation occur, however, because few younger persons choose to live in such communities and because these communities generally also seek to qualify for the exemption under § 3607(b)(2)(B) by admitting *only* persons 62 years old and over, which means they would not allow younger persons to become residents in the first place. For a further discussion of the FHA's "housing for older persons" exemption, see *infra* Part II.B.2.a.

61. For a description of manufactured housing and its popularity among older persons, see FROLIK, *supra* note 12, §§ 7.02–.04, at 7-2 to 7-5.

62. The distinguishing features of condominiums and cooperatives are described in FROLIK & BROWN, *supra* note 56, at §§ 16.03, 16.04.

63. See, e.g., *id.* at § 16.06[1] (noting that housing of various types—including apartment buildings, retirement hotels, condominiums, mobile home parks, and retirement subdivisions—may be restricted to older residents); Shrivastava, *supra* note 49, at C-2 (noting Census Bureau figures showing that 7.7 million homes were in age-targeted communities in 2001). The FHA's "housing for older persons" exemption is discussed *infra* in Part II.B.2.a.

64. 12 U.S.C. § 1701q (2001). Originally established in 1959, the "Section 202 Supportive Housing for the Elderly program . . . provides capital advance funds to [non-profit housing developer-owners] . . . as well as rental assistance [in] the form of Project Rental Assistance Contracts . . . to subsidize the operating expenses of the developments." COALITION ON HUMAN NEEDS, SECTION 202 ELDERLY HOUSING, at <http://www.chn.org/issues/article.asp?Art=330> (last visited Aug. 20, 2004) (on file with the Iowa Law Review). "Qualified tenants must generally be

category are units in apartment buildings—whether subsidized or market-rate—that offer housekeeping, group dining facilities, and other modest services, but no medical or personal-care support.⁶⁵

d. Assisted Living

There is a good deal of debate over the exact definition of “assisted living,”⁶⁶ but most assisted-living facilities have three common characteristics: (1) they provide a variety of on-site health-related and other personal-living services; (2) they are subject to some state licensing requirements; and (3) they offer only private—as opposed to shared—occupancy units.⁶⁷ For

at least 62 years old and have incomes less than 50 percent of their area median [i.e., be low income].” *Id.* “Some facilities have a percentage of units designed to be accessible to non-elderly persons with [mobility] impairments or may serve other targeted disabilities. There are more than 300,000 Section 202 units in over 3,500 developments,” with an additional 6000 new units expected to be developed based on funding from FY 2003 appropriations. *Id.* “According to AARP, there are currently more than nine seniors on waiting lists for each available Section 202 unit.” *Id.* For additional information concerning the section 202 program, *see infra* note 164 and accompanying text.

Other federally assisted housing programs, such as the public housing program administered by HUD pursuant to 42 U.S.C. § 1437 (2000), may also provide rental units for seniors as part of a public housing authority’s decision to establish age-restricted housing developments. Other conventional public housing units in so-called “family developments” are available for all eligible residents including, but not limited to, seniors. For purposes of this Article, such units may be more appropriately categorized as part of the “remaining in place” option discussed *supra* Part I.B.2.b.

With respect to the applicability of federal anti-discrimination laws, section 202 and all other federally assisted housing units are subject to the FHA and also to laws that prohibit discrimination in programs receiving federal financial assistance. *See infra* notes 134–38 and accompanying text.

65. Such “congregate housing” facilities generally provide private living arrangements in apartment units along with housekeeping and some meals in a common dining room, but residents are otherwise self-sufficient (i.e., no health care, in-unit assistance, or other forms of personal support are provided). Interest in congregate housing seems to be waning in favor of assisted-living facilities, discussed *infra* Part I.B.2.d, because most older persons are reluctant to relocate a second time as their health fades. FROLIK, *supra* note 12, §§ 9.02–.03, at 9-2 to 9-3. Thus, some congregate housing providers are adding assisted-living wings, *id.* at 9-3, which means that a particular housing development may offer both “independent living” and “assisted living” options in a single-campus setting, a concept that is further explored *infra* in Part I.B.2.f’s discussion of continuing care retirement communities.

66. *See, e.g.*, ASSISTED LIVING WORKGROUP, 108TH CONG., ASSURING QUALITY IN ASSISTED LIVING: GUIDELINES FOR FEDERAL AND STATE POLICY, STATE REGULATIONS, AND OPERATIONS 11–15 (April 2003) [hereinafter ASSISTED LIVING REPORT] (showing that a nearly 50-member group made up of virtually all national organizations interested in assisted-living issues that was charged with the task of defining “assisted living” failed to develop a definition that can be supported by two-thirds of the participating organizations).

67. This description is derived from ASSISTED LIVING REPORT, *supra* note 66, at 12–15. For another effort to describe assisted living, see *Assisted Living Assoc. v. Moorestown Township*, 996 F. Supp. 409, 415–16 (D.N.J. 1998). According to the ASSISTED LIVING REPORT, the three elements included in the text’s description—provision of certain health-related and other personal-living services; subject to some state regulation; and private occupancy—are, either alone or in

purposes of this Article, assisted living facilities (“ALFs”) will be considered to include all residences that, by providing some medical and other significant personal-care services, fall between the “independent living” categories described above and the nursing-home category described in the next section.⁶⁸ Put another way, ALFs are distinguished by the fact that the care they make available to residents is a major component of the services provided, albeit still secondary to the more traditional housing and housing-related services they also provide.

One of the major advantages of ALFs is that they allow “a resident to age ‘in place’ without constantly moving from facility to facility as a resident’s condition evolves . . . [thereby helping] to ensure that a resident maintains as much independence, autonomy, individuality, privacy, and dignity as possible.”⁶⁹ This is one of the main reasons that assisted living is among the fastest growing forms of housing for seniors.⁷⁰ The typical

combination with one another, considered the key elements used to define “assisted living.” ASSISTED LIVING REPORT, *supra* note 66, at 12–15. *But see supra* note 66 and accompanying text (combining even all three of these elements creates a definition of “assisted living” that is still unacceptable to a substantial number of national groups interested in this type of housing).

With respect to the types of services provided, the following eight services were considered required by those organizations that focused on this element in the ASSISTED LIVING REPORT: (1) 24-hour awake staff to provide oversight and meet scheduled and unscheduled needs; (2) provision and oversight of personal and supportive services (e.g., assistance with activities of daily living); (3) health-related services (e.g., medication-management services); (4) social services; (5) recreational activities; (6) meals; (7) housekeeping and laundry; and (8) transportation. *Id.* at 12.

With respect to state licensing requirements, most states have laws regulating assisted-living facilities. FROLIK, *supra* note 12, app. 9-2, at A9-11 to A9-100 (identifying such state laws); ROBERT MOLLICA & KIMBERLY SNOWE, STATE ASSISTED LIVING POLICY: 2002, available at http://www.nashp.org/_docdisp_page.cfm?LID=E000B754-AA71-45BB-8AD826A8F8245DF (on file with the Iowa Law Review); JENNY SCHUETZ, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, AFFORDABLE ASSISTED LIVING: SURVEYING THE POSSIBILITIES 36–38 (2003), available at <http://www.jchs.harvard.edu/ouublications/seniors/03-1-schuetz.pdf>; *see also infra* note 68.

68. *See, e.g.,* SCHUETZ, *supra* note 67, at 1 (describing assisted living as an “intermediary stage between independent living and skilled nursing facilities”); *Assisted Living Assoc.*, 996 F. Supp. at 415–16 (describing assisted living as providing a lower level of care and a more flexible range of services than nursing homes). State laws often prevent an assisted-living facility from admitting an individual who is bedfast and/or needs a degree of health care that can only be provided in a licensed nursing home. FROLIK, *supra* note 12, § 9.04, at 9-6; *see also* Smith & Lee Assoc., Inc. v. Taylor, Mich., 13 F.3d 920, 922–23 (6th Cir. 1993) (involving a state-licensed adult foster care home for disabled elderly persons who require ongoing supervision, but not continuous nursing care); *infra* notes 338–39 and accompanying text.

69. *Assisted Living Assoc.*, 996 F. Supp. at 415–16; *see also* ASSISTED LIVING REPORT, *supra* note 66.

70. FROLIK, *supra* note 12, § 9.03, at 9-4. More than two-thirds of all new housing for seniors has included an assisted-living component in recent years. *Id.* § 9.02, at 9-2. One factor supporting this trend is that a growing number of states have begun to allow Medicaid funds to be used to reimburse for services in ALFs as an alternative to more expensive nursing home care. *See, e.g.,* MOLLICA & SNOWE, *supra* note 67, at 2 (noting that forty-one states now use

resident is over 80 years old and is impaired in three or more activities of daily living (e.g., walking; bathing; dressing).⁷¹ As is true for the “independent living” option, assisted-living housing may or may not be located in a community that caters exclusively to older persons.⁷²

The housing units in ALFs range from apartments and townhouse-type structures to single rooms that are physically similar to nursing-home units. Such facilities may be operated by non-profit or for-profit organizations, including some national chains.⁷³ Residents sign a contract with the provider and generally pay an entrance fee as well as a monthly fee for the level and types of services they receive.⁷⁴ The contract may specify conditions for termination (e.g., eviction because a resident’s “health has deteriorated to the point that the facility can no longer take responsibility for him[.]”).⁷⁵ However, many individuals who move into ALFs end their lives there; indeed, the most frequent reason for termination of stay is death.⁷⁶

e. Nursing Homes

Nursing homes provide skilled-nursing care or rehabilitation services for injured, disabled, or sick persons who require full-time medical and related services (e.g., administration of medication and prescribed treatments), “but who do not need the acute care provided by hospitals.”⁷⁷

Medicare funds to reimburse services in ALFs or board-and-care facilities for more than 102,000 residents).

71. FROLIK, *supra* note 12, §§ 9.03–.04, at 9-4 to 9-6; *see also Assisted Living Assoc.*, 996 F. Supp. at 416 (“[T]ypical resident of an assisted living facility needs assistance with two or more basic daily activities, such as, toileting, bathing, or dressing, and is, on average, approximately 85 years old.”); JEREMY CITRO & SHARON HERMANSON, AARP PUBLIC POLICY INSTITUTE, ASSISTED LIVING IN THE UNITED STATES (Mar. 1999) (providing overview of U.S. assisted living options and residents’ needs and characteristics), *available at* http://research.aarp.org/il/fs62r_assisted.html (last visited Aug. 20, 2004) (on file with the Iowa Law Review).

72. *See, e.g., The 2003 Senior Class Charts: Assisted Living*, N. SHORE, Aug. 2003, at 42–45 [hereinafter *Senior Class*] (noting that 15 of 33 ALFs reviewed are restricted to persons 55 years old or older).

73. FROLIK, *supra* note 12, § 9.03, at 9-4.

74. *Id.* § 9.07, at 9-13.

75. *Id.* § 9.07, at 9-16 to 9-17; *see also infra* Part III.D.2.

76. FROLIK, *supra* note 12, § 9.07, at 9-16.

77. FROLIK & BROWN, *supra* note 56, § 15.01, at 15-1; *see also* Elizabeth K. Schneider, *The ADA—A Little Used Tool to Remedy Nursing Home Discrimination*, 28 U. TOL. L. REV. 489, 491 (1997). Federal law defines a nursing home as an institution that:

is primarily engaged in providing to residents

(A) skilled nursing care and related services for residents who require medical or nursing care,

(B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons, or

(C) on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services (above the level of

Nursing homes are heavily regulated. They require a state license and are subject to detailed state regulation⁷⁸ and to the federal Nursing Home Reform Act of 1987,⁷⁹ which requires, inter alia, that a nursing home have a pre-admission screening program guaranteeing that the home is an appropriate facility for a would-be resident.⁸⁰

Services in nursing homes vary considerably. Historically, nursing homes focused primarily on older persons who needed “custodial care” (i.e., assistance mainly with the activities of daily living).⁸¹ Today, many nursing homes have added sub-acute services where recovering persons in all age groups can receive care and rehabilitation before returning home or to a lower level of care (i.e., as a stop over on the road to recovery rather than a final living arrangement before death).⁸² Indeed, the average stay in a skilled nursing facility is now less than a year, with about one-third of the people who enter a nursing home staying for less than one month and only about 30% dying there.⁸³

While modern nursing homes are generally not restricted to older people,⁸⁴ the vast majority of residents are seniors, with the over-65 age group accounting for some 2.0 million of the total nursing-home population of 2.3 million.⁸⁵ The average age of residents is 81.⁸⁶ However, the percentage of the elderly in nursing homes has been declining in the past 25

room and board) which can be made available to them only through institutional facilities

42 U.S.C. § 1396r(a) (2000).

78. FROLIK, *supra* note 12, § 12.08, at 12-30 to 12-31 and app. 12-4, at A12-11 to A12-66.

79. 42 U.S.C. § 1396r.

80. *E.g.*, FROLIK, *supra* note 12, § 12.08, at 12-32. Nursing homes are generally not required to admit seriously mentally ill or mentally retarded patients, although dementia is not included in these categories. *Id.* § 12.08, at 12-31; *see also* Schneider, *supra* note 77, at 506–08. *See generally* BAZELON CENTER FOR MENTAL HEALTH LAW, THE IMPACT OF PASARR (1992) (reviewing the effectiveness of the required Preadmission Screening and Annual Resident Review program in preventing the inappropriate admission of people with mental disabilities to nursing homes).

81. *See, e.g.*, Cynthia L. Barrett, 1997 *Elder Law Issues*, SB90 ALI-ABA 1365, 1375 (1997) (noting that, historically, people of limited means who could not stay in their own homes were moved into nursing homes). Prior to the advent of the federal Medicaid program in 1965, many counties maintained “old folks’ homes” for people who could not afford private sector care. *See infra* text accompanying note 88. *See generally* DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971).

82. Mary L. Lubin, *Inside the Nursing Home: The Structure*, in NURSING HOME LITIGATION: INVESTIGATION AND CASE PREPARATION 14 (Patricia W. Iyer ed., 1999).

83. FROLIK & BROWN, *supra* note 56, § 15.01, at 15-2. Nursing homes generally charge on a per-day basis. *See, e.g.*, *Senior Class*, *supra* note 72, at 50–60.

84. *See, e.g.*, *Senior Class*, *supra* note 72, at 50–60 (showing that only 13 of the 85 nursing homes reviewed are restricted to persons over 60 years of age).

85. FROLIK, *supra* note 12, § 12.01, at 12-2; *see also supra* note 27 and accompanying text.

86. FROLIK & BROWN, *supra* note 56, § 15.01, at 15-2; FROLIK, *supra* note 12, § 12.01, at 12-2.

years; fewer than 5% of those aged 75 to 84 now live in nursing homes, and about 20% of those over 85 reside in such facilities.⁸⁷ Indeed, the numbers might be even smaller were it not for the Medicaid program's institutional bias in favor of funding stays in nursing homes rather than in ALFs or other types of lower-care residences.⁸⁸

There are many types and sizes of nursing homes. Most are free-standing (i.e., not associated with other licensed health care or domiciliary facilities), but in recent years, retirement communities have often included a nursing home as part of their facilities. The size of a nursing home is generally described in terms of the number of "beds" provided, with the size varying from as few as four beds to over a thousand.⁸⁹ Ownership patterns also vary. Historically, nursing homes were run primarily by religious organizations, but today, many are owned by other types of entities, including for-profit corporations and not-for-profit associations.⁹⁰

87. FROLIK & BROWN, *supra* note 56, § 15.01, at 15-2; *see also* FROLIK, *supra* note 12, § 12.01, at 12-2; Schneider, *supra* note 77, at 495-96 (providing statistics showing that a much larger portion of the disabled senior population remains "in the community" rather than residing in nursing homes); Erin Ziaja, *Do Independent and Assisted Living Communities Violate the Fair Housing Amendments Act and the Americans with Disabilities Act?*, 9 ELDER L.J. 313, 320 n.44 (2001) (noting that only 4.2% of those over 65 live in nursing homes).

88. *See, e.g.*, Michael Wytychak, III, *Payment of Nursing Home Bills Through the Medicaid Program*, 36 IDAHO L. REV. 243 (2000); Steve Gold, *Institutional Bias in Medicaid: Nursing Homes Rule Long Term Care*, Information Bulletin # 35, available at <http://www.stevegoldada.com/stevegoldada/cgi/getlink.cgi?54> (on file with the Iowa Law Review).

The Medicaid Act, starting at 42 U.S.C. § 1396, establishes "a cooperative federal-state program that provides federal funding for state medical services to the poor." *Frew (ex rel. Frew) v. Hawkins*, 124 S. Ct. 899, 901 (2004). Begun in 1965, Medicaid is now a \$214 billion/year program that includes a nursing home benefit under which the full cost of care for several million low-income beneficiaries is paid by the federal government. *See, e.g.*, THE KAISER COMMISSION ON MEDICAID AND THE UNINSURED, *MEDICAID: A PRIMER 1-2* (2001) (showing that Medicaid financed 46% of U.S. nursing home costs in 1998), available at <http://www.kff.org/medicaid/loader.cfm?url=commonspot/security/getfile.cfm&PageID=13760> (on file with the Iowa Law Review); *see also* U.S. CENTER FOR MEDICARE AND MEDICAID SERV., *NURSING HOME DATA COMPENDIUM 2001 tbl.2.6a*, available at <http://www.cms.hhs.gov/medicaid/survey-cert/datacomp.asp> (on file with the Iowa Law Review). However, Medicaid does not pay for housing, only for specified supports and services covered under a state Medicaid plan, and most state Medicaid plans currently do not cover assisted-living placements except under waiver programs that strictly limit the number of "slots" funded each year. *See, e.g.*, MOLLICA & SNOWE, *supra* note 67, at 1-2; Nat'l Ctr. for Assisted Living, *Medicaid Waiver Slots Allocated*, ASSISTED LIVING NEWS (Aug. 2003), available at <http://www.ncal.org/news/alnews/al0308.htm> (on file with the Iowa Law Review). As a result, many ALFs limit the number of Medicaid placements, which in turn means that many low-income seniors who need something less than full-time nursing care may nevertheless end up in a nursing home because they are unable to secure a place in an ALF or similar lower-care facility. *See, e.g.*, David Nolan & John Rimbach, *A Model of Affordable Assisted Living*, PROVIDER 73 (Oct. 1997) (concluding that the majority of ALFs are "beyond the reach of most low and moderate-income Americans" in the course of describing efforts by some foundations to develop affordable assisted living for Medicaid recipients).

89. *See, e.g.*, *Senior Class*, *supra* note 72, at 51-60.

90. Lubin, *supra* note 82, at 14.

f. Continuing Care Retirement Communities

Continuing care retirement communities (“CCRCs”) offer in a single-campus setting a variety of residential options designed exclusively for senior citizens, including those here described as “independent living,” “assisted living,” and “nursing home.” The housing units available include cottages, townhouses, apartments, and nursing-infirmiry rooms.⁹¹ In addition to offering dining and recreational facilities to all, a range of health and personal-care services is provided, from independent living with perhaps minor services to full-time care in nursing home-type units. Assuring convenient access to higher levels of care through transfer arrangements is one of the advantages of residing in a CCRC.⁹²

While the CCRC concept is at least 100 years old,⁹³ CCRCs have become particularly popular in recent years, especially for middle- and upper-income seniors.⁹⁴ Their attractions include a community designed for older people; recreation and social activities for such a peer group; and availability of later assistance with daily living and ultimately nursing home-type care.⁹⁵ Most people enter CCRCs in their 70s, with the average age being around 75 and with women making up 75% of the residents.⁹⁶ The vast majority of CCRCs are not-for-profit communities, but the fact that a not-for-profit or even a religious entity owns a CCRC may have little effect on its day-to-day operations, because often a management company is interposed between the owner and the resident, and the management company generally determines how the facility is run.⁹⁷

Evolving out of the old “life care” model pioneered by religious organizations at the beginning of the twentieth century,⁹⁸ the CCRC industry has developed three basic payment-financing-insurance options to cover the combined cost of their housing and services over the long term. The most common has been the so-called “extensive” or “life care” agreement, which

91. FROLIK, *supra* note 12, § 8.01, at 8-2. Some newer CCRCs are composed of condominiums or cooperatives, so entry into the community is accomplished by purchasing a condo or co-op shares. *Id.* § 8.02, at 8-7.

92. *Id.* § 8.01, at 8-2 to 8-3.

93. *Id.* § 8.01, at 8-2. Originally, CCRCs were organized by religious organizations to provide lifetime care for individuals who did not have a family, and even today, many not-for-profit entities that operate CCRCs are affiliated with a religious group. *Id.*

94. *Id.* The number of CCRCs in the United States is now well over 1000 and is growing rapidly. *Id.* § 8.01, at 8-2; *see also* U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONG. REQUESTERS HEALTH CARE SERV.: HOW CONTINUING CARE RETIREMENT CMTYS. MANAGE SERV. FOR THE ELDERLY (1997) (finding that in 1997 there were some 1200 CCRCs housing more than 350,000 residents).

95. FROLIK, *supra* note 12, § 8.01, at 8-2.

96. *Id.*

97. *Id.* § 8.09, at 8-17.

98. *See* Stephanie Edelstein, *Assisted Living: Recent Developments and Issues for Older Consumers*, 9 STAN. L. & POL'Y REV. 373, 381-82 n.5 (1998).

involves a substantial entry fee,⁹⁹ but then covers the full cost of “housing, residential services and amenities, prepayment of medical expenses and unlimited long-term care without substantial increases in periodic payments.”¹⁰⁰ The second payment option is the so-called “modified agreement,” which specifies a certain number of days of care each year, with additional days subject to a daily charge.¹⁰¹ The third option is a fee-for-service agreement in which “[h]ealth care is guaranteed on-site, but payment is out-of-pocket, with the resident bearing responsibility for getting third party (Medicare/Medicaid) reimbursement.”¹⁰²

There are no federal regulations governing independent living or assisted living as offered by CCRCs,¹⁰³ but most states regulate CCRCs.¹⁰⁴ Absent a state law provision to the contrary, admission and termination of residential rights are governed by the private contract between the housing provider and resident.¹⁰⁵

g. Hospitals and Hospital-like Facilities

Hospitals are state-licensed facilities designed to provide the highest degree of medical care for patients whose health needs are acute.¹⁰⁶ In addition, certain hospice facilities offer on-site care for terminally ill

99. A CCRC's entry fee is usually non-refundable, even if the resident dies shortly after moving in. FROLIK, *supra* note 12, § 8.06, at 8-12 to 8-13. See also *M & I First Nat'l Bank v. Episcopal Homes*, 536 N.W.2d 175, 185 n.12 (Wis. Ct. App. 1995) (citing various cases where large entry fees charged by lifetime-care housing facilities for seniors were retained by the facility).

100. Lauren Sturm, *Fair Housing Issues in Continuing Care Retirement Communities (CCRCs): Can Residents be Transferred Without Their Consent?*, 6 N.Y. CITY L. REV. 119, 125 (2004). The large admission fee helps support the CCRC's capital costs, but more importantly, it serves as “a sort of health care insurance payment [because] [i]n most cases . . . [a CCRC's] fees do not rise (or rise only modestly) even if a resident whose health declines must move from the independent-living unit to the assisted-care or nursing home facility.” FROLIK, *supra* note 12, § 8.01, at 8-2.

101. Sturm, *supra* note 100, at 125.

102. *Id.*

103. FROLIK, *supra* note 12, § 8.09, at 8-15. However, if a CCRC includes a nursing home, that home would be subject to federal nursing-home regulations. See *supra* notes 79–80 and accompanying text.

104. FROLIK, *supra* note 12, § 8.09, at 8-16 and app. 8-5 at A8-21 to A8-22. See also Edelstein, *supra* note 98, at 376 (arguing that, in the absence of tight governmental regulation, senior residents of assisted living and CCRCs will experience the same kinds of neglect and abuse that have occurred in nursing homes); Michael D. Floyd, *Should Government Regulate the Financial Management of Continuing Care Retirement Communities?*, 1 ELDER L.J. 29, 34 (1993) (arguing against further governmental regulation of CCRCs, because “[m]arket mechanisms have the potential to solve most or all of the perceived financial problems with CCRCs”).

105. FROLIK, *supra* note 12, § 8.09, at 8-17.

106. See, e.g., 1A LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES § 2.6 (Richard M. Patterson ed., 2001). Although licensed and regulated by state health agencies, hospitals may also be subject to significant regulation under such federal programs as Medicare and Medicaid. See, e.g., DAN J. TENNENHOUSE, ATTORNEY'S MEDICAL DESKBOOK § 7:17 (3d ed. 1993).

persons.¹⁰⁷ Hospitals and institutional hospices are not designed for long-term stays and are thus not really a “residential choice” for older persons, but they are listed here as a type of place to stay because a significant portion of older people spend the last days of their lives in such facilities.¹⁰⁸

II. THE FAIR HOUSING ACT’S APPLICABILITY TO HOUSING FOR OLDER PERSONS

A. OVERVIEW OF THE FAIR HOUSING ACT AND OTHER LAWS DEALING WITH HOUSING DISCRIMINATION

1. Fair Housing Act

The FHA’s substantive prohibitions outlaw discrimination on the basis of seven criteria in various housing-related practices dealing with every “dwelling” not covered by one of the statute’s exemptions.¹⁰⁹ For example, the FHA’s most important prohibition makes it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race [or other prohibited factor].”¹¹⁰ Because the FHA’s definition of “dwelling” and some of its exemptions are so important in determining the statute’s applicability to the types of housing dealt with in this Article, these topics are discussed in detail *infra* in Part II.B. Here, the banned bases of discrimination and the particular practices prohibited are briefly reviewed.

The original Fair Housing Act was passed in April of 1968 shortly after the assassination of Dr. Martin Luther King, Jr. and the publication of the Kerner Commission Report with its dramatic conclusion that the Nation was “moving toward two societies, one black, one white—separate and unequal.”¹¹¹ The 1968 FHA, which banned discrimination only on the basis of race, color, religion, and national origin,¹¹² was intended by its proponents to replace residential ghettos “by truly integrated and balanced living patterns.”¹¹³ Congress later added three additional bases of prohibited

107. FROLIK, *supra* note 12, §§ 13.01–.02, at 13-1 to 13-3. While some hospices have their own facilities, the vast majority of hospice services are provided in an individual’s own home. *Id.* Most hospice patients (67%) are over 65 years old, about 80% have cancer, and most are served for less than two months. *Id.* at 13-2.

108. See, e.g., Marshall B. Kapp, *Legal Anxieties and End-of-Life Care in Nursing Homes*, 19 ISSUES IN LAW AND MEDICINE 111, 112 (2003) (citing Miriam S. Moss, *End of Life in Nursing Homes*, 20 ANN. REV. GERONTOLOGY & GERIATRICS 224 (2000)).

109. 42 U.S.C. §§ 3603–3607, 3617 (2000).

110. *Id.* § 3604(a); see also *infra* note 125.

111. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NAT’L ADVISORY COMM’N ON CIVIL DISORDERS 1 (1968).

112. See 42 U.S.C. §§ 3604–3606, 3617 (1970).

113. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 3422 (1968) (remarks of Senator Mondale)).

discrimination to the FHA: “sex” was added by a 1974 amendment,¹¹⁴ and “familial status” and “handicap” were added by the 1988 Fair Housing Amendments Act (“FHAA”).¹¹⁵ The FHAA’s ban on handicap discrimination was intended to be “a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream.”¹¹⁶

By prohibiting discrimination only on the basis of the seven criteria specified, the FHA implies that all other grounds for judging prospective residents are permitted.¹¹⁷ Thus, housing providers may insist that applicants

114. See Pub. L. No. 93-383, § 808, 88 Stat. 633, 729 (1974).

115. See Pub. L. No. 100-430, 102 Stat. 1619 (1988). The FHAA defined “familial status” as meaning an individual under the age of 18 years being domiciled with a parent or legal guardian. 42 U.S.C. § 3602(k) (2000). “Handicap” under the FHAA means:

with respect to a person –

- (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,

but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of title 21).

Id. § 3602(h). In addition to persons who have such a handicap, the FHAA also authorized claims by persons who reside or are associated with such persons. *Id.* § 3604(f) (1)–(2).

The FHAA’s definition of “handicap” is identical to the definition of “disability” in the two other principal federal statutes that ban discrimination based on this factor. See Rehabilitation Act of 1973, 29 U.S.C. § 705(9) (2000 & Supp. 2004); Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2) (2000). Even with respect to the FHAA, the term “disability” is often used instead of “handicap.” See, e.g., *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1146 n.2 (9th Cir. 2003). For these reasons, this Article uses the terms “handicap” and “disability” interchangeably and often uses the term “disability” in describing the FHAA’s coverage of “handicap” discrimination.

In adding “familial status” and “handicap” to the FHA, the FHAA did not alter the basic substantive prohibitions of the 1968 law, other than by making some changes in one provision dealing with home financing, see 42 U.S.C. § 3605 (2000), and by enacting some special handicap provisions now codified at 42 U.S.C. § 3604(f)(3)–(9). See *infra* note 127 and accompanying text. The FHAA did, however, make substantial changes in the FHA’s enforcement procedures, which are codified at 42 U.S.C. §§ 3610–3614. See SCHWEMM, *supra* note 6, chs. 23 to 26, at 23-1 to 23-41.

116. H.R. REP. NO. 100-711, at 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2179 [hereinafter *1988 House Report*]. Furthermore, according to this House Report, the FHAA “repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.” *Id.*

117. E.g., *Madison v. Jeffers*, 494 F.2d 114, 117 (4th Cir. 1974) (citing *Pughesley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055, 1056 (7th Cir. 1976)); cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (stating that other than eliminating the specified illegal bases of discrimination, Title VII “preserv[es] employers’ freedom of choice” and “does not purport to limit the other qualities and characteristics that employers may take into account in making employment decisions”).

be able to meet all of the “essential requirements of tenancy,” which would include such items as timely payment, care of the premises, respect for the rights of others, law-abiding behavior, and compliance with other reasonable standards set by the provider.¹¹⁸ In particular, discrimination on the basis of an individual’s economic status is considered acceptable under the FHA.¹¹⁹ Furthermore, and of special relevance for this Article, the FHA does not bar age discrimination.¹²⁰ It should be noted here that other laws—such as a state or local fair housing statute—may ban types of discrimination beyond the seven bases enumerated in the FHA,¹²¹ and that the FHA, itself, may be violated by an otherwise legal policy that has a disparate impact on an FHA-protected group.¹²² However, apart from these caveats and certain special handicap-only provisions,¹²³ the FHA is limited to prohibiting discrimination based only on race, color, national origin, religion, sex, handicap, and familial status.

The FHA outlaws a variety of discriminatory housing practices.¹²⁴ For the purposes of this Article, the statute’s most important substantive provisions are:

- § 3604(a), which makes it unlawful to refuse to sell, rent, negotiate for, or “otherwise make unavailable or deny, a dwelling to any person because of race [or other prohibited factor]”,¹²⁵

118. See PUB. & ASSISTED HOUS. OCCUPANCY TASK FORCE, REPORT TO CONG. AND TO THE DEP’T OF HOUS. AND URBAN DEV. 1–3 (1994); see also Edelstein, *supra* note 98, at 379 (stating that the FHA allows housing facilities to “deny admission to protected individuals who fail to meet eligibility requirements (e.g., those who cannot afford the fees or require care that the facility is not licensed to provide)”; *infra* note 313 and accompanying text.

119. *E.g.*, Boyd v. Lefrak Org., 509 F.2d 1110, 1112–14 (2d Cir. 1975); see also 114 CONG. REC. 3421 (1968) (remarks of Senator Mondale) (stating that the FHA’s purpose is “to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. It would not overcome the economic problem of those who could not afford to purchase the house of their choice.”); *id.* at 5643 (remarks of Senator Mondale) (stating that the FHA “permits an owner to . . . insist upon the highest price”); *infra* notes 313, 380 and accompanying text.

120. See 42 U.S.C. §§ 3604–3606, 3617 (2000). *But cf. infra* note 146 (noting that state and local fair housing laws often do ban age discrimination).

121. See *infra* notes 144–46 and accompanying text.

122. See SCHWEMM, *supra* note 6, § 10:4, at 10-28 to 10-38.

123. See *infra* note 127 and accompanying text.

124. The prohibitions are contained in 42 U.S.C. §§ 3604–3606, 3617.

125. The bases of discrimination outlawed by § 3604(a) are race, color, religion, sex, familial status, and national origin. The 1988 FHAA added a similarly worded provision—§ 3604(f)(1)—to deal specially with handicap discrimination. For a discussion of Congress’s reasons for dealing with handicap discrimination in a separate provision, see *infra* text accompanying notes 304–07. Because the practices prohibited by § 3604(f)(1) are virtually identical to those prohibited by § 3604(a), this Article uses § 3604(a) throughout as if it also prohibits handicap discrimination. See generally Smith v. Pacific Props. & Dev. Corp., 358 F.3d 1097, 1103–04 (9th Cir. 2004).

- § 3604(b), which prohibits discrimination in the terms, conditions, or privileges of the sale or rental of a dwelling and in the provision of services or facilities in connection therewith;¹²⁶
- § 3604(c), which prohibits discriminatory notices, statements, and advertising relating to housing;
- § 3604(f), which contains a number of provisions designed to provide equal housing opportunities for people with disabilities, including three special provisions in § 3604(f)(3) that make it unlawful, respectively, to refuse to permit reasonable physical modifications of certain premises; to refuse to make reasonable accommodations in housing rules and policies; and to fail to include certain accessibility features in the design and construction of new multifamily dwellings;¹²⁷ and,
- § 3605, which outlaws discrimination in home loans and certain other housing-related transactions.¹²⁸

2. Other Potentially Applicable Anti-discrimination Laws

In addition to the FHA, a number of other anti-discrimination laws may apply to housing for older persons. One is the 1866 Civil Rights Act, whose non-discrimination requirements with respect to contracts¹²⁹ and property¹³⁰ have been held to prohibit racial discrimination in housing.¹³¹ While § 1981 and § 1982 forbid only “racial” discrimination, this concept includes discrimination against Jews, Arabs, most other national origins, and many

126. As with § 3604(a), the bases of discrimination outlawed by § 3604(b) are race, color, religion, sex, familial status, and national origin, while a similarly worded provision—§ 3604(f)(2)—deals specially with handicap discrimination. *See supra* note 125 and accompanying text. Because of § 3604(f)(2), references to § 3604(b) in this Article should be considered to cover handicap discrimination as well as the other six bases of discrimination outlawed by the FHA.

127. *See* § 3604(f)(3)(A) (pertaining to reasonable modifications); § 3604(f)(3)(B) (pertaining to reasonable accommodations); and § 3604(f)(3)(C) (pertaining to accessibility requirements). These mandates apply only to handicap discrimination under the FHA and, therefore, are not available in claims based on the other types of discrimination outlawed by the statute. For further discussions of these § 3604(f)(3) provisions, *see infra* Part III.C.2.d (discussing reasonable accommodations) and Part III.E.1 (discussing reasonable modifications and accessibility requirements).

128. In addition to the prohibitions described in the text, the FHA also bans discriminatory misrepresentations concerning the availability of housing; blockbusting; discrimination in multiple-listing and other brokerage services; and coercion and other types of interference with the rights guaranteed by §§ 3604–3606. *See, respectively,* §§ 3604(d), 3604(e), 3606, 3617.

129. 42 U.S.C. § 1981 (2000).

130. *Id.* § 1982.

131. *E.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). *See generally* SCHWEMM, *supra* note 6, §§ 27:1–26, at 27-1 to 27-68.

minority religions, because the Congress that passed the 1866 Act considered such groups separate “races.”¹³² Furthermore, the courts have made clear that this statute is independent of the FHA, which means that it applies even in situations that the FHA specifically exempts.¹³³

In situations involving disability discrimination, two other federal statutes may come into play in certain housing cases. These statutes are § 504 of the Rehabilitation Act of 1973,¹³⁴ which prohibits discrimination against people with disabilities in any program or activity receiving federal financial assistance, and Title II of the 1990 Americans with Disabilities Act (“ADA”),¹³⁵ which applies a § 504-like mandate to services, programs, and activities of state and local governments.¹³⁶ Together, § 504 and Title II guarantee nondiscrimination against people with disabilities in all government-assisted housing,¹³⁷ a similar mandate to the one contained in Title VI of the 1964 Civil Rights Act, which bans discrimination in federally assisted programs based on race, color, and national origin.¹³⁸

With respect to public accommodations, the ADA’s Title III¹³⁹ prohibits disability discrimination, and Title II of the 1964 Civil Rights Act bans

132. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987).

133. See, e.g., *Jones*, 392 U.S. at 416–17; see also *Bachman v. Saint Monica’s Congregation*, 902 F.2d 1259, 1261 (7th Cir. 1990) (stating that § 1981 and § 1982 “contain no similar defense, at least explicitly” as FHA’s religious exemption). See generally SCHWEMM, *supra* note 6, § 27:2, at 27-6 to 27-9.

134. 29 U.S.C. § 794(a) (West 1999 & Supp. 2004).

135. 42 U.S.C. §§ 12101–12213 (2000).

136. *Id.* § 12132. In addition to the basic nondiscriminatory mandates of § 504 and Title II, both of these statutes also require covered entities to reasonably accommodate persons with disabilities in the same manner as is required by the FHA. See 42 U.S.C. § 3604(f)(3)(B) (2000) (FHA); *id.* §§ 12131(2)–12132 (Title II); 24 C.F.R. § 8.11 (2003).

137. See, e.g., *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1010 (3d Cir. 1995) (stating that § 504 applies to nursing homes that receive federal funding); Stephanie Edelstein et al., *Housing Rights of Group Home and Nursing Home Facility Residents*, 29 CLEARINGHOUSE REV. 664, 669 (1995) (concluding that all nursing home facilities that receive Medicaid and/or Medicare funds are subject to § 504); Schneider, *supra* note 77, at 491 (arguing that ADA’s Title II covers nursing homes operated by states, counties, and municipalities and those that accept Medicaid payments).

138. 42 U.S.C. § 2000d (2000). A similar prohibition exists with respect to age discrimination in programs and activities receiving federal financial assistance as a result of the Age Discrimination Act of 1975, see 42 U.S.C. § 6102 (2000), although this prohibition does not prevent federally assisted housing from taking age into account when this is “necessary to the normal operation or the achievement of any statutory objective of” a federal program or activity. 24 C.F.R. § 146.13(b) (2003); see also *supra* note 64 (describing section 202 housing program for persons age 62 and older).

139. 42 U.S.C. § 12182(a). Accommodations covered by this law include any privately owned “place of lodging” (other than those with five or fewer rooms for rent where the proprietor resides); “sales or rental establishment”; health-care office; “hospital, or other service establishment”; and any “senior citizen center, homeless shelter, . . . or other social service center establishment.” *Id.* § 12181(7)(A), (E), (F), (K). However, “religious organizations [and] entities controlled by religious organizations” are exempted from this statute. *Id.* § 12187.

discrimination based on race, color, religion, and national origin.¹⁴⁰ These laws may be relevant to housing matters relating to senior citizens in two ways: (1) they apply to housing developments' sales and rental offices that might not be covered by the FHA;¹⁴¹ and (2) their coverage extends to hospitals, nursing homes, and similar service establishments, regardless of whether these facilities qualify as "dwellings" under the FHA.¹⁴²

Thus, depending on factors such as the nature of the facility involved, whether it receives governmental assistance, and the particular type of discrimination alleged, a place where seniors live might be covered by one or more federal anti-discrimination laws in addition to the FHA. Indeed, a number of cases have been reported where *both* the FHA and one or more of these other laws were held to apply.¹⁴³

In addition to these federal laws, most states and scores of municipalities have fair housing laws that are at least as broad as the FHA.¹⁴⁴ The FHA specifically authorizes state and local laws to ban housing discrimination in situations beyond those covered by the federal statute.¹⁴⁵ Many of these laws do go beyond the FHA, either by outlawing bases of discrimination not included in the FHA or by providing narrower exemptions than the FHA allows.¹⁴⁶ Finally, other federal, state, and local

140. *Id.* § 2000a(a). Accommodations covered by this law include all establishments that "provide lodging to transient guests" (other than those with five or fewer rooms for rent where the proprietor resides) and all other establishments "physically located within the premises of" such a place. *Id.* § 2000a(b)(1), (4).

141. *See, e.g.*, *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1135, 1149–50 (D. Idaho 2003) (holding that an apartment complex's ground-floor unit that had been converted into a rental office is covered by ADA's Title III); *Sapp v. MHI P'ship, Ltd.*, 199 F. Supp. 2d 578, 583–87 (N.D. Tex. 2002) (holding that a housing development's sales office in a model home is a "public accommodation" covered by ADA's Title III); cases cited in SCHWEMM, *supra* note 6, § 29:3, at 29-9 n.16.

142. *See, e.g.*, 42 U.S.C. § 12181(7)(E), (F) (ADA's Title III covers hospitals and other service establishments); 28 C.F.R. pt. 36, app. B, at 679 (2003) (nursing homes that provide certain services may be covered by ADA's Title III); Edelstein et al., *supra* note 137, at 669 (concluding that privately operated nursing facilities are subject to ADA's Title III); Schneider, *supra* note 77, at 491–94 (arguing that ADA's Title III covers nursing homes).

143. *See, e.g.*, *Reg'l Econ. Cmty. Action Program, Inc. v. Middletown*, 294 F.3d 35, 45–55 (2d Cir. 2002), *cert. denied*, 537 U.S. 813 (2002) (holding that both FHA and ADA apply); *Oconomowoc Residential Programs, Inc. v. Milwaukee*, 300 F.3d 775, 781–87 (7th Cir. 2002) (same); *Dadian v. Wilmette*, 269 F.3d 831, 836–41 (7th Cir. 2001) (same); *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002 (W.D.N.Y. 1990) (holding that both FHA and § 504 apply); *see also* 28 C.F.R. pt. 36, app. B, at 678–79 (stating that nursing homes and other "mixed use" facilities may be covered by both the FHA and ADA).

144. *See supra* note 6 and accompanying text.

145. *See* 42 U.S.C. § 3615 (2000).

146. "Age" and "marital status" are bases of discrimination not covered by the FHA that are commonly included in state and local fair housing laws. *See, e.g.*, California Civil Rights Acts, CAL. CIVIL CODE § 51.2 and CAL. GOV'T CODE § 12955 (2003); Illinois Human Rights Act, 775 ILL. COMP. STATE. 5/1-103(Q), 3-102 (2001); New York Human Rights Law, N.Y. EXEC. LAW § 296-2a(a)–(b), § 296-5 (2001). For an example of a narrower exemption, see the Kentucky Civil

laws may also be available along with the FHA to challenge discriminatory housing practices in particular situations.¹⁴⁷

While a given case may thus support claims under a variety of laws, the focus of this Article is the FHA, because it is the model upon which most state and local fair housing laws are based and because it is the most comprehensive of all federal laws dealing with housing discrimination.¹⁴⁸ Where appropriate, however, we will note the availability of other applicable anti-discrimination laws, particularly in those situations where the FHA's coverage is uncertain and therefore another law's applicability may be critical to the issue of liability.

B. PROPERTIES COVERED BY THE FAIR HOUSING ACT

1. "Dwellings"

The FHA's non-discrimination requirements extend to all dwellings except those covered by a specific exemption in the statute. For purposes of the FHA, a "dwelling" is defined as "any building, structure, or any portion thereof which is occupied as, or designed or intended for occupancy as, a residence" by any individual or family and "any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof."¹⁴⁹

In addition to the obvious coverage of houses and apartments, this definition includes every other kind of "residence," a concept that has been held to cover any accommodation intended by its occupant for more than a

Rights Act, KY. REV. STAT. ANN. § 344.365(1)(a) (Michie 1997), whose prohibitions against housing discrimination contain an exemption for owner-occupied apartment buildings with two or fewer units as opposed to the FHA's comparable exemption in § 3603(b)(2) that covers four or fewer units.

147. See, e.g., *Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 191, 194–99 (2003) (challenging the municipality's delay in approving subsidized housing development based on the Equal Protection and Due Process Clauses of the Fourteenth Amendment as well as under the FHA); *Cartwright v. Am. Sav. and Loan Ass'n*, 880 F.2d 912, 925–27 (7th Cir. 1989) (discussing a mortgage discrimination claim brought under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (1998), as well as the FHA); cases cited *infra* note 468.

148. Other reasons to focus on the FHA as the dominant federal statute in this field include its embrace of a disparate-impact standard, see *supra* note 122 and accompanying text, which may result in prohibition of a broader range of practices than other applicable civil rights laws, and its enforcement procedures and relief provisions, see 42 U.S.C. §§ 3610–3614, which are generally superior to other such laws. See, e.g., *Barnes v. Gorman*, 536 U.S. 181 (2002) (holding that punitive damages may not be awarded in private suits under the ADA's Title II or § 504 of the Rehabilitation Act, as is also true under Title VI of the 1964 Civil Rights Act); see also *United States v. Forest Dale, Inc.*, 818 F. Supp. 954, 969–70 (N.D. Tex. 1993) (wife of disabled person may sue under FHA but not § 504).

149. 42 U.S.C. § 3602(b) (defining "dwelling"); see also *id.* § 3602(c) (defining the term "family," which is used in the definition of "dwelling," to include "a single individual").

brief stay.¹⁵⁰ While the most important factor in determining whether a particular place is a “dwelling” subject to the FHA is the length of time one expects to stay there,¹⁵¹ this is not the only consideration.¹⁵² One other crucial factor may be “the absence of an alternative place of residence.”¹⁵³ As one court noted in holding the FHA applicable to a homeless shelter:

Although the Shelter is not designed to be a place of permanent residence, it cannot be said that the people who live there do not intend to return—they have nowhere else to go Because the people who live in the Shelter have nowhere else to ‘return to,’ the Shelter is their residence in the sense that they live there and not in any other place.¹⁵⁴

With respect to those housing options of special appeal for older persons identified in Part I.B.2 *supra*, the FHA has been held to cover: (1) all types of “independent-living” units, including condominiums, cooperatives, mobile home parks, and various other age-restricted residences;¹⁵⁵ (2) all

150. See, e.g., *N.J. Rooming & Boarding House Owners v. Asbury Park*, 152 F.3d 217, 219 (3d Cir. 1998) (applying the FHA to rooming and boarding houses); *United States v. Columbus Country Club*, 915 F.2d 877, 881 (3d Cir. 1990) (holding that the FHA covers summer bungalows); *United States v. Mass. Indus. Finance Agency*, 910 F. Supp. 21, 24 (D. Mass. 1996) (applying the FHA to residential school for children with emotional disturbances); *Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324, 1327–28 (D. Or. 1996) (holding that the FHA covers camp-like facilities for migrant farm workers); *United States v. Hughes Mem’l Home*, 396 F. Supp. 544, 548–49 (W.D. Va. 1975) (applying the FHA to children’s home); cases cited *infra* notes 154, 166, and 175; see also *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996) (assuming the FHA covers emergency homeless shelter); *Garcia v. Condarco*, 114 F. Supp. 2d 1158, 1160 (D.N.M. 2000) (noting the wide variety of structures designed for temporary living that have been held to be covered by the FHA). See generally SCHWEMM, *supra* note 6, § 9:2, at 9-4 to 9-8 nn.6–28 and accompanying text.

151. E.g., *Villegas*, 929 F. Supp. at 1328; *Woods v. Foster*, 884 F. Supp. 1169, 1173 (N.D. Ill. 1995).

152. See, e.g., *Garcia*, 114 F. Supp. 2d at 1160 (holding that county jail is not a “dwelling” subject to the FHA because it was “designed as a detention facility not a ‘residence,’” and, despite the year-long stays of some inmates, such a facility was not intended to be covered by Congress); see also *infra* note 172 and accompanying text (noting a HUD regulation identifying length-of-stay as one of three factors to consider in determining whether a continuing care facility is a dwelling covered by the FHA).

153. *Villegas*, 929 F. Supp. at 1328 (citing *Woods*, 884 F. Supp. at 1173).

154. *Woods*, 884 F. Supp. at 1173–74. In addition to *Woods*, a number of other FHA decisions involving homeless shelters have been reported, the gist of which seems to be that determining whether a specific shelter is covered by the FHA depends on the “specific facts, circumstances, and expectations of the individuals who are being served by the particular shelter involved.” SCHWEMM, *supra* note 6, § 9:2, at 9-8 n.27 and accompanying text.

155. See, e.g., *Elderhaven, Inc. v. Lubbock*, 98 F.3d 175, 176 (5th Cir. 1996) (applying the FHA to shared living residence for elderly disabled persons); *HUD v. Courthouse Square Co.*, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,155, at 26,232 (HUD ALJ Aug. 13, 2001) (applying the FHA to HUD-assisted apartment complex “for the elderly and the handicapped”); *HUD v. Ocean Sands, Inc.*, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,055, at 25,530–31 (HUD ALJ Sept. 3, 1993), *rev’d in part on other grounds*, 2A Fair Hous.–Fair Lending

types of “assisted-living” units, including those in age-restricted communities;¹⁵⁶ and (3) all types of residential units in age-restricted retirement communities, including cottages, townhouses, and apartments.¹⁵⁷

(Aspen Law & Bus.) ¶ 25,056 (HUD Secretary Oct. 4, 1993) (applying the FHA to 10-unit condominium to which complainants moved after they retired); cases cited in SCHWEMM, *supra* note 6, § 9:2, at 9-2 n.3 (citing cases applying the FHA to condominiums, cooperatives, and mobile home parks); *see also* 54 Fed. Reg. 3238 (Jan. 23, 1989) (noting HUD’s commentary on its FHA regulations indicating that the statute’s definition of “dwelling” is “clearly broad enough to cover . . . mobile home parks, trailer courts, condominiums, cooperatives, and time-sharing properties”); cases cited *infra* note 157.

156. *See, e.g.*, Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment, 284 F.3d 442, 445–46, 459 (3d Cir. 2002) (noting that the parties agree that ninety-five-bed care facility for the elderly is a “dwelling” under the FHA); Parkview Assocs. P’ship v. Lebanon, 225 F.3d 321, 322–23 (3d Cir. 2002) (assuming the FHA applies to fifty-bed personal care facility); Smith & Lee Assocs., Inc. v. Taylor, Mich., 102 F.3d 781, 785 (6th Cir. 1996); Smith & Lee Assocs., Inc. v. Taylor, Mich., 13 F.3d 920, 922 (6th Cir. 1993) (applying the FHA to adult foster care home for disabled elderly persons); Barry v. Rollinsford, No. Civ. 02-147M, 2003 WL 22290248, at *2, 5–7 (D.N.H. Oct. 6, 2003) (assuming the FHA applies to an assisted-living facility for frail elderly persons); Town & Country Adult Living, Inc. v. Mt. Kisco, No. 02 CIV4441 (LTS), 2003 WL 21219794, at *1–3 (S.D.N.Y. May 21, 2003) (assuming the FHA applies to assisted-living residence for disabled senior citizens); Chiara v. Dizoglio, 81 F. Supp. 2d 242, 244–47 (D. Mass. 2000), *aff’d*, 6 Fed. Appx. 20 (1st Cir. 2001) (applying the FHA to proposed assisted-living facility for seniors); Assisted Living Assocs. v. Moorestown Township, 996 F. Supp. 409, 414, 433–41 (D.N.J. 1998) (applying the FHA to an assisted-living facility designed to care for the elderly and handicapped); United States v. Lorantffy Care Ctr., 999 F. Supp. 1037, 1040 (N.D. Ohio 1998) (applying the FHA to assisted-living center for the elderly); *see also* Gamble v. Escondido, 104 F.3d 300, 303–04 (9th Cir. 1997) (applying the FHA to a facility with housing units for physically disabled elderly adults); HUD v. Country Manor Apartments, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,156, at 26,248 (HUD ALJ Sept. 20, 2001) (applying the FHA to multi-phase housing facility for seniors that includes 45 assisted-living units); Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, 59 Fed. Reg. 33364 (June 28, 1994) (discussing whether continuing care facilities are “dwellings” subject to the FHA); Ziaja, *supra* note 87, at 320 (concluding that assisted-living centers are covered by the FHA); *cf.* Weinstein v. Cherry Oaks Ret. Cmty., 917 P.2d 336 (Colo. App. 1996) (applying the state’s FHA-equivalent to residential care facility for senior citizens).

157. *See, e.g.*, Fair Hous. in Huntington v. Huntington, 316 F.3d 357, 360, 366 (2d Cir. 2003) (applying the FHA to an age-restricted residential development for seniors); E. Paralyzed Veterans v. Lazarus-Burman Assocs., 133 F. Supp. 2d 203, 205 (E.D.N.Y. 2001) (assuming the FHA applies to senior-citizen housing development); United States v. Hillhaven Corp., 960 F. Supp. 259, 260 (D. Utah 1997) (applying the FHA to a retirement community); United States v. Forest Dale, Inc., 818 F. Supp. 954, 958 (N.D. Tex. 1993) (applying the FHA to a federally assisted senior-citizen apartment project); HUD v. Country Manor Apartments, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,156, at 26,248–49 (HUD ALJ Sept. 20, 2001) (applying the FHA to a housing facility for seniors that includes “senior apartments” as well as assisted-living units and a nursing home); *see also* Consent order, United States v. Pooler, Ga., No. CV 401-263, (N.D. Ga. June 16, 2003) (resolving case alleging FHA violations by municipality that blocked proposed apartment complex for low-income senior citizens), settlement agreement at <http://www.usdoj.gov/crt/housing/documents/poolersettle.htm> (on file with the Iowa Law Review); Consent order, United States v. Resurrection Ret. Cmty., Inc., No. 02-CV-7453 (N.D. Ill. Oct. 17, 2002), at <http://www.usdoj.gov/crt/housing/documents/resurrectsettle.htm> (on file with the Iowa Law Review) (resolving case alleging FHA violations by retirement community, also discussed at *supra* note 10); *cf.* Canady v. Prescott Canyon Estates Homeowners

In addition to these judicial decisions, the FHA's legislative history includes a number of references to the statute's potential coverage of homes for older persons.¹⁵⁸

These authorities would seem to make clear that all assisted living facilities and retirement communities, even those providing substantial supportive services, are subject to the FHA. Still, there is a good deal of evidence that providers of such housing often behave as if they are exempt from many of the anti-discrimination commands of this statute.¹⁵⁹ The fact that ALFs and some CCRCs provide health-related services along with their residential units has apparently led many of them to assume that the "mixed" nature of their product justifies exemption from the FHA.¹⁶⁰

It does not. The text of the FHA does not recognize any distinction between dwellings in "pure" housing developments and those in housing-plus-service developments. Courts have thus uniformly applied the FHA even to facilities such as "group homes" and homeless shelters that include, along with their dwelling units, some therapeutic services not usually associated with traditional rental housing.¹⁶¹ Furthermore, the fact that Congress has written a number of exemptions into the FHA—including one specifically dealing with housing for older persons¹⁶²—but chose not to provide an exemption for ALFs or other housing that includes health-related services is further evidence that the FHA was intended to cover such facilities.¹⁶³ In only one area of which we are aware—the authority of

Ass'n, 60 P.3d 231 (Ariz. App. 2002) (applying the state's FHA-equivalent to an age-restricted senior living community).

158. *E.g.*, *Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary on S. 3296, Amendment 561 to S. 3296, S. 1497, S. 1654, S. 2845, S. 2846, S. 2923 and S. 3170*, 89th Cong. 396 (1966) [hereinafter *1966 Senate Hearings*] (referencing "homes for the elderly" and "a residential home for the elderly people of the Jewish faith"); *id.* at 1078–79 (referencing "a home for aged members of that [Jewish] faith" and "homes for aged Masons and their wives"); *Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H.R. 2516 and H.R. 10805: Proposed Civil Rights Acts of 1967*, 90th Cong. 142 (1967) (referencing "homes for the aged"); *Hearings Before the Subcomm. on Hous. and Urban Affairs of the Senate Comm. on Banking and Currency on S. 1358, S. 2114, and S. 2280 Relating to Civil Rights and Housing*, 90th Cong. 365 (1967) (referencing "[o]ld-age homes").

159. *See, e.g.*, cases cited *supra* notes 8–10; cases cited *infra* notes 310, 327–30; *infra* notes 260, para. 2, 274, and 284.

160. *See, e.g.*, Sturm, *supra* note 100, at 123, 129–31; cases cited *supra* notes 8–10; cases cited *infra* notes 310 and 321–24; *infra* notes 260, ¶ 2, 274, and 284.

161. *See, e.g.*, cases cited *supra* note 154; cases cited *infra* note 175.

162. *See infra* Part II.B.2.a for a discussion of the FHA's "housing for older persons" exemption. The FHA's other exemptions are reviewed *infra* note 178 and in Part II.B.2.b–c.

163. *See, e.g.*, *Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994) (construing one statutory exemption differently from a more broadly worded exemption in the same statute because "[i]t is generally presumed that Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another" and that

housing providers subsidized under the “Section 202” program to favor persons with certain types of disabilities over others—have courts interpreted the FHA to allow a limited form of disability-based discrimination,¹⁶⁴ a result prompted by the need to reconcile the FHA with section 202’s explicit directives and one that is manifestly not present with respect to any ALF, CCRC, or other housing development not subsidized under section 202. In short, there is no basis for concluding that the nature of the services offered by ALFs and CCRCs justifies their exemption from the FHA.

Nursing homes present a more difficult issue. It is true that a number of courts have applied the FHA to such facilities.¹⁶⁵ As the Third Circuit remarked in holding that a nursing home for elderly persons was subject to the FHA, to the “persons who would reside there, Holiday Village would be their home, very often for the rest of their lives.”¹⁶⁶ Most of these decisions,

therefore the provision under review here “shows that Congress knew how to draft [an exemption in this statute] when it wanted to” (internal quotation marks omitted).

164. See *Beckert v. Our Lady of Angels Apartments, Inc.*, 192 F.3d 601, 606–07 (6th Cir. 1999) (rejecting FHA-based claim by mentally handicapped applicant for section 202 housing complex that favored elderly and physically handicapped persons on the ground that section 202, as authoritatively interpreted by HUD, was intended to serve “certain eligible groups of tenants while denying other eligible groups” and that Congress did not intend the FHA to “supercede the provisions of section 202”); cf. *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1352–54 (10th Cir. 1987) (rejecting in pre-FHAA decision similar section 504-based claim by mentally handicapped applicant who was refused a unit in a section 202 development); *Brecker v. Queen B’Nai B’Rith Hous. Dev. Fund Co.*, 798 F.2d 52, 57 (2d Cir. 1986) (same). Although a section 202 senior housing complex may therefore favor one category of disabled persons over another among its under-62 residents, it may not exclude *all* handicapped persons in favor of “physically independent” seniors without violating the FHA. See *United States v. Forest Dale, Inc.*, 818 F. Supp. 954, 959, 963–65, 968–69 (N.D. Tex. 1993); see also *Jainniney v. Maximum Indep. Living*, No. 00CV0879, slip op. (N.D. Ohio Feb. 9, 2001), at http://www.bazon.org/issues/housing/cases/jainniney_v_maxindliv.pdf (on file with the Iowa Law Review) (holding the same with respect to housing complex subsidized under an offshoot of the section 202 program—section 811 of the Cranston-Gonzales National Affordable Housing Act of 1990, 42 U.S.C. § 8013 (1995 & Supp. 2004)—specifically designed for certain categories of tenants with disabilities).

For a description of the evolution of the section 202 program, see, for example, *Forest Dale, Inc.*, 818 F. Supp. at 958–61; see also *supra* note 64 and accompanying text. For a description of the section 811 program, see *Jainniney*, No. 00CV0879, at 8–10.

165. See, e.g., *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 459 (3d Cir. 2002) (noting that the parties agree that a nursing home for the elderly is a “dwelling” under the FHA); *Hovsons, Inc. v. Brick, N.J.*, 89 F.3d 1096, 1098, 1102 (3d Cir. 1996) (holding that a proposed nursing home for senior citizens is a “dwelling” under the FHA); *Caron v. Pawtucket*, 307 F. Supp. 2d 364, 365–66 (D.R.I. 2004) (applying the FHA in a case involving a nursing facility described as “a convalescent home for the elderly” and “a de facto retirement home”); *United States v. Puerto Rico*, 764 F. Supp. 220, 221 (D.P.R. 1991) (applying the FHA in a case involving a nursing home for elderly individuals); *HUD v. Country Manor Apartments*, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,156, at 26,248 (HUD ALJ Sept. 20, 2001) (applying the FHA to a multi-phase housing facility for seniors that includes a 172-bed nursing home).

166. *Hovsons*, 89 F.3d at 1102.

however, were rendered in the context of FHA-based challenges by the nursing homes themselves against local land-use restrictions, rather than in the context of nursing homes being sued for FHA violations by their residents or would-be residents. This distinction could be important, even though in both types of cases, the coverage question should be answered by considering the same factors, particularly the likely length of stay of the occupants of the subject facility.¹⁶⁷ In a land-use case, a court would likely treat a nursing home offering both short- and longer-term stays as a single entity and therefore may be held covered by the FHA, even if only some of its occupants are longer-term residents.¹⁶⁸ On the other hand, in a claim against such a facility by a short-term occupant—say, a person seeking only a temporary rehabilitative stay before returning home—the FHA might not apply. Given the dearth of cases involving FHA claims against nursing homes and the fact that many occupants of such facilities stay for only a limited time,¹⁶⁹ the issue of the FHA's coverage of nursing homes as defendants requires further analysis.

The FHA's coverage of facilities that offer both short-term and long-term stays has been reviewed by both the Department of Housing and Urban Development ("HUD"), the agency charged with enforcing the FHA and whose views on the statute are therefore entitled to substantial deference,¹⁷⁰ and the Department of Justice, which also has some FHA enforcement responsibilities.¹⁷¹ According to HUD, whether a continuing care facility is subject to the FHA "depends on whether the facility is to be used as a residence for more than a brief period of time," and this in turn means that each of these facilities "must be examined on a case-by-case basis."¹⁷² Similarly, the DOJ has opined that the FHA may cover facilities offering both

167. See *supra* notes 150–54 and accompanying text; *infra* notes 172–75 and accompanying text.

168. Cf. *Turning Point, Inc. v. Caldwell*, 74 F.3d 941, 942–45 (9th Cir. 1996) (assuming that entire homeless facility is subject to the FHA and its prohibitions against handicap discrimination because 75% of the facility's residents are handicapped).

169. See *supra* text accompanying note 83.

170. E.g., *Meyer v. Holley*, 537 U.S. 280, 287–88 (2003); see also *infra* notes 247–48 and accompanying text. For other FHA decisions that have deferred to HUD's interpretive regulations, see cases cited in SCHWEMM, *supra* note 6, § 7:5, at 7-13 to 7-15 n.17.

171. See 42 U.S.C. §§ 3610(e), 3612(o), 3614 (2000).

172. Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, 59 Fed. Reg. 33364 (June 28, 1994). The factors that HUD believes are relevant in determining the FHA's coverage of such a facility-project:

- include, but are not limited to: (1) the length of time persons stay in the project;
- (2) whether policies are in effect at the project that are designed and intended to encourage or discourage occupants from forming an expectation and intent to continue to occupy space at the project; and (3) the nature of the services provided by or at the project.

Id.

residential and short-term stays, but a “case-by-case” determination is required.¹⁷³

In its analysis of this issue, the DOJ concluded that nursing homes are analogous to homeless shelters and other facilities “that provide social services . . . where persons may reside for varying lengths of time.”¹⁷⁴ The case law with respect to homeless shelters is mixed, with some, but not all, of these shelters being held subject to the FHA, depending primarily on the intended length of stay of their occupants.¹⁷⁵

Thus, it appears that to determine the FHA’s applicability to a given nursing home, its individual circumstances must be examined, particularly whether the length of stays of the individual complainant and others living there are likely to extend beyond a brief period of time.¹⁷⁶ This individualized examination, however, will occur against the backdrop of existing case law, which generally favors nursing-home coverage and is at least sufficient to establish that many, if not most, nursing home cases will be subject to the FHA.¹⁷⁷

To summarize, the vast majority of housing options for older persons would be considered “dwellings” subject to the FHA. Other than hospitals and isolated cases involving hospices and nursing homes, all places where older persons are likely to be living must, therefore, comply with the non-discrimination requirements of the FHA, subject only to the statute’s exemptions/defenses discussed in the next section.

173. 28 C.F.R. pt. 36, app. B, at 678 (2003). This observation was made in connection with an analysis of the FHA’s applicability to a hotel that offers some long-term units, but the DOJ indicated that a “similar analysis would also be applied to . . . nursing homes . . . and other facilities where persons may reside for varying lengths of time.” *Id.* at 679. With respect to such facilities, the DOJ also opined that, if the facility has separated its “residential” units from its short-term accommodations, only the former would be covered by the FHA. *Id.* at 678.

174. *Id.* at 679.

175. *See supra* note 154. A similar view has been the basis for holding that the FHA covers group homes for persons whose disabilities might allow them to stay in the home for a limited but uncertain period of time. *See, e.g.*, *Conn. Hosp. v. New London*, 129 F. Supp. 2d 123, 125–26, 132–34 (D. Conn. 2001) (discussing how the FHA covers a group home for recovering substance abusers who stay only as long as they are participating in an out-patient treatment program); *Baxter v. Belleville*, 720 F. Supp. 720, 731 (S.D. Ill. 1989) (finding that the FHA covers hospice costs for people with AIDS); *cf. Gamble v. Escondido*, 104 F.3d 300, 303–04 (9th Cir. 1997) (applying the FHA to a building that was to have adult day care facility on lower floor and housing units for physically disabled elderly adults on upper floors); *Turning Point, Inc. v. Caldwell*, 74 F.3d 941, 942–45 (9th Cir. 1996).

176. To the extent that a nursing home, hospice, or similar facility is not covered by the FHA because of the short length of stay of its occupants, such a facility would almost certainly be considered a “public accommodation” and therefore subject to other federal anti-discrimination laws. *See, e.g.*, 28 C.F.R. pt. 36, app. B, at 678–79 (2003) (discussing the Justice Department’s regulations interpreting ADA’s public accommodations provisions to cover such facilities). The same would hold true for hospitals and other acute-care facilities. *See supra* notes 139–42 and accompanying text.

177. *See supra* note 165 and accompanying text.

2. Exemptions/Defenses

The FHA provides for a number of exemptions/defenses, three of which are described below in some detail because they are particularly relevant to housing for seniors.¹⁷⁸ With respect to these and all other FHA exemptions, the courts have made clear that, because the FHA is remedial civil rights legislation that is to be accorded a generous construction,¹⁷⁹ its exemptions are to be narrowly construed.¹⁸⁰ Furthermore, defendants who claim the benefit of one of the FHA's exemptions bear the burden of proving that their situation qualifies for the particular exemption claimed.¹⁸¹ Finally, it should be noted that even if one of the FHA's exemptions does cover a particular housing provider, that provider is still barred from engaging in racial discrimination by the 1866 Civil Rights Act¹⁸² and from engaging in disability discrimination in federally assisted housing by the Rehabilitation Act of 1973.¹⁸³ Neither of these statutes is subject to any of the exemptions found in the FHA.¹⁸⁴

a. The "Housing for Older Persons" Exemption

One of the FHA's exemptions that is important for seniors is the "housing for older persons" exemption, which provides that the FHA's prohibitions against familial status discrimination (i.e., discrimination against households with children under the age of 18) do not apply to housing for older persons ("HFOP").¹⁸⁵ For purposes of this exemption,

178. In addition to the three exemptions discussed in the text, the FHA's other principal exemptions cover apartment buildings with four or fewer units where the owner resides ("Mrs. Murphy" apartments), certain single-family-house transactions, and private clubs. *See*, respectively, 42 U.S.C. §§ 3603(b)(1), 3603(b)(2), 3607(a) (2000). The statute also authorizes the use of reasonable occupancy standards. *See id.* § 3607(b)(1).

None of these exemptions appears to be of any greater relevance to housing for seniors than it is to other types of housing. In particular, the "Mrs. Murphy" exemption would not be available in any sizeable multi-unit development, and the single-family house exemption, though theoretically available in retirement communities made up of single-family houses, is lost if the subject house is marketed using either the services of a real estate broker or discriminatory advertising (as would be the case in virtually all "housing for older person" situations, *see infra* note 190). *See* 42 U.S.C. § 3603(b)(1), (A)–(B).

179. *E.g.*, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211–12 (1972); *see also* *Havens Realty Corp v. Coleman*, 455 U.S. 363, 380 (1982) (noting the "broad remedial intent" of Congress "embodied in the Act").

180. *E.g.*, *Oxford House, Inc.*, 514 U.S. at 731–32; cases cited in SCHWEMM, *supra* note 6, § 9:3, at 9-10 n.4.

181. *E.g.*, cases cited in SCHWEMM, *supra* note 6, § 9:3, at 9-10 n.2.

182. *See supra* notes 131–33 and accompanying text.

183. *See supra* note 134 and accompanying text.

184. *See supra* note 133 and accompanying text (referencing the 1866 Act); *Robinson v. Gorman*, 145 F. Supp. 2d 201, 205–06 (D. Conn. 2001) (holding that the Rehabilitation Act is not subject to FHA exemptions).

185. 42 U.S.C. § 3607(b)(1) (2000).

HFOP is defined to include three types of dwellings: (1) “housing provided under any state or federal program” that HUD determines is “specifically designed and operated to assist elderly persons”;¹⁸⁶ (2) housing “intended for, and solely occupied by, persons 62 years of age or older”;¹⁸⁷ and (3) housing that has at least 80% of its units occupied by at least one person who is at least 55 years old and meets certain other requirements showing that it is “intended and operated for occupancy by persons 55 years of age or older.”¹⁸⁸ The age restrictions contained in the latter two categories are presumably just the type of requirements that would be included in, and indeed be a defining element of, a community designed for older persons.

The HFOP exemption, which was enacted along with the ban on familial status discrimination as part of the 1988 FHAA,¹⁸⁹ was designed to ensure that the FHAA’s familial status prohibitions do not unfairly limit the housing choices of older persons.¹⁹⁰ Thus, the law allows seniors to live in housing communities that are limited to similarly-aged persons, because Congress recognized “that some older Americans have chosen to live together with fellow senior citizens in retirement-type communities” and “appreciate[d] the interest and expectation these individuals have in living in environments tailored to their specific needs.”¹⁹¹ Furthermore, no other

186. *Id.* § 3607(b)(2)(A). This part of the HFOP exemption has been rendered a virtual nullity as a result of current HUD policy, which has determined not to designate any of HUD’s elderly housing programs as exempt under this provision. *See* SCHWEMM, *supra* note 6, § 11E:6, at 11E-35 to 11E-36 nn.7–8 and accompanying text.

187. 42 U.S.C. § 3607(b)(2)(B).

188. *Id.* § 3607(b)(2)(C). In addition to its age-based restriction, the “55-or-older” option requires that the facility “publishes and adheres to policies and procedures” demonstrating its intent to operate for this age group and comply with HUD-issued rules for verification that occupancy is limited to this age group. *See id.* §§ 3607(b)(2)(C)(ii), (iii). This means, *inter alia*, that such housing “must in its marketing to the public and in its internal operations hold itself out as housing for [older] persons.” *See* Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3255 (Jan. 23, 1989) (providing HUD commentary on its FHAA regulations quoting memorandum of Senators Kennedy and Specter at 134 CONG. REC. S10456 (1988)). As a result, the type of age-based marketing and admissions inquiries that would generally violate the FHA if based on race, color, national origin, religion, sex, and handicap, *see infra* Parts III.B and III.C.2.c, are not only permissible when conducted by a facility qualifying for the “55-or-older” exemption, but may be required of such a facility.

Even those facilities that intend to qualify for the “62-or-older” exemption, *see supra* note 187 and accompanying text, will generally also try to qualify for the “55-or-older” exemption in order to protect their exempt status should they desire to accommodate an occasional person under 62 (e.g., the new spouse of a current resident). Thus, virtually all such facilities will also meet the additional requirements of “55-or-older” housing (i.e., they will adhere to published policies indicating their age-limitations and will employ formal age-verification techniques).

189. *See supra* note 115 and accompanying text.

190. *See* Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3252 (Jan. 23, 1989) (providing HUD commentary on its FHAA regulations, citing statement of Sen. Karnes at 124 CONG. REC. S10465-66 (1988)).

191. 1988 House Report, *supra* note 116, at 21.

U.S. law bans familial status discrimination, so exemption from the FHA means that HFOP is protected against liability from all federal sources.¹⁹²

For purposes of this Article, the most important feature of the HFOP exemption is its narrowness—it only allows such housing to be exempt from the FHA’s ban on familial status discrimination. This means that the other six prohibited forms of discrimination—those based on race, color, national origin, religion, sex, and handicap—apply to HFOP as well as to other nonexempt dwellings under the FHA.¹⁹³

b. The “Religious Organization” Exemption

A second FHA exemption with potential importance to housing for older persons allows certain religious organizations and related institutions to limit some of their dwellings to persons of the same religion.¹⁹⁴ Because so many nursing homes, assisted-living facilities, and retirement communities are operated by organizations with a religious affiliation,¹⁹⁵ this exemption might at first glance appear to exclude a significant portion of senior housing from the commands of the FHA.

There are a number of reasons, however, for concluding that this exemption only applies to a very narrow portion of the overall senior housing market.¹⁹⁶ First, the exemption by its terms extends only to those dwellings that are “owned or operated for other than a commercial purpose,”¹⁹⁷ which means that all religious-affiliated housing operated for a commercial purpose would fail to qualify for this exemption.¹⁹⁸ Second, this

192. The question of whether a state or local fair housing law could prohibit familial status discrimination without providing for an HFOP exemption similar to the FHA’s has not been decided. This question, however, is not of great practical importance, because virtually every state and local fair housing law does provide for such an exemption.

193. For examples of FHA decisions entertaining claims of non-familial status discrimination in connection with housing for older persons, see cases cited *supra* in notes 8–10, 157, and 165. See also *Canady v. Prescott Canyon Estates Homeowners Ass’n*, 60 P.3d 231 (Ariz. Ct. App. 2002) (upholding FHA “reasonable accommodations” challenge to minimum-age rule of seniors-only community by homeowners who sought to have their 26-year-old disabled son live with them).

194. 42 U.S.C. § 3607(a) (2000).

195. See *supra* note 90 and accompanying text; *supra* notes 93, 158; see also *infra* notes 267, 269 and accompanying text.

196. In addition to the reasons given *infra* in the text for concluding that the religious exemption will not protect most senior housing from FHA liability, it is worth remembering that even if a housing development for older persons is covered by this exemption, it would still be subject to suit under the 1866 Civil Rights Act for discrimination against Jews and certain other religions. See *supra* notes 131–33 and accompanying text.

197. 42 U.S.C. § 3607(a).

198. The meaning of the “for other than a commercial purpose” phrase in the FHA’s religious exemption has never been authoritatively construed, see *Bachman v. Saint Monica’s Congregation*, 902 F.2d 1259, 1261 (7th Cir. 1990), but it must be deemed to be different from “nonprofit,” a term that Congress used elsewhere in this exemption and presumably would have simply repeated had the intention been to include all non-profit housing within the exemption.

exemption only authorizes a qualifying institution to discriminate in favor of its co-religionists and thus does not authorize racial or other non-religious types of discrimination.¹⁹⁹ Third, the exemption only allows a religious organization to favor its co-religionists with respect to certain transactions—“limiting the sale, rental or occupancy” and “giving preference”²⁰⁰—thereby implying that such organizations may not engage in the other types of discriminatory transactions condemned by the FHA, such as discriminating in the terms of rental in violation of § 3604(b), publishing discriminatory advertisements in violation of § 3604(c), or refusing to take certain mandated steps for persons with disabilities in violation of § 3604(f)(3).²⁰¹

See *Rusello v. United States*, 464 U.S. 16, 23 (1983) (noting that Congress’s use of particular language in one section, but not another, of the same statute generally indicates an intent to convey a different meaning). Thus, the fact that a religious-affiliated housing complex for seniors is a non-profit entity would not, by itself, qualify its dwellings for exemption as being operated “for other than a commercial purpose.” *Cf. Presbyterian Residence Ctr. Corp. v. Wagner*, 411 N.Y.S.2d 765, 766–67 (N.Y. 1978) (holding that a Presbyterian corporation’s nonprofit apartment building for over-62 residents who paid fees similar to those charged by for-profit rental units is “indistinguishable from a commercial apartment complex” and therefore not entitled to charitable exemption under state tax law).

199. *See, e.g., United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1044 (N.D. Ohio 1998). In *Lorantffy*, the court rejected the claim of an assisted-living center for elderly persons that it was covered by the FHA’s religious exemption on the ground that the defendant was accused of discriminating in favor of white applicants over blacks and not of simply preferring persons of its own religion. *See also Woods v. Foster*, 884 F. Supp. 1169, 1170–78 (N.D. Ill. 1995) (upholding FHA claim based on sexual harassment in a homeless shelter operated by the defendants, a group of religious organizations); *United States v. Hughes Mem’l Home*, 396 F. Supp. 544, 550 (W.D. Va. 1975) (holding that FHA’s religious exemption was “inapplicable by its terms” to a home for needy children that was accused of racial discrimination, because, inter alia, “religion is not the basis for [the alleged illegal] discrimination”).

To further guarantee that the FHA’s religious exemption would not be used to countenance racial or national origin discrimination, Congress explicitly provided that the exemption is not available to religions that are “restricted on account of race, color, or national origin.” 42 U.S.C. § 3607(a) (2000).

200. 42 U.S.C. § 3607(a).

201. *See* 42 U.S.C. §§ 3604(b), 3604(c), 3604(f)(3) (2000), described *supra* text accompanying notes 126–27. *See, e.g., United States v. Salvation Army*, 4 Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 16,387 (S.D.N.Y. Sept. 23, 1999) (noting that a nonprofit religious and charitable corporation accused of violating § 3604(f)(3)(B) defends on the merits rather than claiming to be covered by FHA’s religious exemption). With respect to discriminatory advertising, see, for example, *1966 Senate Hearings, supra* note 158, at 396 (containing an exchange between Senator Ervin and a representative of a realtors’ association agreeing that it would be unlawful for homes for elderly persons of a particular religion “to place an advertisement in print of any kind saying that they were operating these homes for the benefit of the elderly people of their respective faiths”).

In addition, it is unclear whether even the ability to engage in the discriminatory transactions authorized by the FHA’s religious exemption might be lost if a qualifying religious organization first chooses not to “limit occupancy” or “give preference” to members of its own religion (e.g., a Presbyterian Home retirement community admits some Methodists), and then later seeks to adhere to a “co-religionists only” policy. There is no case law on this question. *Cf. Hughes Mem’l Home*, 396 F. Supp. at 550 (holding that FHA’s religious exemption could not be invoked by a home for needy children because, inter alia, the home was “open to children of all

Fourth, the FHA's religious exemption is not available unless the particular housing involved is owned or operated by either "a religious organization, association, or society" or a "nonprofit institution or organization operated, supervised or controlled by or in conjunction with" such a religious organization, association, or society.²⁰² The former phrase would cover only a few religiously affiliated senior housing complexes,²⁰³ and even under the more generous second alternative, many such complexes would fail to qualify because they lack a sufficiently close involvement with their affiliated religious organization.²⁰⁴

The leading case interpreting this second alternative is *United States v. Columbus Country Club*,²⁰⁵ where a divided panel of the Third Circuit denied the exemption to a religiously-oriented social and recreational club that restricted its summer bungalows to Roman Catholics and had numerous connections with the Catholic Church.²⁰⁶ Judge Seitz's majority opinion first held that the club was not "supervised [or] controlled by" the Catholic Church, because there was "no formal or legal relationship" between the club and the Church.²⁰⁷ Thus, simply having a church approve of and

creeds"). Even if such a community were allowed the benefit of the FHA's religious exemption under these circumstances, it presumably would not be able to discriminate against the existing non-adherent tenants in the "terms, conditions, or privileges" of occupancy without violating § 3604(b), because the exemption does not authorize this type of discrimination. *See supra* text accompanying this note.

202. 42 U.S.C. § 3607(a).

203. *See, e.g.*, *United States v. Columbus Country Club*, 915 F.2d 877, 882 (3d Cir. 1990) (discussing a pervasively affiliated defendant who does "not dispute that it is not itself a 'religious organization'" so as to qualify under this part of the exemption). Like the defendant in *Columbus Country Club*, most senior housing complexes would fail to qualify under the first part of the exemption covering "a religious organization, association, or society." *Cf.* *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993) (construing similar language in Title VII's religious exemption to apply only to "churches, synagogues, and the like" and "those institutions with extremely close ties to organized religions"); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988) (same); *Saint Elizabeth Cmty. Hosp. v. NLRB*, 708 F.2d 1436, 1442 (9th Cir. 1983) (holding that a hospital that is owned and operated by a Catholic religious order does not qualify for religious exemption from NLRB jurisdiction, because the hospital's "primary purpose" and "principal function" were not religious and its character was "pervasively secular"); *Presbyterian Residence Ctr. Corp. v. Wagner*, 411 N.Y.S.2d 765, 766-67 (N.Y. App. 1978) (described *supra* note 198). *See generally* Claudia J. Reed, Note, *Housing Law—United States v. Columbus Country Club: How "Religious" Does an Organization Have to Be to Qualify for the Fair Housing Act's Religious Organization Exemption?*, 15 W. NEW ENG. L. REV. 61, 94-100 (1993) (describing cases under various laws).

204. *See infra* notes 267, 272-73 and accompanying text; *see also* *M & I First Nat'l Bank v. Episcopal Homes*, 536 N.W.2d 175, 185 (Wis. Ct. App. 1995) (holding that the primary purpose of church-founded housing facility for older persons was not religious).

205. 915 F.2d 877, 882-83 (3d Cir. 1990).

206. For example, the club's facilities included a chapel where Catholic services were sometimes held and its by-laws emphasized the religious aspects of the community's life and only allowed persons to qualify for full membership who were certified by their parish priest as being practicing Catholics in good standing. *Id.* at 879, 886-87.

207. *Id.* at 882.

support the entity by, say, “permitting religious services to be conducted on the premises” is not sufficient to satisfy this part of the FHA’s religious exemption.²⁰⁸ With respect to the exemption’s final option covering entities that operate “in conjunction with” a religious organization, the *Columbus Country Club* majority held that the club’s relationship with the Catholic Church lacked sufficient interaction and mutual involvement for it to qualify under this language.²⁰⁹

Even if the “in conjunction with” phrase is interpreted more generously than the *Columbus Country Club* majority was willing to do,²¹⁰ this option would at least require an entity seeking its protection to have significant and formal ties with a church or other religious organization. This, in turn, means that determining whether a particular religiously-affiliated senior housing complex qualifies for this exemption would necessitate an individualized evaluation of that complex’s relationship with the religious organization with which it is affiliated.²¹¹

c. The “Direct Threat” Defense

A third exemption/defense that might arise in some FHA cases involving older persons with disabilities provides that nothing in the FHA’s key prohibitions against handicap discrimination “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.”²¹² This “direct threat” provision was enacted along with the prohibitions against

208. *Id.*

209. *Id.* at 883. Thus, according to the *Columbus Country Club* majority, a housing provider does not qualify under the “in conjunction with” phrase merely because it is a religious-oriented institution with substantial ties to an established church or other religious organization, unless those ties amount to a “mutual relationship” with that organization. *Id.*

210. In his dissent in *Columbus Country Club*, Judge Mansmann argued for a broader interpretation of this phrase, one that would include “a number of different types of relationships” between the entity and its affiliated religious organization. *Columbus Country Club*, 915 F.2d at 887.

211. *Cf.* EEOC v. Kamehameha Sch./Bishop Estate, 990 F.2d 458, 460 (9th Cir. 1993) (determining whether an employer qualifies for Title VII’s religious exemption, and holding that “each case must turn on its own facts [a]ll significant religious and secular characteristics must be weighed to determine whether the corporation’s purpose and character are primarily religious” so as to qualify for the exemption) (quoting EEOC v. Townley Eng’g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988)). Among the relevant factors to be considered are: the basic character of the housing complex, its primary purposes and/or mission, and its ownership, organizational, and governing structures. *Cf.* *Kamehameha Sch.*, 990 F.2d at 461–62; *Townley Eng’g & Mfg. Co.*, 859 F.2d at 618–19. *See also* Reed, *supra* note 203, at 107 (concluding that a “comprehensive checklist” of factors should be considered in determining whether a religiously affiliated housing provider is covered by the FHA’s religious exemption).

212. 42 U.S.C. § 3604(f)(9) (2000). By its terms, this defense only applies to “this subsection” (i.e., § 3604(f)), which means that it is not available in handicap-based claims under §§ 3604(c), 3604(d), 3604(e), 3605, 3606, or 3617.

handicap discrimination in the 1988 FHAA,²¹³ and was intended to make clear that housing need not be made available to persons whose impairments make them dangerous to others.²¹⁴

This “direct threat” defense, however, rarely succeeds in defeating a claim of handicap discrimination under the FHA.²¹⁵ The legislative history of this provision makes clear that it was not intended to permit housing to be denied based on the presumption that people with disabilities generally pose a greater threat to the health or safety of others than people without disabilities.²¹⁶ This defense may be invoked only when the defendant proves that the individual complainant does indeed pose such a threat.²¹⁷ Furthermore, a housing provider is not authorized by this provision to ask prospective tenants “blanket questions” about their disabilities; only questions that “relate directly” to “a prospective tenant’s ability to meet tenancy requirements” and that are asked “of all other applicants” are

213. See *supra* note 115 and accompanying text.

214. See *1988 House Report*, *supra* note 116, at 28–29. According to this Report, the FHAA’s “direct threat” provision was intended to track the law under section 504 of the 1973 Rehabilitation Act, see *supra* note 134 and accompanying text, as the U.S. Supreme Court recently interpreted in *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 n.16 (1987). *1988 House Report*, *supra* note 115, at 28–29. In *Arline*, the Court held that “[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job [and thus not protected by section 504] if reasonable accommodation will not eliminate that risk.” 480 U.S. at 287 n.16.

In the housing context, the FHAA’s “direct threat” defense means that “[a]n individual is not otherwise qualified if, for example, he or she would pose a threat to the safety of others, unless such threat can be eliminated by reasonable accommodation.” *1988 House Report*, *supra* note 116, at 28. Examples of FHA section 504 cases in which older residents whose disabilities caused them to behave in ways that made them not “otherwise qualified” include *Wiesner v. 321 W. 16th St. Assocs.*, No. OO CIV.1423 (RWS), 2000 WL 1191075 (S.D.N.Y. Aug. 22, 2000) (involving a tenant whose mental disability caused her to place personal effects in common areas, creating a fire hazard that threatened the health and safety of other residents) and *Nichols v. Saint Luke Ctr.*, 800 F. Supp. 1564, 1567–70 (S.D. Ohio 1992) (involving nursing home resident whose disability caused him to behave violently toward others).

215. See SCHWEMM, *supra* note 6, § 11D:3, at 11D-24 to 11D-25 n.18 (citing numerous cases rejecting or narrowly construing the “direct threat” defense in FHA litigation).

216. See *1988 House Report*, *supra* note 116, at 29 (“Any claim that an individual’s tenancy poses a direct threat and a substantial risk of harm must be established on the basis of a history of overt acts or current conduct. Generalized assumption, subjective fears, and speculation are insufficient to prove the requisite direct threat to others.”); see also *id.* at 18 (quoted *supra* note 116); HUD v. Country Manor Apartments, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,156, at 26,253–54 (HUD ALJ Sept. 20, 2001) (holding that senior housing facility failed to justify its policy of requiring residents who used motorized wheelchairs to obtain liability insurance in part because the policy reflected an unfounded stereotypical view that users of such chairs posed a unique risk to the safety and health of other tenants).

217. See SCHWEMM, *supra* note 6, § 11D:3, at 11D-25 nn.19–20 and accompanying text; see also *1988 House Report*, *supra* note 116, at 30 (providing that only “objective evidence that is sufficiently recent as to be credible, and not from unsubstantiated inferences, that the applicant will pose a direct threat” is sufficient to satisfy the defendant-landlord’s burden under this provision).

justified.²¹⁸ Finally, if an individual does pose the kind of direct threat that would give rise to this defense but “a reasonable accommodation would eliminate the risk, [housing providers] are required to engage in such accommodation” before they may reject or evict that individual.²¹⁹

C. SUMMARY: THE FHA’S BASIC REQUIREMENTS REGARDING SENIOR HOUSING

Part II has established that virtually all types of housing for older persons, including assisted living facilities and even most nursing homes, should be considered “dwellings” covered by the FHA, unless they qualify for one of the statute’s exemptions. Most of these exemptions, such as the ones for “Mrs. Murphy” apartments and certain single-family house transactions,²²⁰ would clearly not apply to any sizeable multi-unit housing development for seniors. Indeed, the only exemption that would generally be available in this field is the one for “housing for older persons,” but this only authorizes such housing to discriminate against families with children, leaving intact the FHA’s bans on discrimination based on the statute’s six other specified criteria.²²¹ The religious exemption might also be available for certain senior housing facilities, but only for those with substantial ties to a religious community, and even then, only to allow certain types of religious preferences, leaving racial and the other types of discrimination condemned by the FHA unlawful.²²² Senior housing that receives federal assistance under

218. 1988 House Report, *supra* note 116, at 30. For a more detailed discussion of how the FHA’s restriction on disability-related inquiries applies to providers of senior housing, see *infra* Part III.C.2.c.

219. 1988 House Report, *supra* note 116, at 29; see also *Roe v. Hous. Auth.*, 909 F. Supp. 814, 822–23 (D. Colo. 1995) (before disabled tenant may be evicted based on FHA’s “direct threat” provision, landlord “must demonstrate that no ‘reasonable accommodation’ will eliminate or acceptably minimize any risk [tenant] poses to other residents”); *Roe v. Sugar River Mills Assoc.*, 820 F. Supp. 636, 639 (D.N.H. 1993) (holding that prior to eviction, the resident of a senior housing complex is entitled to a determination whether any reasonable accommodation might mitigate the direct threat posed by his behavior); *Wiesner*, 2000 WL 1191075, at *5–8 (tenant may challenge eviction otherwise justified under § 3604(f)(9) if reasonable accommodation could ameliorate the threat she is causing to other residents); 1988 House Report, *supra* note 116, at 28 (“Handicapped individuals are ‘otherwise qualified’ if, with reasonable accommodation, they can satisfy all the requirements for a position or service”); cf. *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1014–17 (3d Cir. 1995) (holding that section 504 bars nursing home from denying services to individual whose disability may result in aggressive or violent behavior if defendant-home could ameliorate this problem through a reasonable accommodation); *Nichols*, 800 F. Supp. at 1569–70 (same); *Citywide Assocs. v. Penfield*, 564 N.E.2d 1003 (Mass. 1991) (holding that section 504 bars section 8 landlord from evicting an elderly tenant with a mental disability that caused her to do minor damage to apartment in light of possibility that reasonable accommodation would curb this problem).

The FHA’s “reasonable accommodation” requirement is set forth in 42 U.S.C. § 3604(f)(3)(B) (2000) and is further discussed *infra* in Parts III.C.2.d and III.D.2.

220. See *supra* note 178.

221. See *supra* notes 189–95 and accompanying text.

222. See *supra* notes 197–211 and accompanying text.

the Section 202 program may be entitled to favor non-elderly applicants with certain disabilities over others, but is otherwise subject to all of the FHA's anti-discrimination commands.²²³ Finally, the "direct threat" defense is available in disability cases, but only in very limited circumstances that the defendant must prove to exist in the particular case at hand.²²⁴

To summarize, the vast majority of ALFs, CCRCs, nursing homes, and all other types of residences of special interest to older persons are forbidden by the FHA from discriminating on the basis of race, color, national origin, and sex. Most would also be barred from religious discrimination, although some communities with significant ties to a particular religious organization are authorized to limit themselves to members of that religion.²²⁵ Disability discrimination is also outlawed in all such housing subject only to the limits of the Section 202 program and the "direct threat" defense,²²⁶ and indeed the FHA imposes three additional requirements to guarantee against such discrimination (i.e., allowance of reasonable physical modifications; allowance of reasonable accommodations in rules and policies; and, for certain multifamily units constructed after 1991, inclusion of specified accessibility features).²²⁷ The only type of discrimination outlawed by the FHA that may be practiced in housing for older persons is discrimination against families with children, and then only if the community has adopted certain age-restrictive policies and practices.²²⁸

Thus, resident-selection criteria for virtually all housing for older persons may not discriminate on the basis of race, color, national origin, sex, and, in most cases, handicap and religion. With this basic point established, Part III next considers other types of practices that might also lead to FHA liability in such housing.

III. SPECIFIC ISSUES ARISING FROM THE FHA'S APPLICABILITY TO HOUSING FOR OLDER PERSONS

A. OVERVIEW; PHASES OF THE HOUSING-PROVISION PROCESS

Part III will provide an analysis of the key issues that are likely to arise when the FHA is applied to senior housing. Taken together, the FHA's substantive prohibitions make the statute applicable to all phases of the housing-provision process.²²⁹ These include not only admission to housing through sale or rental, but also the design and construction of housing; its

223. See *supra* note 164 and accompanying text.

224. See *supra* notes 215–19 and accompanying text.

225. See *supra* Part II.B.2.b.

226. See *supra* note 164 and accompanying text; see also *supra* Part II.B.2.c.

227. See *supra* note 127 and accompanying text.

228. See *supra* Part II.B.2.a.

229. See *supra* notes 124–28 and accompanying text.

marketing, financing, and insurance; and the terms and conditions of its occupancy, including eviction. Part III deals with these phases in four sections—advertising and other marketing techniques in III.B; admissions in III.C; terms and conditions during residency in III.D; and other issues, including design and construction (accessibility), financing, and insurance in III.E—thereby providing a comprehensive review of those situations in which the FHA affects the provision of housing for older persons. One area that we do not address is challenges by housing providers to zoning and other land-use restrictions used to block the development of senior housing units. While this is an area of substantial FHA litigation,²³⁰ it is one that tends to align housing providers *with*, not *against*, their prospective residents and is therefore beyond the scope of this Article.²³¹

It is assumed throughout Part III that the housing facilities being considered—whether independent-living communities, assisted-living complexes, nursing homes, or a combination thereof²³²—qualify for the FHA’s “housing for older persons” exemption by imposing minimum age-restrictions and otherwise taking steps to indicate that they are intended and operated only for seniors.²³³ It is also assumed that the housing involved does not qualify for either the FHA’s “Mrs. Murphy’s apartments” exception (because only developments with more than four units are considered) nor the single-family-house exception (because more is involved than the sale or rental of a single-family house by its owner without the use of a broker).²³⁴ The result of these realistic assumptions is that all of the housing considered here is forbidden by the FHA from discriminating on the basis of race, color, national origin, religion, sex, and handicap; that is, all of the bases outlawed by the FHA except familial status, which would be a permissible form of

230. See, e.g., *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 442–68 (3d Cir. 2002); *Hovsons, Inc. v. Brick, N.J.*, 89 F.3d 1096, 1096–106 (3d Cir. 1996); *Assisted Living Assocs. v. Moorestown Township*, 996 F. Supp. 409, 409–47 (D.N.J. 1998); see also *Fair Hous. in Huntington v. Huntington*, 316 F.3d 357, 357–68 (2d Cir. 2003) (upholding a municipality’s approval of age-restricted housing in a predominantly white area that was unsuccessfully challenged as increasing segregation in violation of the FHA); *Consent order, United States v. Pooler, Ga.*, No. CV 401-263, (N.D. Ga. June 16, 2003) (resolving case alleging FHA violations by municipality that blocked proposed apartment complex for low-income senior citizens), settlement agreement at <http://www.usdoj.gov/crt/housing/documents/poolersettle.htm> (on file with the Iowa Law Review) (described *supra* note 157). For an overview of FHA litigation involving zoning and other land-use restrictions, see SCHWEMM, *supra* note 6, § 11D:5, at 11D-28 to 11D-53, §§ 13:8–14, at 13-31 to 13-56.

231. Articles dealing with this subject include those cited in SCHWEMM, *supra* note 6, § 11D:5, at 11D-30 n.10 and Michael Kling, Note, *Zoned Out: Assisted Living Facilities and Zoning*, 10 ELDER L.J. 187 (2002).

232. For descriptions of these types of housing, see *supra* Part I.B.2.c, d, and f.

233. The “housing for older persons” exemption is discussed *supra* Part II.B.2.a.

234. See *supra* note 178 (describing the “Mrs. Murphy” and single-family-house exemptions).

discrimination as a result of the complex's qualifying for the "housing for older persons" exemption.

Three of these outlawed bases of discrimination—race, color, and national origin—are so clearly forbidden that liability is assured if a complex refuses admission or otherwise discriminates against an applicant based on one of these factors. This would also seem to be true for sex discrimination, although the paucity of gender cases under the FHA means that this proposition has not yet been fully tested.²³⁵ Finally, religious and handicap discrimination would also generally be forbidden, but because these two bases of discrimination raise some special issues,²³⁶ they must often be discussed separately.

B. ADVERTISING AND OTHER MARKETING TECHNIQUES

Housing for older persons, like other goods and services in the United States, is marketed to the public. Advertisements for such housing appear in magazines and newspapers, on Web sites, and in direct-mail solicitations.²³⁷

235. While no reported decision has ever countenanced sex discrimination in a non-exempt dwelling under the FHA, there are some cases in which single-sex housing providers have invoked the FHA to challenge adverse governmental land-use restrictions, without prompting any negative judicial comments about the providers' sexual exclusivity. *See, e.g.*, *Doe v. Butler*, Pa., 892 F.2d 315, 316 (3d Cir. 1989) (reviewing FHA claims against municipality on behalf of a "shelter for abused women and children"); *Cnty. Hous. Trust v. Dep't of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 212, 219 (D.D.C. 2003) (ruling in favor of FHA claims against municipality based on plaintiffs' efforts to provide separate group homes for men and women with mental disabilities); *United States v. Jackson*, Miss., 3 Fair Hous.—Fair Lending (Aspen Law & Bus.) ¶ 16,663, at 16,663.2 (S.D. Miss. Oct. 23, 2002), *aff'd*, 359 F.3d 727 (5th Cir. 2004) (referring to a FHA suit brought by the United States on behalf of a "non-profit personal care home" for "elderly women in the early-to-moderate stages of Alzheimer's Disease"). These cases, however, cannot be taken to suggest that exclusion of an otherwise qualified homeseeker on the basis of sex is permitted under the FHA. *See, e.g.*, cases cited *infra* note 298.

236. *See supra*, respectively, Parts II.B.2.b. (relating to religion) and II.B.2.c (relating to handicap).

237. *See, e.g.*, Richard A. Nulman, *Adult Community Advertising: Why It's Different*, SENIORS' HOUS. NEWS 21 (Winter 2001); *id.* at 23 (publishing an advertisement for a company that advises housing developments targeting the 55-and-older market); Shrivastava, *supra* note 49, at C-2 (noting "a distinct change in the way these [senior] communities are marketed"); *see also* Paul C. Luken & Suzanne Vaughan, "Active Living": *Transforming the Organization of Retirement and Housing in the U.S.*, 30 J. SOC'Y. & SOC. WELFARE 145, 148-65 (2003) (describing special advertising campaign undertaken in the 1950s and 1960s by the developer of Sun City, Arizona, one of the nation's first planned retirement communities).

Examples of newspaper and magazine advertisements for housing for older persons include: *Esplanade Senior Residences*, N.Y. TIMES, Feb. 8, 2004, (Magazine) at 10; *Westminster Communities of Bradenton, Florida*, BRADENTON HERALD, May 13, 2003, at 12C; *Richmond Place Senior Living Network*, LEXINGTON HERALD-LEADER, Apr. 25, 2000, at 12; *Atria Retirement and Assisted Living Communities*, N.Y. TIMES, Mar. 5, 2000, (Magazine) at 75. Examples of Web sites include <http://www.presbyterianhomes.org>; <http://www.loomiscommunities.org>; and <http://www.westminsterretirement.com>. Examples of direct-mail advertising include brochures received by the authors from Bristol Village in Waverly, Ohio, and from the Loomis

In addition, many housing developments catering to older persons produce their own brochures, newsletters, and other literature describing their units and services.²³⁸ All of these marketing efforts are subject to the FHA's § 3604(c),²³⁹ which outlaws every discriminatory "notice, statement, and advertisement" relating to housing.²⁴⁰

Three particular areas of concern prompted by § 3604(c)'s applicability to senior housing advertising are dealt with here: (1) the use of problematic words and phrases, including the use of religious terms in naming or otherwise describing housing complexes; (2) the use of human models in brochures and other ads; and (3) other questionable practices. Before these areas are explored, however, some general principles governing § 3604(c) must be noted.

Section § 3604(c) is worded in a unique way that makes it essentially a "strict liability" statute.²⁴¹ Unlike the FHA's other substantive prohibitions, which generally outlaw behavior undertaken "because of" a prohibited ground and thereby focus on the actor's intent in engaging in such behavior,²⁴² § 3604(c) bans any housing-related communication that "indicates" discrimination. Numerous courts have held that, by making

Communities, in Amherst, Holyoke, and South Hadley, Massachusetts (on file with the Iowa Law Review).

238. Examples of brochures include those produced by: Mayfair Village and Marriott's The Lafayette in Lexington, Kentucky; Presbyterian Homes and Services' Echo Ridge and Oak Meadows, both in Oakdale, Minnesota; Presbyterian Homes' Westminster Place in Evanston Illinois; Holiday Retirement Corp.'s Lodge at White Bear in White Bear Lake, Minnesota; and Walker Methodist Foundation's Hazel Ridge in Maplewood, Minnesota (all on file with the Iowa Law Review).

239. 42 U.S.C. § 3604(c) (2000). See 24 C.F.R. § 100.75(b) (2003) (noting that § 3604(c) covers "any applications, flyers, brochures, deeds, signs, banners, posters, billboards or any documents used with respect to the sale or rental of a dwelling").

240. Section 3604(c) outlaws the publication of "any notice, statement, or advertisement" relating to housing that "indicates any preference, limitation, or discrimination" based on a FHA-prohibited ground, or "an intention to make any such preference, limitation, or discrimination." § 3604(c). For a detailed description of the background and meaning of this provision, see Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, XXIX FORDHAM URB. L. J. 189 (2001). Numerous articles have dealt with § 3604(c)'s prohibition of discriminatory advertising. See, e.g., Michael E. Rosman, *Ambiguity and the First Amendment: Some Thoughts on All-White Advertising*, 61 TENN. L. REV. 289 (1993); *id.* at 290-91 nn.3, 5 (citing pertinent articles); Katherine G. Stearns, Comment, *Countering Implicit Discrimination in Real Estate Advertisements: A Call for the Issuance of Human Model Injunctions*, 88 NW. U. L. REV. 1200 (1994).

241. E.g., HUD v. Roberts, 2A Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 25,151, at 26,217 (HUD ALJ Jan.19, 2001); HUD v. Dellipaoli, 2A Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 25,127, at 26,077 (HUD ALJ Jan. 7, 1997).

242. See 42 U.S.C. §§ 3604(a), 3604(b), 3604(d), 3604(f)(1), 3604(f)(2), and 3605. Under certain circumstances, a showing of discriminatory effect without a showing of illegal intent may be sufficient to establish a violation of these provisions, see *supra* note 122 and accompanying text, but this is based on an interpretation of their "because of" language and not the similarity between this language and § 3604(c)'s.

liability turn on what a housing ad, notice, or statement “indicates,” § 3604(c) bars any such communication that conveys discrimination to an “ordinary” reader or listener, regardless of whether the message was intended to be discriminatory.²⁴³

A second noteworthy feature of § 3604(c)’s ban on discriminatory advertising is that it has been the subject of a good deal of administrative, as well as judicial, interpretation. HUD’s current regulation dealing with § 3604(c),²⁴⁴ though relatively brief, does make clear that at least two specific types of housing ads are prohibited: (1) those “[u]sing words, phrases, photographs, illustrations, symbols, or forms which convey” that housing is or is not available to particular groups of persons based on any FHA-prohibited ground;²⁴⁵ and (2) those “[s]electing media or locations for advertising” that “deny particular segments of the housing market information about housing opportunities” because of any FHA-prohibited ground.²⁴⁶

In addition to this regulation, HUD has provided substantial guidance in other formats concerning problematic advertising practices, which, though perhaps not entitled to the same degree of deference as a regulation,²⁴⁷ is nevertheless entitled to considerable deference in interpreting § 3604(c).²⁴⁸ The most important example is a set of HUD guidelines originally issued in 1972 identifying types of housing ads that raise problems under § 3604(c), including those that use certain inappropriate words and phrases and those that selectively use human models or other content or media.²⁴⁹ Additional guidance about other

243. *E.g.*, *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 266–67 (7th Cir. 1996); *Jancik v. HUD*, 44 F.3d 553, 556 (7th Cir. 1995); *Ragin, Jr. v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905–07 (2d Cir. 1993); *Hous. Opportunities Made Equal v. The Cincinnati Enquirer*, 943 F.2d 644, 646 (6th Cir. 1991); *Ragin, Jr. v. The N.Y. Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991); *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 29–30 (D.C. Cir. 1990); other cases cited in SCHWEMM, *supra* note 6, § 15:8, at 15-30 n.2.

244. *See* 24 C.F.R. § 100.75 (2003).

245. *Id.* § 100.75(c)(1).

246. *Id.* § 100.75(c)(3).

247. In accordance with the doctrine established in *Chevron, U.S.A. v. Natural Resources Defense Council*, HUD regulations interpreting the FHA are to be followed so long as they are “a permissible construction of the statute.” 467 U.S. 837, 842–44 (1984). *See also supra* note 170 and accompanying text.

248. *See, e.g.*, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972) (holding that a long-standing interpretation of FHA by HUD fair housing staff “is entitled to great weight”); *see also Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 107 (1979) (holding that the fact that HUD “consistently has treated [the issue presented here in a certain way] . . . commands considerable deference”). *See generally* *United States v. Mead Corp.*, 533 U.S. 218, 228–31 (2001) (describing degree of deference owed to an agency’s non-regulation interpretations of the statutes it enforces).

249. *See* 37 Fed. Reg. 6700 (Apr. 1, 1972) (publishing HUD’s “Advertising Guidelines for Fair Housing”). These guidelines were codified as a part of HUD’s FHA regulations in 1980, *see*

potentially unlawful words and phrases was provided by HUD's top fair housing official in a 1995 memorandum,²⁵⁰ which also addressed a number of religion-based concerns such as the propriety of ads that mention religious services and those that use "the legal name of an entity which contains a religious reference."²⁵¹

1. Problematic Words and Phrases; Properties with Religious Names

The HUD advertising guidelines list numerous words and phrases that might convey illegal discrimination under § 3604(c). These include "restricted," "exclusive," "private," and "traditional."²⁵² In addition, the guidelines caution against use of words or phrases relating to a particular race or national origin (such as "Irish" or "Polish") and against providing directions to housing developments that make reference to landmarks with a racial or national origin significance.²⁵³

Fair Housing Advertising Guidelines, 45 Fed. Reg. 57,102–07 (Aug. 26, 1980) (promulgating 24 C.F.R. pt. 109), and they were updated shortly after enactment of the 1988 FHAA to reflect the addition of handicap and familial status to the statute's list of prohibited bases of discrimination. *See* 54 Fed. Reg. 3308–10 (Jan. 23, 1989). In 1996, HUD removed the guidelines from the Code of Federal Regulations because it felt that such "nonbinding guidance" was not appropriate for inclusion in regulations, but the agency made clear at that time that it continued to view these guidelines as "very helpful" in determining how § 3604(c) should be applied in specific situations. Office of the Assistant Secretary for Fair Housing and Equal Opportunity; Regulatory Reinvention; Streamlining of HUD's Regulations Implementing the Fair Housing Act, 61 Fed. Reg. 14,378, 14,380 (Apr. 1, 1996).

The text of the post-FHAA version of 24 C.F.R. pt. 109, which had contained the most recent version of the HUD advertising guidelines when they took the form of regulations, is set forth at 54 Fed. Reg. 3308–10 (Jan. 23, 1989).

250. Memorandum from Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity to senior HUD Fair Housing Enforcement Staff (Jan. 9, 1995), *reprinted in* 1 Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 5365, at 5365–66 [hereinafter Achtenberg Memo] (providing the "FHEO Guidance Regarding Advertisements Under § 804(c) of the Fair Housing Act").

251. *Id.* at 5366.

252. *See* 54 Fed. Reg. 3309 (Jan. 23, 1989) (setting forth former 24 C.F.R. § 109.20(b)(8) (1990)).

253. *Id.* (setting forth former 24 C.F.R. §§ 109.20(b)(4), 109.20(e)); *see also* Hous. Rights Ctr. v. Donald Sterling Corp., 274 F. Supp. 2d 1129, 1139 (C.D. Cal. 2003), *aff'd*, 84 Fed. Appx. 801 (9th Cir. 2003) (noting that the defendants' use of "Korean" in the title of their apartment buildings is likely to violate § 3604(c), because many persons "would understandably regard the decision to place the word 'Korean' in the name of a building in a racially diverse neighborhood as a coded message: 'Koreans and Korean-Americans are welcome and preferred; others are not'").

For some examples of national origin references in senior housing, see *Senior Class*, *supra* note 72, at 49 (identifying a CCRC run as the "Swedish Retirement Association"); *id.* at 52, 54 ("Russian," "Korean," and "Spanish" programs offered by nursing homes); *see also* Ethnic Nursing Homes Grow in Chicago, Oct. 12, 2004, at <http://www.cnn.com/2004/US/10/12/nursing.homes.ap/index.html> (reporting on "a growing number of Chicago-area nursing homes that assemble residents by ethnicity" so that "Asians live on one floor, Hispanics are on another").

The HUD guidelines also offer examples of problematic language relating to the FHA's other illegal bases of discrimination. With respect to sex, the guidelines caution against using words that state or imply that individual units are available to persons of only one sex and not the other "except where the sharing of living areas is involved."²⁵⁴ With respect to § 3604(c)'s ban on handicap discrimination, HUD makes the obvious point that housing ads should not contain explicit exclusions, limitations, or other indications of handicap discrimination (e.g., "no wheelchairs").²⁵⁵ On the other hand, the agency believes that descriptions of the property (e.g., "walk-in closets") and those describing the conduct required of residents (e.g., "non-smoking" or "sober") are permitted.²⁵⁶ Also acceptable are advertisements containing descriptions of accessibility features.²⁵⁷

HUD's list of handicap-related words and phrases to avoid includes "impaired" and "physically fit."²⁵⁸ The latter phrase's impropriety raises a question about using the conceptually similar term "independent living," which often appears in ads and brochures for senior housing communities. Based on HUD's view that property and service descriptions are generally allowed,²⁵⁹ it would seem that "independent living" could be used if its only function is to describe the nature of the services offered by a housing complex. On the other hand, if this phrase is used to describe the type of people who would be particularly welcome as residents, it would almost certainly indicate an illegal preference in violation of § 3604(c).²⁶⁰ Similarly,

254. 54 Fed. Reg. 3309 (Jan. 23, 1989) (setting forth former 24 C.F.R. § 109.20(b)(5)). See *infra* text accompanying notes 406–07 for further discussion of this provision.

FHA litigation involving sex-based claims of discriminatory advertising has been extremely rare. However, one common practice of retirement communities that might be questionable is to offer sex-separate services or recreational opportunities. See, for example, monthly activities list of Marriott's The Lafayette in Lexington, Kentucky, for May 2001 (giving notice of a "Men Only Luncheon" on May 21). Putting aside for the moment the question of whether providing such discriminatory services might itself be illegal—a question discussed *infra* in Part. III.D.1—the legality of advertising or giving notice of such services under 42 U.S.C. § 3604(c) (2000) finds some support in HUD's view that simply describing discriminatory services does not per se "state a preference for persons likely to make use" of these services. See Achtenberg Memo, *supra* note 250, at 5366.

255. See Achtenberg Memo, *supra* note 250, at 5366.

256. *Id.*

257. See 54 Fed. Reg. 3309 (Jan. 23, 1989) (setting forth former 24 C.F.R. § 109.20(b)(6) (1990)).

258. *Id.*

259. See *supra* note 256 and accompanying text.

260. See, e.g., *Niederhauser v. Independence Square Hous.*, 4 Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 16,305, at 16,305.6 (N.D. Cal. Aug. 27, 1998) (holding that housing provider's publication of rules, policies, and lease terms that express "independent living" limitations on tenancy violated § 3604(c)); Consent order, *United States v. Resurrection Ret. Cmty., Inc.*, No. 02-CV-7453 (N.D. Ill. Oct. 17, 2002), at <http://www.usdoj.gov/crt/housing/documents/resurrectsettle.htm> (on file with the Iowa Law Review) (settling FHA claims based in part on allegations that senior retirement community violated § 3604(c) by making

use of the word “active” to describe the clientele sought in a senior housing community would seem to indicate a preference for nonhandicapped people.²⁶¹

With respect to religious discrimination, a preliminary determination must be made as to whether the particular housing complex involved is covered by the FHA’s religious exemption and, if so, whether this exemption authorizes the complex to engage in religiously discriminatory advertising.²⁶² A negative answer to either of these questions would mean that the complex, even if it has some religious affiliation, is subject to the commands of § 3604(c).

The religion-based commands of § 3604(c) have prompted a good deal of specific guidance from HUD in addition to the agency’s general admonition that “[a]dvertisements should not contain an explicit preference, limitation or discrimination on account of religion.”²⁶³ According to HUD, words and phrases to avoid include “Jewish home” and indeed any reference to the words “Protestant, Christian, Catholic, [or] Jew” in the description of a dwelling or its residents.²⁶⁴ In addition, HUD has opined that directions to housing developments that make reference to a synagogue, congregation, or parish may also indicate an illegal preference.²⁶⁵

On the other hand, based on HUD’s belief that descriptions of properties and services are generally permitted, the agency has determined that ads containing such descriptions as “chapel on the grounds” and “kosher meals available” do not “on their face state a preference for persons likely to make use of those facilities” so as to violate the FHA.²⁶⁶ This is an

statements intended to discourage disabled applicants and to suggest that people with certain kinds of disabilities would not be comfortable living there).

Ads and notices by senior housing providers that include “independent living” and similar disability-based restrictions are ubiquitous. *See, e.g., Ziaja, supra* note 87, at 315–16; *Senior Class, supra* note 72, at 62–67 (described *infra* note 326). For a discussion of the separate, but related, issue of whether senior housing providers can insist that their residents have the ability to “live independently,” see *infra* Part III.C.2.b.

261. *See generally* Jane Adler, *Adult Communities Mean It When They Say “Active,”* CHI. TRIB., Aug. 3, 2003, at A-3 (describing various Chicago-area senior developments that “pitch themselves as ‘active adult’”). Other examples of the use of “active” in advertisements for housing for older person include an ad touting the River Woods development as “Active adult condominium living in your own backyard” in CHI. TRIB., Apr. 13, 2002, § 4, at 10; *see also* Shrivastava, *supra* note 49, at C-2 (describing trend of younger seniors to move to an “active adult community”).

262. The FHA’s religious exemption is discussed *supra* in Part II.B.2.b. With respect to the specific question of whether a complex covered by this exemption is thereby authorized to engage in religiously discriminatory advertising, see *supra* note 201.

263. *See* Achtenberg Memo, *supra* note 250, at 5366.

264. 54 Fed. Reg. 3309 (Jan. 23, 1989) (setting forth former 24 C.F.R. § 109.20(a), (b)(3) (1990)).

265. *Id.* (setting forth former 24 C.F.R. § 109.20(e)).

266. Achtenberg Memo, *supra* note 250, at 5366.

important principle, because many senior housing facilities do offer religion-related services that are featured in their advertising.²⁶⁷ Still, it should be noted that, although HUD views descriptions of such services as not “on their face” violative of § 3604(c), the possibility remains that such a description might, along with other elements in an ad, be suggestive of an illegal religious preference.²⁶⁸

With respect to housing developments that have religious names—and many senior developments do²⁶⁹ HUD has taken the position that:

Advertisements which use the legal name of an entity which contains a religious reference (for example, Roselawn Catholic Home) . . . , standing alone, may indicate a religious preference. However, if such an advertisement includes a disclaimer (such as the statement “This Home does not discriminate on the basis of race, color, religion, national origin, sex, handicap or familial status”), it will not violate the [FHA].²⁷⁰

This guidance is apparently designed for those properties that, while having some religious affiliation, are not sufficiently connected with a religious organization to qualify for the FHA’s religious exemption.²⁷¹ Among the many senior housing communities that fall into this category are those operated under the auspices of various Presbyterian homes. Many of these Presbyterian-affiliated communities either have adopted non-religious names²⁷² or include at least some disclaimer that they do not discriminate in

267. See, e.g., *Senior Class*, *supra* note 72, at 42–67 (showing that the vast majority of ALFs, CCRCs, nursing homes, and retirement communities surveyed offer religious services). This phenomenon is not limited to senior housing facilities that have a formal affiliation with a particular denomination, such as the Presbyterian Homes. See, e.g., *id.* (showing that most facilities offering such services do not have formal church affiliation); MAYFAIR VILLAGE BROCHURE IN LEXINGTON, KENTUCKY (listing among 22 other services “Vespers and Bible Studies”) (on file with the Iowa Law Review); MARRIOTT’S THE LAFAYETTE MAY 2001 MONTHLY NEWSLETTER IN LEXINGTON, KENTUCKY (offering Bible Study on most Tuesdays and a protestant church service or hymn sing on most Sundays) (on file with the Iowa Law Review).

268. As discussed earlier with respect to sex-based advertising, *see supra* note 254, it is a separate question whether, apart from the legality of an advertisement touting the provision of religious services under 42 U.S.C. § 3604(c) (2000), the provision of such services itself might violate § 3604(b)’s ban on discriminatory housing services. This question is dealt with *infra* in Part III.D.1.

269. See, e.g., *Senior Class*, *supra* note 72, at 42–67 (showing that religious names were used in nine of forty-four retirement communities, four or thirty-two ALFs, eight of twenty-one CCRCs, and thirteen of eighty-five nursing homes surveyed in Chicago area); *infra* note 274.

270. Achtenberg Memo, *supra* note 250, at 5366; *cf.* *Hous. Rights Ctr. v. Donald Sterling Corp.*, 274 F. Supp. 2d 1129, 1139 (C.D. Cal.), *aff’d*, 84 Fed. Appx. 801 (9th Cir. 2003). See *supra* note 253 for a description of the *Housing Rights Center* case.

271. See *supra* notes 202–11 and accompanying text.

272. See, for example, the Presbyterian Homes and Services’ Echo Ridge and Oak Meadows retirement communities in Oakdale, Minnesota brochure (on file with the Iowa Law Review).

favor of members of this denomination.²⁷³ On the other hand, there are numerous examples of nursing homes and other housing developments for older persons that have, either through use of a religious name without an assurance-of-nondiscrimination disclaimer or otherwise, included religious references that would appear to indicate an illegal religious preference.²⁷⁴

2. The Use of Human Models in Brochures and Other Ads

Much of the litigation involving § 3604(c)'s ban on discriminatory advertising has dealt with race-based challenges to the exclusive use of white human models in housing ads.²⁷⁵ The key issue in these cases has been whether the use of such models in the defendants' ads violated § 3604(c). The courts have generally agreed that, regardless of a housing advertiser's intent, it may be found to have conveyed an illegal preference either by a single ad that depicts "a large group of all-white models" or by a multi-ad campaign that involves "repetitive publication of advertisements depicting a large number of all-white models."²⁷⁶ The HUD advertising guidelines support these decisions by listing the "selective use of human models" as a potential § 3604(c) violation.²⁷⁷

For present purposes, perhaps the most relevant of the human models decisions is *Saunders v. General Services Corp.*,²⁷⁸ because it involved not only a housing complex's newspaper advertisements but also its pictorial brochure. In *Saunders*, Judge Merhige determined that "the virtual absence of black models from the sixty-eight photographs in that brochure containing human models" violated § 3604(c), because this would indicate a racial preference to the "ordinary reader" in the area (Richmond, Virginia).²⁷⁹ In

273. See, e.g., PRESBYTERIAN HOMES' WESTMINSTER PLACE BROCHURE IN EVANSTON ILLINOIS (noting that it is a "Non-sectarian Member of Presbyterian Homes") (on file with the Iowa Law Review).

274. See, e.g., *Mason Christian Village and Mount Healthy Christian Home*, CIN. MAG., Oct. 1999, at 93 (advertising housing with no disclaimer that includes the claim that the Mount Healthy Christian Home provides a "Christian atmosphere") (on file with the Iowa Law Review); BRIARWOOD ADVERTISEMENT AND BROCHURE IN UNIONTOWN, OHIO (referring to an assisted living/nursing home as a "Christian" facility that is philosophically "committed to providing exceptional medical, physical and emotional care to individuals . . . by implementing the Christian principles of love of God and love for others") (on file with the Iowa Law Review).

275. See, e.g., *Tyus v. Urban Search Mgmt.*, 102 F.3d 254 (7th Cir. 1996); *Ragin, Jr. v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993); cases cited *infra* notes 276, 278. See generally SCHWEMM, *supra* note 6, § 15:6.

276. *Hous. Opportunities Made Equal v. The Cincinnati Enquirer*, 943 F.2d 644, 648 n.4 (6th Cir. 1991); see also *Ragin, Jr. v. The N.Y. Times Co.*, 923 F.2d 995, 1002 (2d Cir. 1991) (stating that for housing advertisers that "use a large number of models and/or advertise repetitively . . . , the message conveyed by the exclusion of a racial group" can be a strong indicator of an illegal preference).

277. 54 Fed. Reg. 3309-10 (Jan. 23, 1989) (setting forth former 24 C.F.R. § 109.25(c) (1990)).

278. 659 F. Supp. 1042 (E.D. Va. 1987).

279. *Id.* at 1058.

reaching this conclusion, the court noted that “advertisers choose models with whom the targeted consumers will positively identify”²⁸⁰ and that therefore “the natural interpretation” of defendants’ brochure was to indicate that their “apartment complexes are for white, and not black, tenants, thus discouraging blacks from seeking housing there.”²⁸¹

For purposes of evaluating the legality of a senior housing development’s brochure or other display ad that uses multiple human models, the lesson from *Saunders* and related cases is that “the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area.”²⁸² Our review of various brochures for housing complexes for older persons suggests that, while some reflect sensitivity to these concerns,²⁸³ many others do not.²⁸⁴

280. *Id.*; accord *The N.Y. Times Co.*, 923 F.2d at 1000–01 (recognizing that advertisers consciously choose human models, including those of particular races, in order to attract certain kinds of prospective customers); see also Luken & Vaughan, *supra* note 237, at 163 (describing how the pictorial images used in ads for Sun City, Arizona, and the placement of those ads in certain periodicals were designed by Sun City’s developer to produce residents who “were able-bodied, heterosexual, white, middle income, Christian couples unencumbered by children”).

281. *Saunders*, 659 F. Supp. at 1058. According to *Saunders*:

[I]t is natural that readers of the [defendants’] *Lifestyle* brochure would look at the human models depicted as representing the kinds of individuals that live in and enjoy [defendants’] apartment complexes. If a prospective tenant positively identified with these models, the message conveyed would be that, “I belong in these apartments. ‘My kind of people’ live there.” Conversely, if the prospective tenant reading the brochure saw no models with whom he or she could identify, the reader would obtain a message that “these apartment are not for me or ‘my kind.’”

Id.

282. 54 Fed. Reg. 3309–10 (Jan. 23, 1989) (setting forth former 24 C.F.R. § 109.30(b) (1990)).

283. See, e.g., WALKER METHODIST FOUNDATION’S HAZEL RIDGE BROCHURE IN MAPLEWOOD, MINNESOTA (featuring four photos of human beings that include one identifiable African-American couple); *Covenant Retirement Communities in Northbrook and Batavia, Illinois*, CHI. TRIB., July 13, 1997, (Magazine), at 23; *Richmond Place Senior Living in Lexington, Kentucky*, LEXINGTON HERALD-LEADER, Apr. 25, 2000, at 12 (featuring three photos of human beings in a full-page advertisement that includes one identifiable African-American); *Marjorie P. Lee Retirement Community in Cincinnati, Ohio*, CIN. MAG., Oct. 1999, at 25 (featuring two photos of human beings in a full-page advertisement that includes one identifiable African-American couple); *River Woods Condominium in Chicago, Illinois*, CHI. TRIB., Apr. 13, 2002, § 4, at 10 (featuring two photos of human beings in an advertisement that includes one identifiable African-American couple) (all on file with the Iowa Law Review).

284. See, e.g., Matt Whittaker, *Group Alleges Discrimination in Senior Housing Advertising*, BALTIMORE SUN, Sept. 17, 2003, at 1B (reporting on yearlong study of print publication advertisements for Baltimore-area senior housing finding that “of the 365 advertisements using human models, 63% used only white models, 20% were racially mixed and 5% used exclusively black models”). See also LOOMIS ADVANTAGE NEWSLETTER OF THE LOOMIS COMMUNITIES IN AMHERST, HOLYOKE, AND SOUTH HADLEY, MASSACHUSETTS (containing, respectively, eight and

One element that might arguably distinguish the persons depicted in a senior housing development's brochure from those in *Saunders* is that the former might involve actual residents, while the latter were professional models. Thus, it might be thought that simply using photos of actual scenes and people showing "real life" in the development would send a less discriminatory message than the more conscious act of selecting racially identifiable human models to portray an idealized version of the complex. No reported § 3604(c) case has yet dealt with "real life" models, so this potential defense is at least theoretically viable.

The problem with such a defense, however, is that it focuses on the advertiser's lack of discriminatory intent, which is generally not a relevant factor in determining liability under § 3604(c).²⁸⁵ Because the key to liability is the nature of the message sent by the racial make-up of the people in the photos, it would seem not to matter whether they are paid professional models or simply local residents. Furthermore, even if only local-resident pictures are used, the fact remains that the creator of a housing ad or brochure still exercises choice in the selection of which photos to use. Thus, if the chosen photos "indicate exclusiveness because of race,"²⁸⁶ the display would presumably be just as problematic under § 3604(c) as if professional models were used.

Another issue that has yet to be the subject of a reported § 3604(c) case and is therefore somewhat murky is whether the theory of the race-based human model decisions applies with equal force to other FHA-prohibited bases of discrimination. Would, for example, the failure to show any wheelchair users in a multi-photo retirement community ad or brochure indicate illegal discrimination on the basis of disability? The HUD guidelines dealing with the selective use of human models do explicitly forbid techniques that "indicate exclusiveness because of . . . handicap" and all other FHA-banned criteria as well as race.²⁸⁷ It is unclear precisely what is required by this guidance with respect to certain disabilities, national origins, and religions that are not readily identifiable in photographs, but other categories, such as sex and disabilities involving mobility impairments, could well be the basis for a § 3604(c) claim if the persons depicted in a senior housing development's ads indicate exclusiveness based on these factors.

five photos of one or more human beings in the Spring 2004 and Summer 2003 issues, none of whom appears to be African-American) (all on file with the Iowa Law Review).

285. See *supra* notes 242–43 and accompanying text.

286. See 54 Fed. Reg. 3309–10 (Jan. 23, 1989) (setting forth former 24 C.F.R. § 109.30(b) (1990)).

287. *Id.*; see also *id.* (setting forth former 24 C.F.R. § 109.25(c) (cautioning against selectively using human models on the basis of sex)).

3. Other Problematic Marketing Techniques

Other marketing techniques commonly employed by housing developments for older persons may also violate § 3604(c). The essence of such a development's marketing is presumably to identify its potential customers and to focus its advertising on this target audience through selected publications, direct-mail solicitations, or other media. The methods employed in this targeting process may result in illegal discrimination.

The HUD guidelines specifically address the possibility that the "selective use of advertising or . . . media . . . can lead to discriminatory results" in violation of the FHA.²⁸⁸ The guidelines give two examples of such problematic media selection that seem particularly relevant for senior housing in racially diverse areas: (1) the distribution by mail of "brochure advertisements . . . within a limited geographic area"; and (2) "advertising in particular geographic coverage editions of major metropolitan newspapers or in newspapers of limited circulation which are mainly advertising vehicles for reaching a particular segment of the community."²⁸⁹ Furthermore, according to HUD, "the use of English language media alone or the exclusive use of media catering to the majority population in an area, when, in such area, there are also available non-English language or other minority media" may indicate illegal discrimination.²⁹⁰

FHA case law involving the selective use of media is virtually nonexistent. The only reported decision appears to have occurred in 1975 in *NAACP v. ITT Community Development Corp.*,²⁹¹ which simply approved a consent order in a private class action alleging that the defendant's advertising and marketing practices for its Florida development had been focused away from racial minorities in violation of § 3604(c). The court-approved settlement required the defendant to take a number of affirmative steps to correct these practices, including using minority models in its advertising, developing a direct-mail program targeted to minority prospects, hiring more minority salespersons, and spending \$55,000 of its future advertising budget in media that served primarily black audiences.²⁹²

Another marketing technique that some senior housing developments employ is to invite individually identified prospects to an open house, meal, or other gathering. The methods used for determining which persons to invite to such events (e.g., gathering prospect names from current residents, from local churches, or from purchased lists based on certain demographic

288. 54 Fed. Reg. 3309 (Jan. 23, 1989) (setting forth former 24 C.F.R. § 109.25).

289. *Id.* (setting forth former 24 C.F.R. § 109.25(a)). *See also* Luken & Vaughan, *supra* note 237, at 163 (describing how "the placement of these advertisements in certain periodicals" by the developer of Sun City, Arizona, helped create a restricted image of the types of residents desired). *See discussion supra* note 280.

290. 54 Fed. Reg. 3309 (Jan. 23, 1989) (setting forth former 24 C.F.R. § 109.25).

291. 399 F. Supp. 366 (D.D.C. 1975).

292. *Id.* at 368-69.

and/or zip code criteria) might narrow the pool of invitees in ways that violate the FHA. While no case involving a § 3604(c) claim based on this theory has yet been reported, there are FHA decisions in analogous areas that would support such a theory. For example, in *Langlois v. Abington Housing Authority*,²⁹³ the court held that the practice of public housing authorities in predominantly white towns of giving a preference to local residents had the unjustified effect of discriminating against racial minorities and therefore violated the FHA.²⁹⁴ Applying a similar approach to senior housing developments in white areas that use local-resident targeting devices suggests that the resulting white-preferred prospect pools for their marketing programs might run afoul of the FHA.

C. ADMISSIONS

1. In General

Perhaps the most dramatic conclusion of this Article—although one that seems obvious from a legal standpoint—is that the FHA makes it unlawful for senior housing of any type to discriminate in admissions on the basis of race, color, or national origin. This conclusion is dramatic, because racial segregation is still the norm in much of America’s housing.²⁹⁵ While this fact alone does not establish that any particular development has engaged in illegal racial or national origin discrimination, there is a growing amount of anecdotal evidence indicating that such discrimination is widespread in housing for older persons.²⁹⁶ Indeed, it would be surprising if this were not so, because America’s housing markets continue to be

293. 234 F. Supp. 2d 33, 55–70 (D. Mass. 2002).

294. See also *United States v. Hous. Auth.*, 504 F. Supp. 716, 732 (S.D. Ala. 1980) (holding that the residency requirement of the City of Chickasaw’s all-white public housing authority violates the FHA because it “has an adverse impact on all non-Caucasians; it perpetuates segregation”).

295. See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 61–78 (1993); JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* 110–17 (1995); Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 797–801 (1996). See generally U.S. DEP’T OF COMMERCE, *RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980–2002* (Aug. 2002), <http://www.census.gov/population/www/cen2000/briefs.html> (last visited Aug. 20, 2004) (on file with the Iowa Law Review).

296. See, e.g., *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037 (N.D. Ohio 1998); *Fair Housing of Marin Publishes Audit of Discrimination in Residential Care Facilities*, 1 Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 8.4 (2003) (reporting that testing-based investigation of twenty residential care facilities for older persons in Marin and Sonoma Counties, California, revealed “differential treatment favoring the white testers at 60 percent of the sites”); Whittaker, *supra* note 284, at 1B; see also David Falcone & Robert Broyles, *Access to Long-Term Care: Race as a Barrier*, 19 J. HEALTH, POL., POL’Y & L. 583 (1994) (finding that, in addition to demographic trends, race discrimination may be limiting the number of people of color in ALFs and nursing homes).

characterized by a large degree of race and national origin discrimination,²⁹⁷ and there is no reason to believe that those segments of the housing industry that cater to older persons are exempt from this phenomenon.

Sex discrimination in admissions is also clearly forbidden by the FHA,²⁹⁸ but there is little evidence to suggest that retirement communities and other types of housing for older persons generally engage in this practice.²⁹⁹ Nevertheless, as we shall see,³⁰⁰ the fact that sex discrimination is barred by the FHA may carry with it some additional requirements relating to the admissions-and-assignment process that many senior housing facilities are not complying with.

The two remaining applicable bases of forbidden discrimination—religion and handicap—would also generally be outlawed in housing for older persons, but each raises some special issues. With respect to religion, housing developments must be divided into two groups: (1) those run by nonprofit religious-oriented organizations that are so closely associated with a particular religion that they qualify for the FHA's religious exemption, which would allow them to limit admission to members of their own faith,³⁰¹ and (2) all others, which include religious-oriented developments not sufficiently affiliated with a religious organization to qualify for the religious exemption and which, not having the benefit of this exemption, are fully subject to the FHA's mandates against religious discrimination.

With respect to handicap, some of the FHA's non-discrimination commands are written in a unique way that require individual attention, which is provided in the next section. Basically, however, the FHA does outlaw discrimination against people with disabilities in the admission phase subject only to the "direct threat" defense.³⁰² In addition, the statute's

297. See, e.g., MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000 iii-v (2002) (concluding based on a nationwide paired-testing study that "discrimination still persists in both rental and sales markets of large metropolitan areas" and showing that whites were consistently favored over blacks in 21.6% of rental tests and 17.0% of sales tests and that non-Hispanic whites were consistently favored over Hispanics in 25.7% of rental tests and 19.7% of sales tests). The levels of discrimination found in this study were generally lower than those found in a similar national study conducted in 1989, although the incidence of discrimination against Hispanic renters remained essentially the same. *Id.* at iii. For a description of the 1989 study and how its discrimination-rate findings mirrored those of a similar 1977 study, see YINGER, *supra* note 295, at 19-49.

298. See, e.g., Walker v. Crigler, 976 F.2d 900, 901-03 (4th Cir. 1992); United States v. Reece, 457 F. Supp. 43, 47-48 (D. Mont. 1978); HUD v. Yankee Dev. Assocs., 2A Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 25,074, at 25,690-91 (HUD ALJ, June 28, 1994).

299. But see United States v. Jackson, Miss., 3 Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 16,663 (S.D. Miss., Oct. 23, 2002), *aff'd*, 359 F.3d 727 (5th Cir. 2004) (described *supra* note 235); *infra* note 403.

300. See *infra* text accompanying notes 403-07.

301. See *supra* Part II.B.2.b.

302. See *supra* Part II.B.2.c.

mandate that “reasonable accommodations” must be made to afford such persons equal housing opportunities also has some important implications at the admissions phase.³⁰³

2. Admissions and the FHA’s Prohibitions Against Handicap Discrimination

a. Basic Prohibitions

This section deals with the question of whether the FHA allows housing for older persons to discriminate on the basis of handicap in admissions. The short answer seems to be that such discrimination is allowed if it *favours* people with disabilities, but that any discrimination *against* such individuals would be unlawful.

This asymmetrical conclusion is dictated by the language of the statute. In outlawing handicap discrimination in the 1988 FHAA, Congress did not simply add “handicap” to the list of prohibited bases of discrimination in § 3604(a)’s ban on discriminatory refusals to deal and § 3604(b)’s ban on discriminatory terms and conditions, as it did with the new prohibition against “familial status” discrimination and as it had in 1974 when it prohibited “sex” discrimination.³⁰⁴ Rather, the basic prohibitory language of § 3604(a) and § 3604(b) was copied into two new provisions— § 3604(f)(1) and § 3604(f)(2)—that banned discrimination “because of a handicap” of any buyer, renter, or person residing or associated with such a buyer or renter.³⁰⁵

The reason for treating handicap discrimination in this special way was apparently to make clear that the amended FHA would not condemn housing that is made available especially *for* people with disabilities (i.e., that the statute does not authorize “reverse discrimination” suits against such housing by non-handicapped persons). The principal congressional report supporting the FHAA described § 3604(f)(1) and § 3604(f)(2) as prohibiting discrimination “against” handicapped persons,³⁰⁶ and HUD’s commentary on its FHAA regulations noted that the statute “does not prohibit the exclusion of non-handicapped persons from dwellings.”³⁰⁷

303. See *infra* Part III.C.2.d.

304. See *supra* notes 114–15 and accompanying text.

305. See *supra* notes 125–26. Contrast the language used in 42 U.S.C. § 3604(a), (b) (2000), which makes it unlawful to discriminate on the basis of a prohibited ground against “any person.”

306. 1988 House Report, *supra* note 116, at 24–25.

307. 54 Fed. Reg. 3246 (Jan. 23, 1989). This commentary was prompted by HUD’s recognition that certain government programs provide assistance for housing that is available only to persons with disabilities. *Id.* For example, in a case decided one year before passage of the 1988 FHAA, the Tenth Circuit in *Knutzen v. Eben Ezer Lutheran Housing Center* noted that “only the elderly and the handicapped are eligible for residency in section 202 housing.” 815 F.2d 1343, 1347 (10th Cir. 1987). For more on the section 202 program and its interplay with

Thus, for example, assisted-living units may be restricted to those persons whose impaired condition qualifies them for the type of care provided by such a facility.³⁰⁸ Reflecting this conclusion, a number of cases have applied the FHA in situations that involved an ALF or nursing home exclusively designed for older persons with disabilities.³⁰⁹

On the other hand, no FHA-covered housing is permitted to discriminate against any buyer or renter because that person has a disability or resides or is associated with someone who does.³¹⁰ This means that admission to a retirement community or other type of housing for older persons cannot be denied because of an applicant's disability. It also means that such housing "may not increase for handicapped persons any customarily required security deposit."³¹¹ Indeed, *any* harsher "term or condition" that is directed against applicants or tenants because of their disability would violate the FHA's § 3604(f)(2).³¹²

the FHA, see *supra* notes 64, 164. Despite this concern with subsidized housing, however, HUD's commentary made clear that *any* housing provider, including a "privately owned unsubsidized housing facility may lawfully restrict occupancy to persons with handicaps." 54 Fed. Reg. 3246 (Jan. 23, 1989).

308. See, e.g., cases cited *infra* notes 309–10; cases discussed *infra* text accompanying notes 327–32.

309. E.g., *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 445–46, 459 (3d Cir. 2002) (applying the FHA to a ninety-five-bed care facility for the elderly); *Hovsons, Inc. v. Brick, N.J.*, 89 F.3d 1096, 1102 (3d Cir. 1996) (applying the FHA to nursing home for disabled elderly persons); *Smith & Lee Assoc., Inc. v. Taylor, Mich.*, 102 F.3d 781, 795 (6th Cir. 1996); *Smith & Lee Assoc., Inc. v. Taylor, Mich.*, 13 F.3d 920, 922 (6th Cir. 1993) (applying the FHA to adult foster care home for disabled elderly persons); *United States v. Puerto Rico*, 764 F. Supp. 220, 227 (D.P.R. 1991) (applying the FHA in a case involving nursing home for elderly individuals); *HUD v. Country Manor Apartments*, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,156, at 26,248 (HUD ALJ Sept. 20, 2001) (applying the FHA to housing facility for seniors that "includes a 172-bed nursing home, 45 'assisted living' units, and 155 'senior apartments'"); *HUD v. Courthouse Square Co.*, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,155, at 26,232 (HUD ALJ Aug. 13, 2001) (applying the FHA to HUD-assisted apartment complex "for the elderly and the handicapped").

310. See, e.g., *United States v. Forest Dale, Inc.*, 818 F. Supp. 954, 961, 968–69 (N.D. Tex. 1993) (upholding § 3604(f)(1) claim challenging apartment complex's policy of renting only to "ambulatory senior citizens"). See generally 24 C.F.R. §§ 100.60, 100.202(a)–(b) (2003) (providing HUD's FHA regulations prohibiting handicap discrimination in refusals to sell or rent dwellings). As noted above, one exception to the FHA's general mandate barring discrimination against persons with handicaps has been recognized to allow housing complexes that receive federal assistance under the section 202 program to favor non-elderly tenants with certain types of disabilities over others. See *supra* note 164 and accompanying text; see also *Forest Dale*, 818 F. Supp. at 963–65.

311. 24 C.F.R. § 100.203(a).

312. See, e.g., *Country Manor Apartments*, 2A Fair Hous.–Fair Lending at 26,248, 26,252–54 (holding senior housing complex's requirement that tenants using motorized wheelchairs obtain special liability insurance held to be discrimination in the terms and conditions of rental in violation of § 3604(f)(2)); see also *infra* Part III.D.2 (discussing various ways in which § 3604(f)(2)'s guarantee of nondiscriminatory terms and conditions apply to current residents of senior housing).

Thus, while a senior housing provider may deny admission to applicants who cannot meet the provider's basic financial and behavioral standards,³¹³ it may not exclude people who otherwise meet the qualifications of tenancy merely because they have a disability or because of the severity of that disability.³¹⁴ A necessary corollary of these propositions is that, once admitted, residents cannot be evicted because they later become disabled.³¹⁵ Furthermore, the FHA seems to bar senior housing providers from denying their units to those applicants and residents who are unable to "live independently" and to limit the questions a provider may ask about a tenant's disabilities, topics that are so crucial to the way many senior housing complexes are run that they are dealt with separately in the next two sections.

b. "Independent Living" Requirements

Beginning in 1990 with *Cason v. Rochester Housing Authority*³¹⁶ a series of cases has interpreted the FHA's ban on handicap discrimination to prohibit housing providers from imposing a requirement that their tenants be capable of "independent living."³¹⁷ In *Cason*, three disabled individuals (two of whom were seniors) brought a § 3604(f)(1) claim against their local public housing authority after it had rejected them for failing to meet its "ability to live independently" eligibility requirement.³¹⁸ The court ruled for

313. See, e.g., *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998) (concerning financial eligibility); *Schanz v. Vill. Apartments*, 998 F. Supp. 784 (E.D. Mich. 1998) (same); *Arnold Murray Constr., L.L.C. v. Hicks*, 621 N.W.2d 171 (S.D. 2001) (concerning behavior). See generally *supra* notes 117–19 and accompanying text.

314. See *supra* note 116 and accompanying text; see, e.g., case cited *supra* note 310.

315. See, e.g., 24 C.F.R. § 100.60(b)(5) (providing HUD regulation that includes eviction among the FHA's prohibited practices); *Radecki v. Joura*, 114 F.3d 115 (8th Cir. 1997) (ruling that unlawful discrimination occurs when a tenant is evicted from his dwelling due to the tenant's disability); see also *United States v. Forest Dale, Inc.*, 818 F. Supp. 954, 959, 968–69 (N.D. Tex. 1993) (upholding FHA claim against senior apartment complex whose written policies included a provision authorizing the complex to terminate a tenancy where "a prolonged illness of the Tenant shall require special care or treatment and such care or treatment shall tend to disrupt the general atmosphere and operation of [the complex] or renders the Tenant to be 'non-ambulatory'"); cases cited *infra* note 429.

316. 748 F. Supp. 1002 (W.D.N.Y. 1990).

317. In addition to *Cason*, see cases discussed *infra* notes 327–32; cf. *Armstrong v. Senior Citizens Hous. of Ann Arbor, Inc.*, 317 N.W.2d 255 (Mich. Ct. App. 1982) (holding a retirement complex's rejection of an applicant based on her inability to satisfy complex's "live independently" requirement violated state law's prohibition of disability discrimination in housing).

318. 748 F. Supp. at 1003–07. The *Cason* defendant's "ability to live independently" requirement provided for screening out any applicant who was not able "to perform those basic functions of adult living for and by him/her self. These activities include . . . [the] ability to perform basic housekeeping and personal care." *Id.* at 1004. In addition to their FHA claim, the *Cason* plaintiffs also sued under section 504 of the Rehabilitation Act because the defendant-Authority received federal financial assistance, see *supra* note 134 and accompanying text, but the court decided the case based solely on the FHA. 748 F. Supp. at 1007–09.

the plaintiffs, concluding that this requirement and the inquiries conducted by the defendant's staff to implement it "are in clear violation of federal law."³¹⁹ In rejecting the defendant's argument that its "ability to live independently" requirement should be upheld because the Authority had only relied on it to turn down a small fraction of handicapped applicants (17 out of 276), the *Cason* opinion pointed out that this requirement still had a substantial discriminatory effect on handicapped persons because "no non-handicapped persons" were denied housing on this basis.³²⁰ The court also rejected the defendant's attempt to justify its requirement based on the FHA's "direct threat" provision, finding "no evidence that the challenged practices allow the Authority to screen out potentially dangerous tenants."³²¹ Finally, the defendant argued that it lacked the staff and resources to provide support services to tenants, but, according to the court, plaintiffs:

require nothing of the sort from the Authority; rather, many handicapped applicants receive support from Medicaid or other assistance programs. A tenant who is able to meet the objective requirements of tenancy should not be denied housing simply because she receives medical assistance or other aid.³²²

The *Cason* defendant's "ability to live independently" requirement had apparently received HUD's approval prior to passage of the 1988 FHAA³²³ and indeed was typical of screening policies of HUD-assisted public housing authorities throughout the country.³²⁴ As a result of *Cason*, however, HUD revised its public housing occupancy policies to make clear that such authorities could no longer employ "independent living" eligibility criteria.³²⁵

319. *Id.* at 1003. For further discussion of the inquiries part of the *Cason* decision, see *infra* text accompanying notes 344–45.

320. 748 F. Supp. at 1007. Indeed, the defendant simply "never questioned" the non-handicapped applicants' "ability to live independently." *Id.* at 1008.

321. *Id.* at 1008. According to *Cason*, there was "no evidence in the record . . . to indicate that an *inability* to live independently creates the type of threat contemplated by [§ 3604(f)(9)]." *Id.* at 1009. For a description of the FHA's "direct threat" defense in § 3604(f)(9), see *supra* Part II.B.2.c.

322. 748 F. Supp. at 1009 n.1.

323. *Id.* at 1009.

324. Prior to 1990, HUD "had actively encouraged exclusion of applicants deemed not capable of independent living." Barbara Sard, *The Massachusetts Experience with Targeted Tenant-based Rental Assistance for the Homeless: Lessons on Housing Policy for Socially Disfavored Groups, Part II*, 1 GEO. J. ON FIGHTING POVERTY 182 (1994); see also U.S. DEP'T OF HOUS. & URBAN DEV., MULTIFAMILY HANDBOOK 4350.3, HUD Transmittal CHG-24 (Jan. 19, 1993) (giving HUD guidance to private owners of federally subsidized housing concerning their obligations to comply with *Cason*).

325. U.S. DEP'T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY: ADMISSION HANDBOOK 7465.1, HUD Transmittal REV-2-CHG-2 (July 12, 1991) (rescinding pre-*Cason* Handbook provisions and announcing HUD policy that public housing authorities should not "judge whether handicapped applicants are capable of living independently [and not] require a

The lessons of *Cason* and HUD's subsequent policy change have not been readily absorbed by providers of senior housing, many of whom continued to impose "independent living" requirements throughout the 1990s and into the new century.³²⁶ Their intransigence has prompted a series of FHA cases, all of which have been resolved by eliminating the defendant-provider's "independent living" restriction, either through judicial decisions or consent decrees.

The principal judicial decisions are *Niederhauser v. Independence Square Housing*,³²⁷ which struck down an apartment complex's practice of requiring that tenants "be capable of tending to their needs independently" and "have a successful history of living independently," and *Jainniny v. Maximum Independent Living*,³²⁸ which held that a landlord's rejection of a disabled applicant on the ground that he was "not ready to live independently" violated the FHA. In *Niederhauser*, the defendant received federal financial assistance under the section 202 program,³²⁹ and it argued that this program justified its "independent living" requirement, an argument that the court specifically rejected.³³⁰ The *Jainniny* decision is even more dramatic on this point. The case involved a housing complex subsidized under an offshoot of the section 202 program—section 811 of the 1990 Cranston-Gonzales National Affordable Housing Act³³¹—specifically designed for certain categories of disabled tenants. The court held that although section 811 authorized the defendant to favor persons with physical disabilities over others, the program could not be used

physical examination as a condition of admission"); *see also* HUD Memorandum from Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, and Joseph G. Schiff, Assistant Secretary for Public and Indian Housing et al., to All Regional Administrators (Dec. 31, 1990) (issuing a HUD memorandum re: PHA Determination of "Ability to Live Independently" as a Criterion for Admission to Public Housing, which advised public housing authorities, in light of *Cason*, to "rescind policies which may treat handicapped applicants different from others" and to not require proof of the ability to live independently) (on file with the Iowa Law Review).

326. *See, e.g.,* Ziaja, *supra* note 87, at 319 (discussing how senior housing facilities often still "restrict residency to seniors that are ambulatory and require only assistance with housekeeping efforts"); Barbara Baster, *Fighting Back: Active, Bike-Riding Tenant Resists City's Eviction Notice*, AARP BULLETIN, Nov. 2003, at 12 (reporting on *Symons v. City of Sanibel* litigation, which is described *infra* note 335); *Senior Class*, *supra* note 72, at 62–67 (identifying eleven of forty-four Chicago-area retirement communities in 2003 that included disability-related restrictions, such as "must be able to live independently," "ambulatory residents only," "active adults," and "no mentally ill residents").

327. 4 Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 16,305, at 16,305.2–6 (N.D. Cal. Aug. 27, 1998).

328. No. 00CV0879, slip op. at 3, 15 (N.D. Ohio Feb. 9, 2001), *available at* http://www.bazelon.org/issues/housing/cases/jainniny_v_maxindliv.pdf (on file with the Iowa Law Review).

329. *See supra* note 64 and accompanying text.

330. *Niederhauser*, 4 Fair Hous.–Fair Lending at ¶ 16,305.4–5.

331. *See supra* note 164.

as a tool for owners to exclude people with physical disabilities who may also suffer from additional disabilities or to discriminate on the basis of the ability to live independently. . . . The exclusion of Mr. Janniney and other people with mobility disabilities who have been deemed by [defendant] to be incapable of independent living can be viewed at best as a paternalistic attempt to direct these individuals to more suitable housing and at worst, as prejudicial discrimination. Either way, the exclusion of those who do in fact suffer from a mobility disability but who are not able to live independently is violative of the FHAA and is not condoned by § 811. As such, “independent living” is not a proper admissions criteria for § 811 housing.³³²

Of the post-*Cason* cases decided by consent decrees, perhaps the most important is *United States v. Resurrection Community, Inc.*,³³³ where the Justice Department in 2002 brought a “pattern or practice” complaint against a 500-unit retirement community, alleging that the defendant’s FHA violations included discouraging prospective residents who used wheelchairs and requiring applicants to be able to “live independently” and to submit to medical assessments conducted by the defendant’s employees as a condition of residency. The case is significant not only because it demonstrates the ongoing resistance of senior housing providers—including large, market-rate retirement communities—to abandoning their “independent living” requirements, but also as a demonstration of the federal government’s commitment to challenging such requirements as part of its FHA enforcement responsibilities.³³⁴ The *Resurrection* case ultimately resulted in a consent decree under which the defendant, in addition to paying \$220,000

332. *Janniney v. Maximum Indep. Living*, No. 00CV0879, slip op. at 12–16 (N.D. Ohio Feb. 9, 2001), at http://www.bazelon.org/issues/housing/cases/janniney_v_maxindliv.pdf (on file with the Iowa Law Review).

333. Consent order, *United States v. Resurrection Ret. Cmty., Inc.*, No. 02-CV-7453 (N.D. Ill. Oct. 17, 2002), at <http://www.usdoj.gov/crt/housing/documents/resurrectsettle.htm> (on file with the Iowa Law Review).

334. See also *United States v. Forest Dale, Inc.*, 818 F. Supp. 954 (N.D. Tex. 1993) (described *supra* note 310); Consent order, *United States v. Savannah Pines, L.L.C.*, No. 401CV3303 (D. Neb. Apr. 30, 2003), at <http://www.usdoj.gov/crt/housing/documents/savannahsettle.htm> (on file with the Iowa Law Review) (senior housing development agrees to abandon rental agreement that Justice Department alleged violated the FHA by requiring residents to move out if they “can no longer care for [their] personal needs”); *HUD v. Strawberry Point Lutheran Home for the Aged, Inc.*, No. 07-01-0584-8, 2003 WL 1311336 (HUD ALJ Mar. 5, 2003) (settling HUD’s FHA charge based on the retirement complex’s attempt to require long-term resident to move to nursing home because of her need for assistance in transferring from bed to wheelchair, with center agreeing to cease all eviction efforts and to consult with complainant-resident and her physician before proposing any future move); *HUD v. Wilmette Real Estate*, No. 25-98-0148-8, 2000 WL 1478457 (HUD ALJ Oct. 3, 2000) (settling HUD’s FHA charge based in part on apartment complex’s inquiring about rejected complainant-applicants’ “ability to live independently”).

in monetary damages and penalties, agreed to rescind its “independent living” and medical-exam policies.³³⁵

Thus, it would seem that admission to all traditional senior rental housing is governed by *Cason* and its progeny. But would an “independent living” requirement also be illegal if imposed by an ALF, CCRC, or other facility that provides significant medical and other supportive services along with its residential units? As an initial matter, one has to note the irony of these types of housing providers employing such a policy, because their appeal is inherently directed to that very subset of seniors whose age-related impairments may make them incapable of meeting an “independent living” requirement.³³⁶ And yet, such providers who “bundle” together their housing-and-services charges³³⁷ would naturally be concerned about having to absorb potentially open-ended health care costs and might therefore seek to limit these costs by screening out applicants who cannot demonstrate an ability to “live independently.” Certainly, such self-interested pricing strategies and “bottom line” concerns would not be adequate to justify an otherwise clear violation of the FHA, any more so than would a housing facility’s desire to foster an “active seniors” or “nonhandicapped” atmosphere.

A more appealing defense, however, might be the need of some ALFs and CCRCs to comply with state regulations establishing “level of care” protections for their residents (i.e., barring such a facility from accepting people incapable of “independent living” if it is not licensed to serve such persons).³³⁸ This is a harder issue, and the case law is not yet well developed

335. See *Resurrection*, No. 02-CV-7453, at 3, 6–7, consent decree available at <http://www.usdoj.gov/crt/housing/documents/resurrectsettle.htm> (on file with the Iowa Law Review); see also *Symons v. Sanibel*, 1 Fair Hous.–Fair Lending (Aspen Law & Bus.), ¶ 1.8 (M.D. Fla. Nov. 3, 2003) (discussing the FHA-based challenge to senior housing complex’s attempt to evict 82-year-old resident for allegedly not being “capable of living independently” results in settlement providing for resident to remain in place and for defendants to “eliminate any reference to the ability to live independently from their tenancy criteria”). Author Allen was counsel for the plaintiff in the *Symons* case.

336. Cf. *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1010 (3d Cir. 1995) (“Obviously, everyone that applies for admission to a nursing home does so because of his or her disabilities. Indeed, no one would be able to meet a nursing home’s admissions requirements in the absence of some handicapping condition necessitating nursing home care.”); see also *supra* note 219 (describing the *Wagner* case in further detail); *infra* note 375 (same).

337. See *supra* notes 99–100 and accompanying text.

338. See, e.g., Marie-Therese Connolly, *Federal Law Enforcement in Long-Term Care*, 4 J. HEALTH CARE L. & POL’Y 230 (2001). Many states have asserted an interest in regulating ALFs, see *supra* note 67, at para. 3 and accompanying text, in large part because of concerns that their residents will be subjected to the same types of abuses that have historically plagued nursing home residents. See, e.g., Christine V. Williams, *The Nursing Home Dilemma in America Today: The Suffering Must Be Recognized and Eradicated*, 41 SANTA CLARA L. REV. 867 (2001). In order to forestall such abuses, states generally certify ALFs for a particular “level of care” and prohibit the admission or retention of residents who need care above that level. See, e.g., Edelstein, *supra* note 98, at 378; 210 ILL. COMP. STAT. 9/75 (Illinois Assisted Living and Shared Housing Act,

on this point.³³⁹ Part of the answer may lie in the degree to which the FHA allows ALFs and other housing-plus-medical-service facilities to inquire about their residents' health and disability status to ensure compliance with state licensing requirements, an issue that is discussed in the next section.³⁴⁰

Overall, we conclude that the persistence of "independent living" requirements in all types of senior housing, despite substantial FHA case law to the contrary, amounts to a gathering storm of potential litigation. That many senior housing and long-term care providers have not conformed their practices to the mandates of *Cason* and its progeny suggests that these providers do not believe the FHA applies to their operations, clearly a misguided assumption.³⁴¹ Furthermore, in light of the growing willingness of the senior housing industry's disabled clientele to challenge "independent living" and similar requirements,³⁴² the pressure feeding this litigation storm seems unlikely to abate.

c. Prohibited Admissions Inquiries

In *Cason* and many of the other cases reviewed in the previous section,³⁴³ the defendant-housing providers were accused of violating the FHA not only by imposing an "independent living" requirement, but also by making pre-admission inquiries about applicants' physical and mental

limiting admission and retention in ALFs based, inter alia, upon severity and persistence of mental illnesses).

339. Compare *Weinstein v. Cherry Oaks Ret. Cmty.*, 917 P.2d 336, 337–38 (Colo. Ct. App. 1996) (noting that, to the extent such requirements "are consistent with the federal Fair Housing Amendments Act," licensed "mid-care" retirement facilities must comply with state and local regulations that require, inter alia, denial of admission to and discharge of residents who "have physical limitations that prevent ambulation unless such limitations are adequately compensated by artificial means"), with *Baggett v. Baird*, No. Civ. A4:94CVO2 82-HLM, 1997 WL 151544 (N.D. Ga. Feb. 18, 1997) (invalidating state regulation barring wheelchair users from residing in personal-care home on the ground that that regulation facially discriminates against non-ambulatory people with disabilities), and *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health*, 19 F. Supp. 2d 567, 570–72 (N.D.W.Va. 1998) (holding that state law and regulations requiring residents of convalescent group homes to "possess the ability to remove themselves, physically, from situations involving imminent danger" single out the handicapped for special treatment and should therefore be analyzed as intentionally discriminatory under the FHA). See also *O'Neal by Boyd v. Ala. Dep't. of Pub. Health*, 826 F. Supp. 1368, 1375 (M.D. Ala. 1993) (rejecting procedural defenses to FHA and ADA claims based on state agency's threat to revoke ALF's license for not evicting elderly residents suffering from Alzheimer's disease who were thought to need a higher level of care and noting that the goals of these federal statutes might conflict with the state's licensing regulations).

340. See *infra* notes 361–68 and accompanying text.

341. See generally *supra* Part II.B.

342. See, e.g., Michael Allen & Susan Silverstein, *Preserving Elders' Housing Rights*, 39 TRIAL 32, 39 (Oct. 2003).

343. See, e.g., cases cited *infra* notes 353–55; see also *United States v. Salvation Army*, 4 Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 16,387, at 16,387.4, 16,387.7 (S.D.N.Y. 1999) (holding that a housing provider's elimination of all questions concerning disability from its applications forms defeats need for injunctive relief).

impairments, a practice that has also generally been held to amount to illegal handicap discrimination. In *Cason*, for example, the court struck down the defendant-Authority's practice of conducting "detailed inquiries into the nature and scope of the applicant's disabling condition."³⁴⁴ In reaching this conclusion, the *Cason* opinion relied on HUD's FHA regulations, which specifically restrict such inquiries.³⁴⁵

According to the relevant HUD regulation, housing providers are not allowed to make pre-admission inquiries in order "to determine whether an applicant . . . has a handicap or to make inquiry as to the nature or severity of a handicap of such a person."³⁴⁶ Indeed, the HUD regulations do not even authorize inquiries to determine whether an applicant poses the kind of "direct threat" that would justify refusal of admission under the FHA.³⁴⁷ The HUD regulations do allow providers of housing that is made available especially for people with disabilities, such as units subsidized under the section 202/section 811 program,³⁴⁸ to make inquiries necessary to determine whether applicants are qualified for such housing.³⁴⁹ Even in these circumstances, however, handicap-related inquiries are unlawful if they go beyond those necessary to determine such qualifications.³⁵⁰

These HUD regulations are based directly on statements made in the Report of the House Judiciary Committee that is the principal source of legislative history on the 1988 amendments to the FHA barring handicap discrimination.³⁵¹ Furthermore, although the relevant HUD regulation by its

344. *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002, 1004 (W.D.N.Y. 1990).

345. *Id.* at 1008–09 (citing 24 C.F.R. § 100.202(c) (1990)).

346. 24 C.F.R. § 100.202(c).

347. *See* 54 Fed. Reg. 3247 (Jan. 23, 1989) (discussing HUD's decision not to accede to the requests of housing-provider organizations advocating the allowance of such inquiries). The FHA's "direct threat" defense is discussed *supra* in Part II.B.2.c.

348. *See supra* note 64.

349. *See* 24 C.F.R. § 100.202(c)(2)–(3), which authorizes inquiries "to determine whether an applicant for a dwelling is qualified for a dwelling available only to persons with handicaps or to persons with a particular kind of handicap" and inquiries to determine whether an applicant "is qualified for a priority available to persons with handicaps or to persons with a particular type of handicap." Even these inquiries are prohibited, however, unless they "are made of all applicants, whether or not they have handicaps." *Id.* § 100.202(c).

350. *See, e.g.*, cases cited *infra* notes 353–54.

351. According to this Report, the 1988 FHAA

is not intended to give landlords and owners the right to ask prospective tenants and buyers blanket questions about the individuals' disabilities. . . . Under [the FHAA], only an inquiry into a prospective tenant's ability to meet tenancy requirements would be justified. Thus, in assessing an application for tenancy, a landlord or owner may ask an individual the questions that he or she asks of all other applicants that relate directly to the tenancy . . . , but may not ask blanket questions with regard to whether the individual has a disability. Nor may the landlord or owner ask the applicant or tenant to waive his right to confidentiality concerning his medical condition or history.

terms only outlaws handicap-related inquiries at the admissions stage, the FHA has also been interpreted to bar such inquiries by a landlord to its "sitting tenants."³⁵²

A number of post-*Cason* decisions have dealt with how far a housing provider that receives federal subsidies to favor seniors or tenants with a specific disability may go in making inquiries of applicants to determine their eligibility for such housing. All have held that the HUD regulation authorizing inquiries to determine such eligibility does not allow questions beyond the scope necessary to make this determination, so that, for example, seeking information about other disabilities or limitations is prohibited.³⁵³ As the *Niederhauser* court noted in holding that the FHA bars questions going beyond basic eligibility standards, a landlord subsidized under the section 202 program

may not inquire into the nature and extent of an applicant's or tenant's disabilities beyond that necessary to determine eligibility. For example, if an applicant applies for tenancy at a Section 202 Project intended for the elderly, the applicant may be asked whether that person meets the minimum age requirement and whether that person is otherwise qualified for tenancy; e.g., ability to pay rent. However, it does not appear that the applicant can be asked if he or she can live independently since this is not an eligibility criterion.³⁵⁴

1988 House Report, *supra* note 116, at 30.

352. *E.g.*, HUD v. Williams, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,007, at 25,114–15 (HUD ALJ Mar. 22, 1991) (interpreting FHA's § 3604(f)(2) to prohibit handicap-related inquiries by landlord to sitting tenants); *see also infra* text accompanying note 354.

353. *See, e.g.*, Robards v. Cotton Mill Assoc., 713 A.2d 952, 954 (Me. 1998) (holding that § 100.202(c)(2) does not authorize a landlord to require an applicant to provide a description of his handicap); *Niederhauser v. Indep. Square Hous.*, 4 Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 16,305, at 16,305.4, 16,305.7 (N.D. Cal. Aug. 27, 1998) (holding that § 100.202(c)(2) does not authorize a landlord to inquire into the ability of applicants or tenants to meet their medical, hygiene, and other personal needs); *Jainnney v. Maximum Indep. Living*, No. 00CV0879, slip op. at 12–16 (N.D. Ohio Feb. 9, 2001), at http://www.bazelon.org/issues/housing/cases/jainnney_v_maxindliv.pdf (following *Niederhauser* regarding illegality of defendant's inquiries) (on file with the Iowa Law Review).

In *Jainnney*, the court held violative of the FHA the defendant's practice of routinely asking applicants questions related to the long-term nature of their mobility impairments "as well as general questions designed to elicit information as to whether the applicant can 'live independently' and 'access needed services.'" *Jainnney*, No. 00CV0879, slip op. at 5.

354. *Niederhauser*, 4 Fair Hous.–Fair Lending at ¶ 16,305.5; *accord Robards*, 713 A.2d at 954. In *Robards*, the defendant-landlord's health status form contained the following instruction: "STATEMENT OF HEALTH INCLUDING ANY DISABILITIES (statement of your doctor should be used here). Physician should state here a brief description of your medical condition, disability and/or handicap and whether you are able to care for yourself if living alone and/or able to care for [an] apartment." *Id.* at 953. Holding that this inquiry went too far, the Maine Supreme Court concluded:

Of course, in non-subsidized rental units that are not intended only for persons with disabilities, the “no inquiry” rule would seem to be virtually absolute, as demonstrated by the Justice Department’s recent action against a market-rate retirement community in *United States v. Resurrection Retirement Community, Inc.*³⁵⁵

Like the “independent living” requirement discussed in the previous section, the FHA’s general prohibition of handicap-related inquiries is still regularly ignored by senior housing providers some fifteen years after its initial promulgation.³⁵⁶ Some of these providers may be using health inquiries as part of their admission process because they only want residents who will project an “active-healthy” atmosphere, although this reason can no more justify a FHA violation than would the desire of a racially segregated community to project a “white” image.³⁵⁷ More likely, the articulated justification for health-related screening inquiries would be financial, particularly for those housing providers who charge a relatively high admission fee as part of “a sort of health care insurance” system, so that subsequent monthly charges “do not rise (or rise only modestly) even if a resident whose health declines must move from the independent-living unit

A permissible inquiry [by a § 202 landlord] is therefore one limited to discerning whether an applicant has a handicap. Understandably, a landlord is allowed to request that a physician verify an applicant’s handicap. A landlord is not, however, permitted to require the applicant to provide the landlord with a description of his handicap. By requesting a description of Robards’s disability, Cotton Mill exceeded the scope of the permissible inquiry allowed by [HUD’s regulation in §] 100.202(c)(2).

Id. at 954.

355. Consent order, *United States v. Resurrection Ret. Cmty., Inc.*, No. 02-CV-7453 (N.D. Ill. Oct. 17, 2002), at <http://www.usdoj.gov/crt/housing/documents/resurrectsettle.htm> (on file with the Iowa Law Review). In this case, the Justice Department accused a large, market-rate retirement complex of violating the FHA by, inter alia, inquiring about the severity of applicants’ disabilities and requiring disabled applicants to submit to a medical assessment, practices that the defendant agreed to abandon in the consent decree. For a further description of this case, see *supra* text accompanying notes 333–35. Other FHA cases successfully challenging disability-related inquiries in non-subsidized housing include *HUD v. Wilmette Real Estate*, 2000 WL 1478457 (HUD ALJ Oct. 3, 2000) (described *supra* note 334); see also *Williams*, 2A Fair Hous.–Fair Lending at ¶ 25,007, at 25,114–18 (finding that a non-subsidized landlord’s handicap-related questions to current tenant would be prohibited by the FHA, but for their being excused in the particular circumstances of this case by the “direct threat” defense of § 3604(f)(9)).

356. In addition to the cases cited *supra* notes 353–55, see, for example, the Waverly Heights, Ltd. Medical-Self Evaluation Form, which requires applicants to disclose their physical and mental impairments and all surgical procedures, hospitalizations, serious illnesses, and medications used (on file with the Iowa Law Review). See also *infra* note 359.

357. See *supra* notes 111, 116, and accompanying text (noting that Congress sought in the 1988 FHAA to end the residential segregation and isolation of disabled persons in much the same way it sought to end racially segregated neighborhoods in the 1968 FHA); *infra* note 388 and accompanying text (noting that the FHA generally forbids race-based application inquiries).

to the assisted-care or nursing-home facility.”³⁵⁸ Such facilities have an obvious incentive to screen their applicants through health-related inquiries.³⁵⁹ As with the “independent living” requirement, however, it seems unlikely that a provider’s desire to maintain its traditional fee structure and related financial benefits would be sufficient justification for creation of an exemption from the FHA’s ban on disability-related inquiries.³⁶⁰

A more plausible defense that might be available for some ALFs and CCRCs is that they must be permitted to inquire into an applicant’s health care needs in order to comply with applicable state regulations designed to insure that residents receive an appropriate “level of care” (i.e., that the facility would be in violation of such regulations if it failed to screen out people whose medical, nursing, or personal care needs exceeded the level for which it is licensed).³⁶¹ Putting aside the difficult question of whether such “level of care” regulations are truly in the best interests of disabled homeseekers,³⁶² it must be conceded that a facility faced with having to

358. FROLIK, *supra* note 12, § 8.01, at 8-2.

359. Indeed, one commentator has recently suggested that if the FHA’s “no inquiry” precedents are applied to the senior housing industry:

the whole CCRC model might be called into question If a CCRC cannot make inquiries and make determinations about a person’s ability to live independently, then it cannot effectively provide a continuum of care If the illegal inquiry theory were to be adopted by the court, CCRCs would have to completely reevaluate their entire residency policy, which could lead to negative financial results, or could tempt them to use other legal residency requirements as a pretext for excluding the “nonyouthful elderly.”

Sturm, *supra* note 100, at 128–31.

360. Congress clearly intended that a housing provider’s rule or practice which discriminates against people with disabilities could not be justified under the FHA “simply because that is the manner in which such rule or practice has traditionally been constituted.” 1988 *House Report*, *supra* note 116, at 25. Furthermore, if this statute does indeed bar senior housing providers from making the type of health-related inquiries they feel are needed to offer a financially viable “bundled-fee” care package, such providers would certainly not be prevented from providing a “continuum of care effectively,” compare with *supra* note 358, but they might well decide to “unbundle” their fees, which would mean that a resident’s ultimate health-care costs will be more individualized and thus less predictable at the initial move-in phase.

361. See *supra* notes 338–39 and accompanying text for more on state “level of care” regulations.

362. Some advocates who believe that self-determination concerning one’s housing and services ought to be accorded a higher value challenge the traditional approach to resident well-being reflected in “level of care” regulations. See, e.g., NATALIE M. DUVAL & CHARLES MOSELEY, NEGOTIATED RISK AGREEMENTS IN LONG-TERM SUPPORT SERVICES (2001); see also Michael Allen & Eric Carlson, *Can’t We All Just Get Along: A Friendly Argument About Discrimination in Long-Term Care* 14(3) NAELA NEWS 1 (May/June 2002). These advocates argue that residents should be permitted to assume some risk in order to maximize opportunities for housing and care in a setting of their choice. *Id.* For example, an older person or a person with a disability might be willing to forego some of the services or supports that other residents enjoy in order to live in a facility that is attractive for other reasons (e.g., proximity to friends and relatives),

choose between obeying the “no inquiry” commands of the FHA and the regulations of its state licensing agency has a real dilemma. This is not to say that state regulatory laws can trump the commands of a federal statute, a position obviously inconsistent with the Supremacy Clause.³⁶³ Rather, the argument would be that courts should interpret the FHA in a flexible way that does not conflict with state health regulations, on the theory that Congress did not intend the federal statute to override these regulations.³⁶⁴

prompting that individual to agree to arrange for her own services and supports (e.g., through a personal care attendant).

The ALF industry has responded by offering “negotiated risk” agreements by which residents “give up their right to sue the assisted living facility in exchange for its accommodation of a resident choice that might be more likely to cause harm than the alternative preferred by the [provider].” DUVAL & MOSELEY, *supra*, at 3; *see also* GENERAL ACCOUNTING OFFICE, GAO/HEHS-97-93, LONG-TERM CARE: CONSUMER PROTECTION AND QUALITY-OF-CARE ISSUES IN ASSISTED LIVING 6 (1997), at <http://www.gao.gov/archive/1997/he97093.pdf> (on file with the Iowa Law Review); Marshall B. Kapp & Keren Brown Wilson, *Assisted Living and Negotiated Risk: Reconciling Protection and Autonomy*, 1 J. ETHICS, L., AND AGING 11 (1995); Allen A. Lynch, II & Sarah A. Teachworth, *Risky Business: The Enforceability and Use of Negotiated Risk Agreements*, 1 SENIORS HOUS. & CARE J. 3, 4 (2002). Obviously, such agreements could prove problematic in some cases. *See, e.g.*, Bruce Vignery & Zita Dresner, *Troubling Assisted Living Facility Issues: Negotiated Risk Agreements*, VII (4) ELDER L.F. 10 (1995). On the other hand, they might allow the admission of an individual who would otherwise be assigned to a higher level of care, such as a nursing home. *See, e.g.*, Edelstein, *supra* note 98, at 380. Still, the very flexibility to evade generally applicable regulatory limitations on admissions is worrisome to some commentators. *See, e.g.*, Eric Carlson, *In the Sheep's Clothing of Resident Rights: Behind the Rhetoric of 'Negotiated Risk' in Assisted Living*, NAELA Q. 1 (Spring 2003) (arguing that overly broad negotiated risk agreements are more likely to simply expand market share of ALF and CCRC providers while shielding them from liability for matters for which they should be held accountable). A forthcoming report from the U.S. Department of Health and Human Services on “Negotiated Risk in Assisted Living” may shed further light on this issue. *See Government Research on Assisted Living Released*, NORTHEAST NETWORK HEALTHCARE REV. (July 9, 2004) (noting that this HHS report is scheduled to be released in November 2004), available at http://www.healthcarereview.com/back_issues/articles.php?show=424 (last visited July 9, 2004) (on file with the Iowa Law Review).

363. *See, e.g.*, *Robards v. Cotton Mill Ass'n*, 677 A.2d 540 (Me. 1996) (holding that under the Supremacy Clause, HUD's regulations governing disability-related inquiries supersede a state law provision dealing with the same subject); *see also* 42 U.S.C. § 3615 (2000) (declaring that any state or local law “that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid”); *N.J. Rooming & Boarding House Owners v. Asbury Park*, 152 F.3d 217, 221 (3d Cir. 1998) (striking down as inconsistent with the FHA city licensing ordinances allegedly enacted to protect elderly and disabled residents of rooming and boarding houses because they were “freighted with discriminatory intent” and did not “allow handicapped persons to live in the residences and communities of their choice”); *United States v. Wisconsin*, 395 F. Supp. 732 (W.D. Wis. 1975) (striking down state's anti-testing law on Supremacy Clause grounds because it conflicted with the FHA). For the subsequent history of the *Robards* litigation, *see supra* note 354.

364. *See, for example*, *Bangerter v. Orem City*, 46 F.3d 1491, 1505 (10th Cir. 1995), which, in the context of a clash between the FHAA and city restrictions on housing for persons with disabilities, noted in dicta “the importance of leaving room for flexible solutions to address the complex problem of discrimination” and concluded that:

Indeed, even some advocates for ALF residents believe that FHA mandates should be eased when necessary to protect the health and safety of such residents.³⁶⁵

We believe that the apparent dilemma of long-term residential care facilities in having to comply both with the FHA and state “level of care” regulations may be more imagined than real and is certainly capable of being resolved without disregarding the FHA. Because these facilities provide both housing and health care, the key in deciding whether a health-related inquiry is permitted lies in identifying which part of the services offered dictates such an inquiry. Recall that, for purposes of determining whether an applicant is to be admitted to housing, the HUD regulations strictly limit health-related inquiries, unless that information is necessary to determine whether an applicant is eligible for that housing because it is available only to persons with a disability.³⁶⁶ This latter exception means that a long-term care facility should be able to obtain health-related information to the extent it is necessary to determine whether an applicant falls within the level of care for which admission is sought. Thus, for example, the required information should be minimal for applicants to the “independent living” section of a CCRC, since these individuals are not requesting any medical care at the time of admission.³⁶⁷ On the other hand, more

the FHAA should not be interpreted to preclude special restrictions on the disabled that are really beneficial to, rather than discriminatory against, the handicapped. . . . [R]estrictions that are narrowly tailored to the particular individuals affected could be acceptable under the FHAA if the benefit to the handicapped in their housing opportunities clearly outweigh whatever burden may result to them.

Id. at 1504. *Accord* Marbrunak, Inc. v. Stow, 974 F.2d 43, 47 (6th Cir. 1992) (described *infra* note 411).

365. See, e.g., Allen & Carlson, *supra* note 362. Obviously, there is another side to this issue, as the Allen & Carlson article demonstrates. For example, some have argued that, while states may have a legitimate interest in licensing and monitoring medical, nursing, and personal care services, they have no more interest in regulating the housing component of the services provided in housing-and-services facilities like ALFs than they do with respect to any other landlord-tenant relationship. See, e.g., NATIONAL LEAGUE OF CITIES, FAIR HOUSING: THE SITING OF GROUP HOMES FOR PEOPLE WITH DISABILITIES AND CHILDREN 28–29 (1999) (giving the position of the Coalition to Preserve the Fair Housing Act). Furthermore, others have suggested that ALFs themselves created this dilemma by providing in a single facility both housing and medical services that involve an inherent contradiction in legal obligations. See, e.g., Henry Korman et al., *Housing as a Tool of Coercion*, in COERCION AND AGGRESSIVE COMMUNITY TREATMENT 95 (Deborah L. Dennis & John Monahan eds., 1996); Jennifer Honig, *Impact of Community Residence Tenancy Law on the Use of Housing to Coerce Treatment*, THE ADVISOR, Spring 1997, at 17.

366. See *supra* notes 346–49 and accompanying text.

367. Similarly, nursing homes should need only a relatively small amount of such information at the admission stage, because such facilities are required to be able to provide care for a broad spectrum of medical conditions. See, e.g., 42 U.S.C. § 1396r(b)–(c) (2000)

information would presumably be needed from applicants for ALFs and other facilities that are licensed to offer an intermediate level of care. Whatever the care-level offered, however, the information sought should not exceed what is needed to determine threshold eligibility and whether an applicant needs and can take advantage of the services offered.

Thus, we believe that ALFs and other providers of long-term residential care should take steps to clearly separate their health-related inquiries into two stages. The admissions stage would be limited to a narrow set of inquiries designed solely to determine an applicant's eligibility for living in the facility. The second stage could involve more detailed health-related inquiries by physicians, nurses, and other health care staff designed to insure that residents receive proper care. This more detailed information should be protected from use by the facility's non-medical staff and in particular by those employees who are responsible for making admission and eviction decisions. By separating eligibility inquiries from those necessary for care decisions, a residential-plus-care facility could comply with both FHA and state "level of care" requirements. Furthermore, there is no legitimate business reason to conflate these sets of inquiries; health-care personnel may need full access to a resident's medical information, but admissions staff do not.³⁶⁸

To summarize, the Congress that passed the 1988 FHAA intended to make disability irrelevant in all but a narrow range of housing admission decisions.³⁶⁹ The HUD regulations implementing this law essentially bar housing providers from asking health-related questions as a means of screening applicants, excepting only those inquiries designed to *favor* people with disabilities for admission. Many ALFs, CCRCs, and other senior housing providers, however, have chosen to ignore this law. To the extent they have done so based on reasons other than legitimate "level of care" concerns, they are simply inviting unwinnable litigation; to the extent that "level of care" concerns have dictated their behavior, they would be well advised to adjust their procedures to restrict the nature and use of health-related inquiries so as not to bar admission to otherwise qualified people with disabilities.

d. Reasonable Accommodations

An additional consideration in cases involving applicants with disabilities is how a senior housing facility's admissions process is affected by § 3604(f)(3)(B)'s requirement that housing providers "make reasonable

(imposing this requirement on nursing homes according to provisions of the Nursing Home Reform Act).

368. For a more detailed description of the suggestion made in this paragraph, see Eric Carlson & Michael Allen, *Why Does the Business Manager Need My Complete Medical History? An Examination of Housing Discrimination in Long-Term Care*, 16 NAELA NEWS 1, 8 (Mar. 2004).

369. See *supra* notes 116, 127, 215–19 and accompanying text.

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.”³⁷⁰ Examples of required accommodations under § 3604(f)(3)(B) are waiver of an apartment complex’s “no pet” rule to allow a blind applicant to live there with a seeing eye dog and waiver of a “first come/first served” rule concerning parking spaces to allow a mobility-impaired applicant to have a reserved space near his unit.³⁷¹

The “reasonable accommodation” requirement is, of course, applicable not only at the admissions stage, but throughout a disabled tenant’s residency, and further examples of how § 3604(f)(3)(B)’s mandate might apply to senior housing during an on-going tenancy are discussed *infra* in Part III.D.2. Here, it is sufficient to note that four types of cases would seem to arise most frequently at the admissions stage.

The first involves needed changes in the admissions process itself, where, for example, an applicant with a disability finds it difficult to fill out the necessary papers by himself or to attend an admission interview in a particular location, but would be able to supply the required information or interview in another way.³⁷² A second category is made up of cases where an applicant requests a reduction in the fees charged by the complex, either because his disability makes it difficult for him to pay in general or because he cannot benefit from the particular service for which a fee is charged.³⁷³ The third type of case includes the “no pet” and “parking space” examples and involves adjustments to a complex’s rules that define the terms and conditions of occupancy; another example of this type of accommodation in age-restricted senior housing would be allowing in an “under-age” household member either because he is needed to help a disabled applicant or because he is by virtue of his own disability dependent on living with the applicant.³⁷⁴ Finally, a housing provider may not rely on the “direct threat” defense under § 3604(f)(9) to reject an applicant unless the provider can prove that the threat posed by the applicant could not be effectively mitigated by a reasonable accommodation.³⁷⁵

370. 42 U.S.C. § 3604(f)(3)(B) (2000).

371. See 24 C.F.R. § 100.204(b), ex. (1), (2) (2000).

372. See, e.g., Gaona v. Town & Country Credit, 324 F.3d 1050, 1056–57 (8th Cir. 2003) (suggesting that entities covered by the FHA might be obligated to provide a sign language interpreter as a reasonable accommodation for deaf applicants in refusal-to-sell and refusal-to-rent claims under § 3604(f)).

373. See *infra* notes 380–83 and accompanying text.

374. See, e.g., Canady v. Prescott Canyon Estates Homeowners Ass’n, 60 P.3d 231 (Ariz. Ct. App. 2002) (holding that the defendant’s refusal to waive its 55-or-older age requirement to allow 26-year-old developmentally disabled son to reside with age-qualified parents violated the FHA’s “reasonable accommodation” mandate); see also cases cited *infra* notes 432, 437.

375. See *supra* note 219 and accompanying text. Generally, the cases applying this principle have dealt with applicants and residents with a mental disability, such as Alzheimer’s disease,

It is difficult to provide general guidance with respect to “reasonable accommodation” claims, because determining whether a particular accommodation is mandated by § 3604(f)(3)(B) is a “highly fact-specific” endeavor requiring a “case-by-case” determination.³⁷⁶ The test is a practical one that often requires balancing the cost of the requested accommodation to the housing provider against its benefit for the claimant.³⁷⁷

It is clear, however, that housing providers need not make accommodations that impose “undue financial or administrative burdens” on them or require a “fundamental alteration” in the nature of their programs.³⁷⁸ Thus, for example, a retirement community is not required to offer new supportive services, such as counseling or medical care, that would not otherwise be available.³⁷⁹

Furthermore, applicants whose financial resources are limited due to their handicap are generally not thereby entitled to demand relief from the essential financial requirements of the housing being sought.³⁸⁰ Still, the

whose problematic behavioral manifestations might be curbed by some method that would qualify as a reasonable accommodation. *See, e.g.,* *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002 (3d Cir. 1995) (dealing with nursing home’s rejection of applicant with Alzheimer’s disease that caused her to occasionally behave in a combative and threatening manner); discussion *supra* note 219.

376. *E.g.,* *Groner v. Golden Gate Garden Apartments*, 250 F.3d 1039, 1044 (6th Cir. 2001); *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 838 (7th Cir. 2001); *United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1418 (9th Cir. 1994); *cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (interpreting similarly worded requirement in the ADA to require “an individualized inquiry . . . to determine whether a specific modification for a particular person’s disability would be reasonable under the circumstances as well as necessary for that person”).

377. *E.g.,* *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).

378. *See, e.g.,* *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1157 (9th Cir. 2003); *Groner*, 250 F.3d at 1044.

379. *See* Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3249 (Jan. 23, 1989) (providing HUD commentary on its regulation interpreting the FHA’s “reasonable accommodation” requirement).

380. *See, e.g.,* *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d Cir. 1998) (rejecting (in a 2-1 decision) § 3604(f)(3)(B) challenge to landlord’s policy against accepting Section 8 tenants, because, according to the majority, “[e]conomic discrimination . . . is not cognizable as a failure to make reasonable accommodations” and § 3604(f)(3)(B) cannot be invoked “every time a neutral policy imposes an adverse impact on individuals who are poor”); *Cal. Mobile Home Park*, 29 F.3d at 1417 (noting in § 3604(f)(3)(B) case that “residential fees that affect handicapped and non-handicapped residents equally . . . are clearly proper”); *HUD v. Hous. Auth.*, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,161, at 26,292 (HUD ALJ June 19, 2002) (rejecting a § 3604(f)(3)(B) claim for outside-meals-expense reimbursement by a person whose disability prevented him from preparing his own meals, because complainant “simply wanted to have more money to spend” and “it is not the objective of the [FHA] to enhance the economic condition or quality of life of the handicapped person not directly related to his housing needs”). On the general right of housing providers to insist that their financial standards be met by applicants without incurring FHA liability, see *supra* notes 117–19 and accompanying text.

The *Salute* majority and certain decisions by the Seventh Circuit go even farther by holding that § 3604(f)(3)(B) can only be used to challenge rules and policies “that hurt

basic thrust of the “reasonable accommodation” requirement is that an applicant with a disability may well be entitled to waiver of a housing development’s generally applicable rules,³⁸¹ and this, in turn, may require the development to incur some costs it otherwise would not have experienced.³⁸² Thus, for example, a development may be required to waive its “no co-signer” policy or make some other appropriate accommodation for a disabled applicant who otherwise would not be able to meet the financial requirements for admission, at least if this does not substantially increase the risk of non-payment.³⁸³

Apart from the specifics of individual cases, retirement communities and other types of housing catering to older persons should, at the very least, be aware that their clientele includes a large portion of persons who are, or eventually will be, entitled to assert rights under § 3604(f)(3)(B).³⁸⁴ Such housing providers, therefore, would be well advised to have a system in place for processing and evaluating reasonable accommodation claims, and this system should be designed to accommodate applicants as well as current residents.

handicapped people by reason of their handicap, rather than that hurt them solely by virtue of what they have in common with other people, such as a limited amount of money to spend on housing.” *Good Shepherd Manor Found. v. Momence*, 323 F.3d 557, 561 (7th Cir. 2003) (quoting *Hemisphere Bldg. Co. v. Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999)); *accord Salute*, 136 F.3d at 301–02. This view was rejected by the Ninth Circuit in *Giebeler*, 343 F.3d at 1149–56, at least for claims brought by individuals whose handicaps substantially limit their ability to work and therefore directly cause their reduced financial ability. According to *Giebeler*, the contrary view of *Salute* and *Hemisphere* is inconsistent with the Supreme Court’s subsequent ADA decision in *U.S. Airways v. Barnett*, 535 U.S. 391 (2002), which indicated “that accommodations may adjust for the practical impact of a disability, not only for the immediate manifestations of the physical or mental impairment giving rise to the disability.” *Giebeler*, 343 F.3d at 1150. Even *Giebeler*, however, conceded that § 3604(f)(3)(B) probably cannot require “mandating lower rents for disabled individuals.” *Id.* at 1154; *see also id.* at 1159 (noting that the § 3604(f)(3)(B) claimant there “was in no way trying to avoid payment of the usual rent”).

381. *E.g.*, *Giebeler*, 343 F.3d at 1150 (stating that required accommodations under § 3604(f)(3)(B) “may indeed result in a preference for disabled individuals over otherwise similarly situated non-disabled individuals”).

382. *E.g.*, *id.* at 1152–53; *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 334–35 (2d Cir. 1995); *Cal. Mobile Home Park*, 29 F.3d at 1416–18; *see also Samuelson v. Mid-Atlantic Realty*, 947 F. Supp. 756, 759–62 (D. Del. 1996) (holding that a disabled tenant with limited financial means may invoke § 3604(f)(3)(B) to seek waiver of landlord’s generally applicable lease termination fees).

383. *See, e.g.*, *Giebeler*, 343 F.3d at 1143 (holding that a financially unqualified disabled applicant whose financially qualified mother offered to be responsible for the rent may challenge an apartment complex’s “no cosigner” policy under § 3604(f)(3)(B)); *Anast v. Commonwealth Apartments*, 956 F. Supp. 792, 801 (N.D. Ill. 1997) (holding that § 3604(f)(3)(B) may require landlord to accept late rent payment from mentally disabled tenant). *But see Schanz v. Vill. Apartments*, 998 F. Supp. 784 (E.D. Mich. 1998) (holding that a landlord’s policy of not accepting guarantors does not constitute an unlawful refusal to provide reasonable accommodation).

384. *See supra* notes 32–39 and accompanying text.

3. Admissions Inquiries Regarding Non-Handicapped Bases of Discrimination

As noted above in Part III.C.2.c, the FHA's basic ban on discrimination against persons with disabilities has been interpreted to include a prohibition against making certain medically related inquiries at the admission-to-housing stage. Similarly, admissions-related inquiries based on race and some of the other bases of discrimination outlawed by the FHA have been held to violate § 3604(c), which bans every sale- and rental-related statement that indicates a discriminatory preference or limitation. Section 3604(c) was considered earlier in connection with its prohibition of discriminatory advertising,³⁸⁵ but here it is noted as a source of potential liability when applied to a senior housing project's written admissions requirements, statements, and inquiries on an application form, or questions asked by an admissions officer that relate to a basis of discrimination outlawed by the FHA.³⁸⁶

For example, in *Soules v. HUD*,³⁸⁷ the Second Circuit opined that § 3604(c) would be violated by any inquiry by a housing provider concerning a prospective tenant's race, because "[t]here it is simply no legitimate reason for considering an applicant's race."³⁸⁸ Of course, a senior housing facility that qualifies for the "housing for older persons" exemption would be entitled to inquire about an applicant's familial status.³⁸⁹ Given the probable

385. See *supra* Part III.B.

386. See, e.g., *Armstrong v. Senior Citizens Hous. of Ann Arbor, Inc.*, 317 N.W.2d 255, 259 (Mich. Ct. App. 1982) (noting, in reviewing retirement complex's written admissions requirements, that "most of the provisions of defendant's standards for admission violate . . . on their face" the § 3604(c)-like part of the state's anti-disability discrimination statute).

387. 967 F.2d 817 (2d Cir. 1992).

388. *Id.* at 824; accord *Jancik v. HUD*, 44 F.3d 553, 557 (7th Cir. 1995) (holding that the landlord violated § 3604(c) by, inter alia, inquiring about homeseekers' race in phone interviews); *Hous. Rights Ctr. v. Donald Sterling Corp.*, 274 F. Supp. 2d 1129, 1141-42 (C.D. Cal. 2003), *aff'd*, 84 Fed. Appx. 801 (9th Cir. 2003) (holding that national origin questions on application form for apartment services violates § 3604(c)); *HUD v. Roberts*, 2A Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 25,151, at 26,218 (HUD ALJ Jan. 19, 2001) (holding that landlord violated § 3604(c) by asking the race and nationality of potential tenants); *HUD v. Blackwell*, 2A Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 25,001, at 25,009 (HUD ALJ Dec. 21, 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990) (holding that homeowner violated § 3604(c) by asking broker the race of potential buyers).

In *Soules*, the Second Circuit distinguished racial inquiries from those involving familial status, which the court held should not be considered per se violations of § 3604(c) because there are situations in which it is legitimate to make inquiries about children in a prospect's household (e.g., because of local zoning regulations or neighborhood conditions). *Soules*, 967 F.2d at 824. According to *Soules*, the legality of inquiries that might have some legitimate basis other than prohibited discrimination are to be judged on the basis of a variety of factors, including the context of the conversation and the speaker's intent. *Id.* at 824-25.

389. Indeed, age-related questions may be required for a facility to qualify for this exemption. See *supra* note 190. The FHA's "housing for older persons" exemption is discussed *supra* Part II.B.2.a.

per se illegality of most handicap-related inquiries³⁹⁰ and of those regarding race, color, and national origin,³⁹¹ this leaves sex and religion.

Application forms that include an inquiry about a would-be resident's sex are no doubt used by many housing developments for older persons, and no reported case has ever held that such an inquiry violates the FHA.³⁹² The legality of an inquiry about an applicant's religion is more problematic, unless, of course, the housing facility qualifies for the religious exemption and is therefore entitled to give preference to its co-religionists.³⁹³ For all other housing, the question would seem to be analogous to a racial inquiry and therefore per se illegal, unless situations could be identified in which housing providers might legitimately use such information.³⁹⁴

This is a possibility. In *Knutzen v. Eben Ezer Lutheran Housing Center*,³⁹⁵ applicants who were denied admission to a housing project for seniors and physically disabled persons sued the landlord on a number of theories, including religious discrimination under the FHA based on the defendant's having inquired into the plaintiffs' church affiliation and pastor's name on the application form. The court rejected this claim, finding that the defendant's refusal to rent to the plaintiffs was based on factors that had nothing to do with their religious affiliation and that the defendant was seeking religious information about its applicants "for a reasonable, secular purpose, namely, to allow the managers of the project to notify a tenant's clergyman in the event of death or serious illness."³⁹⁶

As a precedent, however, *Knutzen* is less than conclusive on the legality of religious inquiries, because it was based solely on § 3604(a) and did not even discuss § 3604(c),³⁹⁷ which subsequent appellate decisions have applied

390. See *supra* Part III.C.2.c.

391. See cases cited *supra* note 388.

392. A gender-based question in a housing application seems an unlikely method of facilitating illegal discrimination, if for no other reason than that the information sought could so easily be obtained in other ways (e.g., by observing the candidate in a personal interview). In addition, following the logic of the *Soules* decision, see *supra* note 388, at ¶ 2, such an inquiry would not be considered a per se violation of § 3604(c), because there are situations in which a retirement community might legitimately use such information (e.g., to plan activities that might appeal to the sexes differently). See *infra* note 417 and accompanying text.

393. The FHA's religious exemption is discussed *supra* in Part II.B.2.b. Even as to a senior housing facility that qualifies for this exemption, there is some question whether the types of discrimination allowed include those condemned by § 3604(c), see *supra* note 201 and accompanying text, although it would seem, as a practical matter, that a qualifying facility would have to be allowed to ascertain its would-be residents' religion as a necessary corollary of its exempt status.

394. See *supra* note 388, para. 2 (discussing *Soules*' view that the potential existence of legitimate uses of familial status information might justify an inquiry about this status).

395. 617 F. Supp. 977, 983–84 (D. Colo. 1985), *aff'd*, 815 F.2d 1343 (10th Cir. 1987).

396. *Id.* at 984.

397. See *id.* at 983–84.

quite strictly against racial inquiries.³⁹⁸ Thus, even if a religious inquiry is not considered *per se* illegal for the reasons set forth in *Knutzen*, it might still trigger liability under § 3604(c) if the overall context, including the inquirer's intent, suggests illegal discrimination.³⁹⁹ Therefore, a housing development for seniors that uses such questions on its application form would be well advised both to make clear why it is asking such questions and that prospective residents are free not to respond to such questions without jeopardizing their admission.

4. Steering Within a Development: Assigning Units Based on FHA-Prohibited Factors

"Steering" is the practice of directing prospective homeseekers to different areas on the basis of race or some other factor outlawed by the FHA.⁴⁰⁰ Illegal steering under the FHA may take a variety of forms, one of which is that a housing provider reserves certain units or areas for one race while directing other applicants to different areas.⁴⁰¹ Certainly, a senior housing development could not employ such an assignment process based on race, color, or national origin without clearly violating the FHA. Religious steering would also seem to be illegal, even for those communities operating under the FHA's religious exemption, because this exemption, by its terms, does not authorize discrimination within a complex among religious groups if applicants of another religion are permitted to become residents.⁴⁰² On the other hand, more difficult issues are raised by some forms of sex-based and handicap-based steering within a complex.

Can ALFs, CCRCs, or nursing homes assign women to particular floors or areas and men to others without violating the FHA?⁴⁰³ There is no case law on this point, reflecting the general dearth of sex discrimination decisions under the FHA.⁴⁰⁴ Those interpretive sources that are available, however, suggest that sex-based steering would violate the FHA,⁴⁰⁵ meaning,

398. See appellate cases cited *supra* note 388.

399. See, e.g., *Jancik v. HUD*, 44 F.3d 553, 557 (7th Cir. 1995); *Soules v. HUD*, 967 F.2d 817, 824-25 (2d Cir. 1992).

400. See, e.g., *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 94 (1979). See generally SCHWEMM, *supra* note 6, § 13:5, at 13-13 to 13-18.

401. See, e.g., cases cited in SCHWEMM, *supra* note 6, § 13:5, n.8.

402. See *supra* notes 200-01 and accompanying text.

403. For an example of this phenomenon, see *Senior Class*, *supra* note 72, at 49 (identifying a "men only" CCRC).

404. Apart from sexual harassment cases, fewer than 20 FHA decisions involving claims of sex discrimination have been reported. See SCHWEMM, *supra* note 6, § 11C:1, at 11C-1 to 11C-6. A few examples are cited *supra* note 298.

405. See 24 C.F.R. § 100.70(c)(4) (2003) (steering practices outlawed by the FHA include "[a]ssigning any person to a particular section of a . . . development, or to a particular floor of a building, because of . . . sex").

for example, that a senior housing facility could not deny or delay a female applicant's admission because the only unit available is on a male-designated floor.

There is, however, some reason to believe that not all sex-based housing restrictions are to be treated exactly the same as would their race-based counterparts. For example, HUD has opined that the FHA's prohibition of sexually discriminatory advertising in § 3604(c) does not apply to cases "where the sharing of living areas is involved."⁴⁰⁶ This exception, however, does not apply to "the rental of separate units in a single or multi-family dwelling."⁴⁰⁷ Thus, the "shared living" exception could not be invoked by a multi-family senior housing facility that offers residences in separate units. Even in shared-unit situations, such as those involving two-bed nursing home rooms, HUD's approval of a sex-based exception to the general command of nondiscriminatory treatment applies only to § 3604(c)'s ban on discriminatory advertising. Thus, HUD has apparently authorized providers of shared-unit housing to *advertise* a preference for one sex over the other, but not to actually *make* such a preference in admissions or unit assignments, thereby leaving the practice of sex-based steering by even shared-living facilities open to challenge.

With respect to handicap-based assignments, would the FHA allow a senior housing facility to assign, say, mobility-impaired applicants to particular floors or areas because they could thereby more easily reach the dining room or escape the building in an emergency? As noted above,⁴⁰⁸ the FHA generally permits handicap-based discrimination that favors people with disabilities, which means that a non-handicapped person could not

In addition to this regulation, there is a basic interpretive principle in sex-based cases under the FHA, derived from the fact that Congress added "sex" to the statute's list of prohibited bases of discrimination without providing any limits or exemptions, *see* 42 U.S.C. §§ 3604–3606, 3617 (2000), and *supra* note 114 and accompanying text, that such prohibitions should be read just as broadly as the FHA's bans on race, color, and national origin discrimination. *Cf.* L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (holding that Congress in Title VII "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" (quoting *Sprogis v. United Air Lines*, 444 F.2d 1194, 1198 (7th Cir. 1971)); *see also* 54 Fed. Reg. 3235–36 (Jan. 23, 1989) (providing HUD commentary on its FHA regulations concluding that the protections afforded new protected classes under the 1988 FHAA should be interpreted in the same manner as the protections provided to the FHA's other protected classes). Following this principle would make sex-based steering illegal. *Cf.* Hamad v. Woodcrest Condo. Ass'n, 328 F.3d 224, 233 (6th Cir. 2003) (relying on FHA race-based steering precedents as proper guide for determining the degree to which FHA prohibits steering based on familial status).

406. 54 Fed. Reg. 3309 (Jan. 23, 1989) (proposing FHA regulation that was later adopted as 24 C.F.R. § 109.20(b)(5)). Although this regulation has been removed, it is still viewed by HUD as a "helpful" source of FHA guidance. *See* Office of the Assistant Secretary for Fair Housing and Equal Opportunity, Regulatory Reinvention; Streamlining of HUD's Regulations Implementing the Fair Housing Act, 61 Fed. Reg. 14,378, 14,380 (Apr. 1, 1996).

407. 54 Fed. Reg. 3309 (Jan. 23, 1989).

408. *See supra* notes 304–07 and accompanying text.

complain about having his application turned down or delayed because the only available unit was in a handicap-only area. On the other hand, denying a “non-handicapped” unit to a person with a disability would be presumptively illegal, subject only to a potential “direct threat” defense.⁴⁰⁹ This defense, in turn, could only succeed if the housing provider had conducted an individualized evaluation of the applicant that produced reasonable grounds for concluding that assigning him to a unit in a “non-handicapped” area would indeed pose a direct threat to the health or safety of others.⁴¹⁰ It is an open question whether this defense could be invoked if the only danger were to the disabled resident himself,⁴¹¹ but even if such a threat-to-self defense were recognized, it is clear that housing providers may not assume that all individuals with disabilities pose such a threat.⁴¹²

In short, the very practice of creating “nonhandicapped” areas within a housing facility for older persons would invite liability under the FHA.

409. The FHA’s “direct threat” defense is discussed *supra* in Part II.B.2.c.

410. See *supra* notes 216–17 and accompanying text.

411. Although the language of the FHA’s “direct threat” exemption is limited to those concerns relating to the health and safety of “other individuals” and the property of “others,” see 42 U.S.C. § 3604(f)(9) (2000), some courts have opined that defendants may also be legitimately concerned with dangers to disabled residents themselves. See, e.g., *Bangerter v. Orem City*, 46 F.3d 1491, 1503–05 (10th Cir. 1995) (stating that the city may justify its special restrictions on group home for disabled persons either on the ground that they are required by public safety concerns or on the ground that they are actually beneficial to the home’s disabled residents); *Marbrunak, Inc. v. Stow*, 974 F.2d 43, 47 (6th Cir. 1992) (stating that the city may impose special safety standards on housing for developmentally disabled persons “so long as that protection is demonstrated to be warranted by the unique and specific needs and abilities of those handicapped persons”). This view, however, has not developed into a general doctrine that would permit housing providers to exclude people with disabilities from specific units. Cf. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78 (2002) (upholding EEOC’s regulation interpreting ADA’s “direct threat” defense to include threats-to-self as well as threats-to-others despite the fact that statutory language only explicitly mentions the latter as example of legitimate ground for job disqualification in an employment discrimination setting).

In an analogous area under the FHA, housing providers have been unsuccessful in justifying their discrimination against families with children on the ground that a particular unit might be unsafe for such a family. See, e.g., *Fair Hous. Cong. v. Weber*, 993 F. Supp. 1286, 1293–94 (C.D. Cal. 1997) (holding that safety concerns do not justify apartment complex’s policy of not renting second-floor-entry units to families with small children); *United States v. Grishman*, 818 F. Supp. 21, 22–23 (D. Me. 1993) (holding that the home owner’s refusal to rent house on a rocky ocean cliff to a family with small children is not excused by defendant’s concern that the property would pose a danger to the children); *HUD v. Bucha*, 2A Fair Hous.—Fair Lending (Aspen Law & Bus.) ¶ 25,046, at 25,455 (HUD ALJ May 20, 1993) (holding that landlord’s safety concerns for small children who might fall down steep stairs do not excuse discriminatory refusal to rent to family). As the court in *Grishman* concluded: “Nothing in the [FHA] permits the owner to determine that risks and circumstances of his dwelling and the neighborhood make it inappropriate for children. That decision is for the tenant.” *Grishman*, 818 F. Supp. at 23.

412. See, e.g., *Bangerter*, 46 F.3d at 1504–05; *Marbrunak, Inc.*, 974 F.2d at 47; *HUD v. Country Manor Apartments*, 2A Fair Hous.—Fair Lending (Aspen Law & Bus.) ¶ 25,156, at 26,254 (HUD ALJ Sept. 20, 2001).

Furthermore, whatever liability might be prompted by such disability-based steering could not be avoided by requiring applicants with disabilities either to sign a waiver for the risks identified or to provide for insurance to cover such risks, because this practice, itself, would amount to illegal discrimination in terms or conditions in violation of the FHA's § 3604(f)(2).⁴¹³

D. TERMS AND CONDITIONS DURING RESIDENCY

1. The FHA's Basic Mandates; Group-Focused Services

The FHA's § 3604(b) not only protects homeseekers in their efforts to secure housing on a nondiscriminatory basis, it also guarantees their right to equal treatment once they have become residents of that housing. This means, for example, that black tenants who are not permitted to use the swimming pool or laundry facilities to the same degree as whites have a claim under § 3604(b).⁴¹⁴ It also means that residents may not be evicted for FHA-prohibited reasons.⁴¹⁵

It is obvious that race and national-origin discrimination in the provision of services or facilities by a housing complex for older persons is barred by § 3604(b). The same would also be true for disability discrimination, and indeed an additional FHA provision—§ 3604(f)(3)(B)'s "reasonable accommodations" mandate—further ensures that tenants with disabilities have full and equal access to a development's facilities and services.⁴¹⁶ (A further discussion of the implications of these disability mandates is provided in the next section.)

Apart from these clear mandates, the most interesting issue under § 3604(b) for current residents of senior housing involves the provision of services that are of particular interest to certain FHA-protected classes, but not to others. Examples include religious activities geared to a particular

413. See, e.g., *Country Manor Apartments*, 2A Fair Hous.–Fair Lending ¶ 25,156, at 26,248. For a further discussion of such potential "terms and conditions" violations, see *infra* Part III.D.2.

414. See, e.g., *United States v. Sea Winds of Marco, Inc.*, 893 F. Supp. 1051, 1055 (M.D. Fla. 1995) (holding that § 3604(b) bars housing complex from enforcing renter-identification and monitoring policy only against Hispanic renters); cf. *Weber*, 993 F. Supp., at 1292 (holding that apartment complex's restriction on children's access to certain common areas violates § 3604(b)); *HUD v. Paradise Gardens*, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,037, at 25,388–91 (HUD ALJ Oct. 15, 1992) (holding that housing development's restrictions on swimming pool use by families with children violate § 3604(b)).

415. See *supra* note 315 and accompanying text.

416. See, e.g., 54 Fed. Reg. 3248 (Jan. 23, 1989) (commenting that § 3604(f)(3)(B) applies to services and would require a landlord to waive its rule against non-tenants using the laundry room to allow the friend of a disabled tenant to do the tenant's laundry); see also *Gourlay v. Forest Lake Estates Civic Ass'n*, 276 F. Supp. 2d 1222, 1233–34 (M.D. Fla. 2003) (opining that § 3604(f)(3)(B) provides additional protection beyond § 3604(b) in cases alleging handicap-based discriminatory services).

denomination and recreational opportunities designed for one sex (e.g., a women-only or men-only bridge night).⁴¹⁷

There is no FHA case law on the legality of providing such particular-interest services, nor do HUD's FHA regulations cast much light on the subject. According to the specific HUD regulation dealing with § 3604(b), it is unlawful to "deny or limit" housing-related services based on any FHA-prohibited factor, and the practices covered by this prohibition include "[l]imiting the use of privileges, services or facilities associated with a dwelling."⁴¹⁸ If this means that an actual denial or limitation of service is required to violate § 3604(b), then presumably a housing complex—even one not protected by the FHA's religious exemption⁴¹⁹—is permitted to offer single-denomination religious activities, at least if residents of other faiths are allowed to attend.⁴²⁰ On the other hand, excluding residents because of their sex from an activity would appear to run afoul of the HUD regulations.

Even the provision of single-denomination religious services, however, could become problematic if carried too far. A separate HUD regulation cautions against any conduct that restricts housing choice "so as to perpetuate, or tend to perpetuate, segregated housing patterns."⁴²¹ Actions barred by this provision include "[c]ommunicating to any prospective purchaser that he or she would not be comfortable or compatible with existing residents of a . . . development because of . . . religion."⁴²² It takes little imagination to conclude that a housing development for seniors which provides a substantial number of single-denomination religious activities would be engaged in conduct that tends to perpetuate a religiously segregated clientele and that communicates to prospective residents of other faiths that they would not be comfortable there.⁴²³

417. See, e.g., *Senior Class*, *supra* note 72 (referring to religious services); senior housing brochures cited *supra* note 254 (referring to single-sex activities).

418. 24 C.F.R. § 100.65(a), (b) (4) (2003).

419. The FHA's religious exemption is discussed *supra* Part II.B.2.b.

420. This conclusion is supported by HUD's guidance with respect to the FHA's prohibition of religiously discriminatory advertising, which lists "chapel on the grounds" and "kosher meals available" as examples of the types of services that housing providers are allowed to describe without prompting a claim of illegal advertising. See *supra* note 266 and accompanying text.

421. 24 C.F.R. § 100.70(a).

422. *Id.* § 100.70(c) (3).

423. Cf. *HUD v. Schuster*, 2A Fair Hous.—Fair Lending (Aspen Law & Bus.) ¶ 25,091, at 25,829, 25,834-35 (HUD ALJ Jan. 13, 1995) (holding that condominium president's statements to applicant that no other residents had children and that her children might be "a little uncomfortable" held to violate FHA by indicating a preference against families with children); see also *United States v. Badgett*, 976 F.2d 1176, 1178, 1180 (8th Cir. 1992) (holding that rental agent's statements to applicant with young child that apartment complex had no playground equipment and that no other children of the same age lived there were likely to discourage applicant and thereby helped establish prima facie case of familial status discrimination).

2. Specific Disability Issues During Residency; Eviction

Because of the correlation between aging and disabilities among seniors,⁴²⁴ a number of disability-specific issues are likely to arise during residency in senior housing. Two issues in particular have already resulted in a number of reported cases. One involves the eviction of tenants whose health needs or difficult behavior have grown beyond the landlord's capacity to serve or tolerate. The other involves restrictions on the use of motorized carts and other assistive devices. These situations may give rise to FHA claims either under the statute's guarantee of nondiscriminatory terms and conditions for people with disabilities in § 3604(f)(2), or its requirement of reasonable accommodations for disabled residents in § 3604(f)(3)(B), or both.⁴²⁵

The problems associated with evictions and involuntary transfers of seniors from nursing homes and subsidized rental housing have been well documented,⁴²⁶ but less attention has been paid to this topic in other types of senior housing, such as market-rate developments, ALFs, and CCRCs.⁴²⁷ As shown above, all senior housing covered by the FHA is barred from evicting tenants because they are disabled.⁴²⁸ Furthermore, even evictions based on nondiscriminatory and generally acceptable reasons—such as failure to pay the rent on time, unruly behavior, and poor housekeeping—may violate the FHA if the offending condition is attributable to the resident's disability and could be ameliorated by a reasonable accommodation under § 3604(f)(3)(B).⁴²⁹ Indeed, even an eviction because

424. See *supra* notes 32–39 and accompanying text.

425. See generally *supra* note 126 (regarding § 3604(f)(2)) and text accompanying note 127 (regarding § 3604(f)(3)(B)).

426. As to nursing homes, see, for example, Sally Brooks et al., *The Physician Decision-Making Process in Transferring Nursing Home Patients to the Hospital*, 154 ARCHIVES INTERNAL MED. 902, 905 (1994); Vicki Gottlich, *Protection for Nursing Facility Residents Under the ADA*, GENERATIONS, Winter 1994, at 43–47. As to rental housing, see, for example, Allen & Silverstein, *supra* note 342, at 39; Joseph W. McQuade, Note, *O'Brien Properties, Inc. v. Rodriguez: Upholding Statutory Eviction Protection For Elderly, Disabled, and Blind Tenants in Connecticut*, 24 CONN. L. REV. 599 (1992).

427. But see Edelstein, *supra* note 98, at 378–79 (dealing with evictions of ALF residents); Sturm, *supra* note 100 (dealing with involuntary transfers of CCRC residents).

428. See *supra* note 315 and accompanying text; eviction cases cited *supra* notes 219, 334.

429. See, e.g., cases cited *supra* note 214, para. 2; see also *Anast v. Commonwealth Apartments*, 956 F. Supp. 792, 801 (N.D. Ill. 1997) (described *supra* note 383); *Weisner v. 321 W. 16th St. Assocs.*, No. 00 Civ. 1423(RWS), 2000 WL 1191075, at *7–8 (S.D.N.Y. Aug. 22, 2000) (stating that § 3604(f)(3)(B) may bar eviction of tenant with mental disability so long as her poor housekeeping does not create a public nuisance); *Kendall v. Oxford Hous. Auth.*, No. 3:93CV124-SD, 1995 WL 1945488, at *1 (N.D. Miss. Sept. 25, 1995) (holding that § 3604(f)(3)(B) was not violated by eviction of mentally disabled tenant who continued to disregard public housing's housekeeping rules after various steps had been taken to accommodate him); cf. *Cobble Hill Apartments Co. v. McLaughlin*, 1999 Mass. App. Div. 166 (Mass. App. 1999) (rejecting eviction action under state law fails where landlord did not show it had first attempted to accommodate disabled resident); *Cordrey v. Hous. Auth.*, No. 80-C-881,

the resident's health has deteriorated to the point where her ALF or CCRC believes it can no longer provide an appropriate level of care may be challenged under the FHA's "reasonable accommodation" mandate.⁴³⁰

At least three reported decisions have dealt with restrictions on wheelchairs, motorized chairs, and similar assistive devices in senior housing.⁴³¹ The first was in 1996 in *Weinstein v. Cherry Oaks Retirement Community*,⁴³² where provisions of a state fair housing law virtually identical to the FHA's § 3604(f)(2) and § 3604(f)(3)(B) were held to have been violated by a senior housing provider's policy of requiring wheelchair users to transfer to regular chairs in order to eat in the dining room. The defendant in *Weinstein* was a "privately-owned, residential care facility for senior citizens" that was licensed as a "personal care boarding home" and that tried to justify its wheelchair restriction as necessary to comply with local fire regulations and as a way of allowing its staff "to observe residents regularly and to ensure that they were physically appropriate to remain at the boarding home."⁴³³ However, the real reason was determined to be so that the facility could "maintain a 'disability-free' atmosphere," which led the court to rule against the defendant based on its discriminatory intent and its refusal to reasonably accommodate Mr. Weinstein.⁴³⁴

The two other cases reached mixed results. In *United States v. Hillhaven Corp.*,⁴³⁵ a district court in 1997 held that a retirement community's policy of restricting motorized carts to certain common areas at meal times did not violate the FHA. The court found that the defendant's policy was motivated solely by a desire to ensure "the safety of all . . . residents, many of whom have their own handicaps of vision, hearing, or balance"; that the policy did not prevent the complainant from using her cart at other times and places, thereby allowing her to have "meaningful access to [the complex] as a

1980 U.S. Dist. LEXIS 17835, at *11 (D. Colo. Dec. 3, 1980) (blocking eviction of disabled tenant under the U.S. Housing Act and directing defendants to "bear in mind that they are dealing with an elderly woman who cannot take care of herself and her home with the skill, vigor, energy and alacrity of a young, healthy person").

430. See, e.g., *HUD v. Strawberry Point Lutheran Home for the Aging*, No. 07-01-0584-8, 2003 WL 1311336, at *8 (HUD ALJ Mar. 5, 2003) (described *supra* note 334). For more on the potential conflict between "level of care" requirements and the FHA, see *supra* notes 338-39, 361-68 and accompanying text.

431. In addition to the three decisions discussed *infra* text accompanying notes 432-38, see Consent order, *United States v. Savannah Pines, L.L.C.*, No. 401CV3303 (D. Neb. Apr. 30, 2003), at <http://www.usdoj.gov/crt/housing/documents/savannahsettle.htm> (on file with the Iowa Law Review) (providing that defendant-senior housing development will cease enforcing several restrictions it had placed on motorized scooters and wheelchairs and is enjoined from "restricting or otherwise interfering with the use of motorized assistive devices . . . in a manner inconsistent with the [FHA]").

432. 917 P.2d 336, 339-40 (Colo. Ct. App. 1996).

433. *Id.* at 337.

434. *Id.* at 339-40.

435. 960 F. Supp. 259, 263-64 (D. Utah 1997).

whole”; and that whatever discriminatory effect the policy may have had on mobility-impaired persons was justified by its “genuine business need” and the absence of any “less restrictive alternative.”⁴³⁶

On the other hand, in *HUD v. Country Manor Apartments*,⁴³⁷ a senior housing facility was held to have engaged in disability discrimination in violation of the FHA by requiring its residents who used motorized wheelchairs to obtain liability insurance. The facility failed in its attempt to justify this policy as a way of protecting its residents’ health and safety, because it had no “empirical basis to conclude that operators of motorized wheelchairs pose a substantial risk of harm to themselves or others” and therefore its policy simply reflected “improper stereotyping.”⁴³⁸

Taken together, *Weinstein*, *Hillhaven*, and *Country Manor* are not that difficult to reconcile—the liability determinations in all three were highly fact-based—and indeed form a body of precedent that actually gives substantial guidance to senior housing providers. The unifying theme is that such providers are permitted to restrict their residents’ use of wheelchairs and other assistive devices only if the restrictions are based on demonstrable health and safety concerns and even then, only if they are limited in scope and allow mobility-impaired residents the highest possible degree of access to the property’s facilities.

E. OTHER ISSUES

1. Accessibility: Reasonable Modifications and New Construction Requirements

In amending the FHA to prohibit handicap discrimination, Congress added two provisions designed to make dwellings more accessible to people with disabilities by changing the physical construction of housing. These provisions—§ 3604(f)(3)(A) and § 3604(f)(3)(C)—require, respectively, that handicapped persons be allowed to make any “reasonable modifications” that may be necessary for their “full enjoyment of the premises” and that most new multifamily housing be designed and constructed to include seven specified accessibility features.⁴³⁹

436. *Id.* at 261, 263–64.

437. 2A Fair Hous.—Fair Lending (Aspen Law & Bus.) ¶ 25,156, at 26,252–54 (HUD ALJ Sept. 20, 2001).

438. In support of the general proposition that a senior housing provider cannot require its disabled residents to purchase liability insurance as a condition of engaging in a particular activity absent evidence of the safety risks of that activity, see also *HUD v. Twinbrook Vill. Apartments*, 2A Fair Hous.—Fair Lending (Aspen L. & Bus.) ¶ 25,157, at 26,265 (HUD ALJ Nov. 9, 2001) (holding that a landlord’s refusal to permit construction of accessibility ramps unless wheelchair users purchased liability insurance violates the FHA).

439. 42 U.S.C. § 3604(f)(3)(A), (C) (2000). In addition to these FHA mandates, some senior housing may also be subject to accessibility obligations under two other federal statutes, section 504 of the 1973 Rehabilitation Act and the 1990 Americans with Disabilities Act. See

The modifications authorized by § 3604(f)(3)(A) must be made “at the expense of the handicapped person.”⁴⁴⁰ They may be made to a building of any age and at any time during a tenancy (i.e., they need not all be made when a disabled person first occupies a unit),⁴⁴¹ and the “premises” that may be modified include lobbies, main entrances, and other common-use areas as well as the interior of a disabled tenant’s unit.⁴⁴² A landlord who places unreasonable conditions on a § 3604(f)(3)(A) modification or who unreasonably delays approving such a modification is considered to have violated this provision.⁴⁴³ Furthermore, a landlord may not avoid liability by

supra notes 134–42 and accompanying text. Section 504 covers housing that receives federal assistance and requires an even higher level of accessibility than the FHA, at least for some units. With respect to new construction or substantial rehabilitation of housing units after June 2, 1988, at least 5% of units in section 504-covered housing must meet the Uniform Federal Accessibility Standards (UFAS) for people with mobility impairments, and an additional 2% of units must be made fully accessible to people with hearing and vision impairments. 24 C.F.R. §§ 8.22, 8.23 (2003). In addition, section 504-covered housing must make reasonable modifications to units and common areas to provide for greater accessibility for residents not living in the designated accessible units. 24 C.F.R. §§ 8.24, 8.33. Finally, such housing must conduct a self-evaluation to identify and remove physical and programmatic barriers to participation by people with disabilities in all programs and services. 24 C.F.R. § 8.51.

A senior housing facility will also have to comply with ADA-mandated accessibility standards to the extent it is considered a “public entity.” *See* 28 C.F.R. § 35.104 (2003). This would mean that units constructed after January 26, 1992, must comply with UFAS or the ADA’s Accessibility Guidelines (28 C.F.R. § 35.151(a)), and existing buildings must, to the “maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities” 28 C.F.R. § 35.151(b). In addition, any portion of a senior housing facility held out for use by the general public (such as a rental office, recreation center, social hall, or retail establishment) must meet the accessibility standards applicable to “places of public accommodation.” *See supra* note 139 and accompanying text.

440. 42 U.S.C. § 3604(f)(3)(A). However, federally assisted housing facilities that are thereby also subject to section 504 of the Rehabilitation Act of 1973, *see supra* note 134, must pay for section 504-mandated modifications. *See* 24 C.F.R. § 8.23 (2003). The proportion of the overall senior housing market affected by section 504 is difficult to ascertain, but it is known that HUD funding supports approximately 663,000 units of privately-owned housing for seniors and people with disabilities and an additional 537,500 units of public housing limited to these two populations. *See* CONSORTIUM FOR CITIZENS WITH DISABILITIES AND TECHNICAL ASSISTANCE COLLABORATIVE, *OPENING DOORS: RECOMMENDATIONS FOR FEDERAL POLICY TO ADDRESS THE HOUSING NEEDS OF PEOPLE WITH DISABILITIES* 13 (1996). These units and others that receive assistance under similar federal programs are subject to the section 504 requirement that landlords pay the reasonable cost of physical modifications necessary to comply with the statute’s accessibility mandates.

441. *See* 54 Fed. Reg. 3248 (Jan. 23, 1989); cases cited *infra* note 443.

442. *See* 24 C.F.R. § 100.201 (2003) (defining “Premises”), § 100.203(a); 54 Fed. Reg. 3247–48 (Jan. 23, 1989); *Garza v. Raft*, 3 Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 16,406 (N.D. Cal. Nov. 3, 1999).

443. *See, e.g., Twinbrook Village Apartments*, 2A Fair Hous.–Fair Lending at ¶ 25,157, at 26,264–67; *HUD v. Ocean Sands, Inc.*, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,055, at 25,539–42 (HUD ALJ Sept. 3, 1993), *aff’d in part and remanded in part on other grounds*, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,056 (HUD Secretary), *additional relief awarded*, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,061 (HUD ALJ Oct. 4, 1993).

offering a different, more accessible unit to a disabled tenant who seeks to make a § 3604(f)(3)(A) modification to his current unit.⁴⁴⁴ Finally, the cost of violating § 3604(f)(3)(A) may be significant, for, as one judge put it in awarding \$75,000 for the intangible injuries suffered by a disabled tenant who was forced to be “a prisoner in [her] own home” while waiting 20 months for her landlord to approve a requested modification, the wheelchair ramp she sought was the “only thing that stood between [her] and the outside world that she longed to see.”⁴⁴⁵

Perhaps because the expenses of § 3604(f)(3)(A) modifications must be borne by the disabled residents themselves, only a few cases dealing with this provision have been reported. Significantly for purposes of this Article, however, all of these have been brought by mobility-impaired residents who sought to install a wheelchair ramp or similar device in order to enhance accessibility to their units.⁴⁴⁶ A need for such accessibility-enhancing modifications may be expected to occur quite regularly in senior housing, where residents are likely to have, or at least eventually to develop, a need for mechanical assistance in moving about.⁴⁴⁷

The design-and-construction mandates of § 3604(f)(3)(C) apply only to newly constructed units (i.e., those first occupied after March 31, 1991) and only to “covered multifamily dwellings” (i.e., all units in elevator buildings containing four or more units and ground-floor units in non-elevator

In the *Twinbrook Village* case, for example, a landlord refused to permit ramps to be built to improve accessibility for wheelchair-bound tenants unless certain changes in the ramps’ design were made and the tenants first procured insurance to cover any injury in the construction or use of the ramps. As a result, the county Department of Human Services, which had agreed to pay for the ramps, delayed their construction for 20 months. The insurance requirement and the unnecessary design changes were held to violate § 3604(f)(3)(A), because they amounted to unreasonable preconditions to granting permission for the modifications sought. *Twinbrook Village Apartments*, 2A Fair Hous.–Fair Lending at ¶ 25,157, at 26,264–67. The insurance requirement was also held to constitute discrimination in the “terms, conditions and privileges of . . . rental” in violation of § 3604(f)(2). *Id.* at 26,267–68.

444. See, e.g., *Hunter v. Trenton Hous. Auth.*, 698 A.2d 25, 26 (N.J. Super. 1997); *Twinbrook Village Apartments*, 2A Fair Hous.–Fair Lending at ¶ 25,157, at 26,267.

445. *Twinbrook Village Apartments*, 2A Fair Hous.–Fair Lending at ¶ 25,157, at 26,269–70. In determining the amount of this award, the *Twinbrook Village* judge remarked: “What is the price of freedom? . . . Over the 20-month period the \$75,000 breaks down roughly to \$125 per day. I find \$125 per day of confinement is reasonable compensation.” *Id.* at 26,270.

446. See *Elliott v. Sherwood Manor Mobile Home Park*, 947 F. Supp. 1574 (M.D. Fla. 1996); *United States v. Country Club Garden Owners Ass’n, Inc.*, 159 F.R.D. 400 (E.D.N.Y. 1995); *United States v. Freer*, 864 F. Supp. 324 (W.D.N.Y. 1994); cases cited *supra* notes 442–44.

447. Indeed, in at least two of the reported § 3604(f)(3)(A) cases, the complainant was identified as a senior citizen. See *Hunter*, 698 A.2d at 26 (noting that plaintiff was 64 years old); *HUD v. Ocean Sands, Inc.*, 2A Fair Hous.–Fair Lending (Aspen Law & Bus.) ¶ 25,055, at 25,530–31 (noting that complainants were retired couple in Florida condominium); see also Consent order, *United States v. Tamarack Prop. Mgmt. Co.*, No. CV-02-79-BLG-RWA (D. Mont. Aug. 11, 2003), at <http://www.usdoj.gov/crt/housing/documents/tamaracksettle.htm> (on file with the Iowa Law Review) (involving request for wheelchair ramp at a retirement community in a § 3604(f)(3)(C) case).

buildings with four or more units).⁴⁴⁸ Examples of the features required are doors “sufficiently wide to allow passage by handicapped persons in wheelchairs” and kitchens and bathrooms in which “a wheelchair can maneuver.”⁴⁴⁹

Multi-unit senior housing developments constructed since 1991 are subject to § 3604(f)(3)(C).⁴⁵⁰ As we have shown earlier, virtually all senior housing is covered by the FHA’s definition of a “dwelling,”⁴⁵¹ and in particular, HUD has noted that continuing care facilities “used as a residence for more than a brief period of time” are subject to the accessibility requirements of § 3604(f)(3)(C).⁴⁵²

One might assume that all developers and operators of senior housing would incorporate the accessibility features mandated by § 3604(f)(3)(C) simply as a matter of good business practice in order to meet the needs of their elderly residents, many of whom have or are likely to develop mobility impairments. Indeed, we are aware of only one § 3604(f)(3)(C) case that has been brought against a development for seniors.⁴⁵³ Still, the possibility of additional cases seems likely, given the fact that architects and developers accused of violating § 3604(f)(3)(C) continue to cite lack of awareness of this provision as the reason for their failure to incorporate the mandated accessibility features in newly constructed housing.⁴⁵⁴ Ignorance of this law, of course, is not an excuse for its violation,⁴⁵⁵ and failure to include the § 3604(f)(3)(C)-required features may result in costly remedies, including substantial damages awards, stop-work orders, and orders to retrofit inaccessible units.⁴⁵⁶

448. 42 U.S.C. §§ 3604(f)(3)(C), 3604(f)(7) (2000); 24 C.F.R. § 100.205 (2003); *see also* Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472 (Mar. 6, 1991) (providing “Fair Housing Accessibility Guidelines”).

449. 42 U.S.C. § 3604(f)(3)(C)(ii), (iii)(IV).

450. *See* Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, 59 Fed. Reg. 33364 (June 28, 1994).

451. *See supra* Part II.B.1.

452. *See* Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, 59 Fed. Reg. 33364 (June 28, 1994) (providing HUD’s commentary on the applicability of § 3604(f)(3)(C) to continuing care facilities); *see also supra* note 172 and accompanying text.

453. *See* Complaint at 1, *United States v. Lytton IV Hous. Corp.*, (N.D. Cal. 2000) (alleging violations of § 3604(f)(3)(C) against HUD-funded housing for low-income senior citizens, at <http://www.usdoj.gov/crt/housing/documents/lyttoncomp.htm>).

454. *See, e.g.*, *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1137, 1151–52 (D. Idaho 2003); *United States v. Quality Built Constr., Inc.*, 309 F. Supp. 2d 756, 767 (E.D.N.C. 2003).

455. *E.g.*, *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1137, 1152; *United States v. Hallmark Homes, Inc.*, No. CV01-432-N-EJL, 2003 WL 232119807, at *7 (D. Idaho Sept. 29, 2003).

456. *See, e.g.*, cases cited in SCHWEMM, *supra* note 6, § 11D:9 n.31, at 11D-79 to 11D-80.

2. Financing and Insurance

The FHA prohibits discrimination in the financing and insuring of housing. Mortgage and other housing-related financial discrimination is explicitly outlawed by the FHA's § 3605 and may also violate § 3604(a)'s ban on discriminatory practices that make housing "otherwise unavailable" and § 3604(b)'s prohibition of discriminatory housing "services."⁴⁵⁷ Insurance is not explicitly dealt with in the FHA, but a HUD regulation and many judicial decisions have held that discrimination in home insurance violates § 3604(a) and § 3604(b).⁴⁵⁸

a. Financing

Discrimination may occur at any stage of the mortgage lending process, which includes "advertising and outreach by lending institutions, responses to pre-application inquiries from potential borrowers, approval or denial of loan applications and determination of loan terms and conditions, and finally, loan administration."⁴⁵⁹ Indeed, evidence of widespread race and

457. *E.g.*, *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 22 (D.D.C. 2000) (upholding claims under § 3604(a) and § 3604(b) as well as § 3605 based on discriminatory home-purchase loans); *Harrison v. Otto G. Heinzerth Mgmt. Co.*, 430 F. Supp. 893, 896 (N.D. Ohio 1977) (holding that § 3604(a) as well as § 3605 violated by mortgage discrimination involving home sale); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 491-93 (S.D. Ohio 1976) (holding that § 3604(a) and § 3604(b) as well as § 3605 apply to mortgage discrimination involving home sales); *see also Cartwright v. Am. Sav. & Loan Ass'n*, 880 F.2d 912, 924-25 (7th Cir. 1989) (assuming without deciding that mortgage redlining is actionable under § 3604); *Smart Unique v. Mortgage Correspondents of Ill.*, 3 Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 15,937, at 15,937.1-2 (N.D. Ill. Aug. 24, 1994) (holding that mortgage redlining is actionable under § 3604(a) if it results in preventing plaintiffs from buying, building, or renting homes).

458. The HUD regulation identifies refusing to provide "property or hazard insurance for dwellings or providing such . . . insurance differently because of race [or other prohibited factor]" as an example of the unlawful provision of housing services. 24 C.F.R. § 100.70(d)(4) (2003); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1355-60 (6th Cir. 1995) (holding that insurance redlining violates § 3604(a) and § 3604(b)); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 297-301 (7th Cir. 1992) (same); *Nat'l Fair Hous. Alliance v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 55-57 (D.D.C. 2002) (same); *see also Dehoyos v. Allstate Corp.*, 345 F.3d 291 (5th Cir. 2003) (assuming that FHA covers home insurance discrimination). *But see Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 423-25 (4th Cir. 1984) (holding that FHA does not outlaw home insurance discrimination). *See generally* John F. Stanton, *The Fair Housing Act and Insurance: An Update and the Question of Disability Discrimination*, 31 HOFSTRA L. REV. 141 (2002).

The courts are divided over whether the FHA's § 3605 also applies to insurance. *Compare Am. Family Mut. Ins. Co.*, 978 F.2d at 297 ("No"), *with Nat'l Fair Hous. Alliance*, 208 F. Supp. 2d at 57-58 ("Yes").

459. Margery Austin Turner et al., *THE URBAN INST., ALL OTHER THINGS BEING EQUAL: A PAIRED TESTING STUDY OF MORTGAGE LENDING INSTITUTIONS 1* (2002).

national origin discrimination in home financing continues to be found despite the FHA's long-standing condemnation of this practice.⁴⁶⁰

It must be assumed that such discrimination is encountered just as frequently by seniors as by younger homeseekers. On the other hand, the problem of mortgage discrimination in senior housing is not likely to raise unique issues due to the nature of the housing involved or the age of the homeseekers. In other words, while mortgage discrimination may well occur in situations involving seniors, it would generally present the same types of issues and be governed by the same FHA principles as would comparable cases involving younger borrowers.

There are three potential exceptions to this rule. First, a retirement complex or other type of senior housing that requires a large initial fee or investment might provide "in-house" loans or other debt plans for prospective residents as an option to obtaining financing from an outside lending institution.⁴⁶¹ The situation where a housing provider takes on the additional role of financier does not by itself create any new FHA requirements, but it would impose on the provider non-discrimination duties that are traditionally shouldered by separate entities (e.g., a housing developer and a lending institution). Thus, for example, a retirement complex with an "in-house" financing plan would have to be careful not only to select residents on a nondiscriminatory basis, but also to make available equal services and terms in connection with the loans provided.⁴⁶²

A second special problem in connection with the financing of housing for older persons is "predatory lending," a devastating, albeit somewhat illusive, concept that usually involves manipulative sales tactics and outrageous terms.⁴⁶³ Older persons are often targeted by predatory

460. See, e.g., *id.* at iii (concluding, based on 250 paired tests in Chicago and Los Angeles, that "African American and Hispanic homebuyers face a significant risk of receiving less favorable treatment than comparable whites when they visit mortgage lending institutions to inquire about financing options"); MARGERY AUSTIN TURNER & FELICITY SKIDMORE, MORTGAGE LENDING DISCRIMINATION: A REVIEW OF EXISTING EVIDENCE 2 (1999) (existing research evidence shows that minority homebuyers "face discrimination from mortgage lending institutions"); YINGER, *supra* note 295, at 63-81 (describing studies showing racial discrimination in mortgage lending). See generally MORTGAGE LENDING, RACIAL DISCRIMINATION, AND FEDERAL POLICY (John Goering & Ron Wienk eds., 1996).

461. See, e.g., GARLANDS OF BARRINGTON BROCHURE IN BARRINGTON, ILLINOIS (offering "in-house" and other financing packages at a retirement community) (on file with the Iowa Law Review).

462. Cf. *United States v. Bankert*, 186 F. Supp. 2d 623, 626-30 (E.D.N.C. 2000) (holding that housing provider's refusal to deal with prospective home buyer because of his use of a black-owned finance company violates § 3605's prohibition against discriminatory lending as well as § 3604(a)-(b)'s prohibitions against discriminatory sales); *United States v. Mass. Indus. Fin. Agency*, 910 F. Supp. 21, 28-29 (D. Mass. 1996) (holding defendant that acted only as a "conduit" for home financing rather than providing financial assistance directly to borrowers is liable under § 3605).

463. Predatory lending "involves engaging in deception or fraud, manipulating the borrower through aggressive sales tactics, or taking unfair advantage of a borrower's lack of

lenders,⁴⁶⁴ but this is generally because these targets are persons who have built up substantial equity in their homes and are borrowing money in order to “remain-in-place,” which is not the primary focus of this Article.⁴⁶⁵

Of course, predatory lending can occur in connection with financing a new home.⁴⁶⁶ When it does, however, the FHA is rarely the primary source of legal redress. It is true that predatory lenders have on occasion been charged with illegally targeting racial minorities or other classes of persons protected by the FHA,⁴⁶⁷ but the abusive practices in these cases often are also challenged under a variety of other federal and state laws that do not require a showing of discrimination.⁴⁶⁸ And in those predatory-lending cases where the facts do show the type of discrimination condemned by the FHA, a FHA claim would be appropriate even if the loan terms are not egregious enough to be considered “predatory” for purposes of other legal claims.

A third aspect of the FHA’s application to the home lending process that might arise more frequently in situations involving older persons deals with the requirement of reasonably accommodating disabled persons imposed by § 3604(f)(3)(B). This requirement does apply to certain financial requirements,⁴⁶⁹ but it relates only to claims based on § 3604(f) and therefore does not apply to the FHA provision most clearly applicable to financial discrimination in housing (i.e., § 3605). Thus, for example, in *Gaona v. Town & Country Credit*,⁴⁷⁰ the Eighth Circuit held that a mortgage lender accused of violating § 3605 was under no obligation to provide a sign

understanding about loan terms . . . often combined with loan terms that, alone or in combination, are abusive or make the borrower more vulnerable to abusive practices.” JOINT U.S. DEP’T OF HOUS. AND URB. DEV.—U.S. DEP’T OF THE TREASURY TASK FORCE ON PREDATORY LENDING, *Curbing Predatory Home Mortgage Lending* 1 (June 2000). For alternative definitions of predatory lending, see Kurt Eggert, *Lashed to the Mast and Crying for Help: How Self-Limitation of Autonomy Can Protect Elders from Predatory Lending*, 36 LOY. L.A. L. REV. 693, 699–700 (2003) and Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1260 (2002).

464. See, e.g., Eggert, *supra* note 463, at 704–09.

465. See *supra* Part I.B.2.b.

466. See, e.g., *Eva v. Midwest Nat’l Mortgage Banc, Inc.*, 143 F. Supp. 2d 862, 884 (N.D. Ohio 2001) (noting that reverse-redlining allegations “often occur in connection with sale of a dwelling”); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 15 (D.D.C. 2000) (noting that predatory-lending plaintiff Robinson “purchased residential property”).

467. See, e.g., *Eva*, 143 F. Supp. 2d at 880–90 (upholding FHA claim based on predatory lending targeted at female borrowers); *Hargraves*, 140 F. Supp. 2d at 19–22 (upholding some FHA claims based on predatory lending targeted at African-American neighborhoods).

468. See, e.g., *Anderson v. Wells Fargo Home Mortgage, Inc.*, 259 F. Supp. 2d 1143 (W.D. Wash. 2003) (involving predatory lending claims under state banking and consumer laws and the federal Home Ownership and Equity Protection Act, Truth in Lending Act, and Real Estate Settlement Procedures Act as well as the FHA); *Hargraves*, 140 F. Supp. 2d at 22–28 (upholding predatory lending claims based on local fraud law and the federal Equal Credit Opportunity Act and RICO as well as the FHA).

469. See *supra* note 382 and accompanying text.

470. 324 F.3d 1050 (8th Cir. 2003).

language interpreter as a reasonable accommodation for deaf applicants.⁴⁷¹ Under *Gaona*, FHA financing cases seeking a reasonable accommodation must be brought under § 3604(f)(1)'s "otherwise make unavailable" provision or under § 3604(f)(2)'s ban on discriminatory "services."⁴⁷² These provisions have generally been held to apply only to financing that is sought in connection with "acquiring a home" and not also to loans "for maintaining a dwelling previously acquired" (which are covered only by § 3605).⁴⁷³

Even so limited, however, the FHA's reasonable accommodation requirement would apply in virtually all situations where an older person seeks financing in order to move into a retirement community or other new residence. As a result, a variety of reasonable accommodations, such as the one requested in *Gaona*, might well have to be made for older disabled persons seeking financial help in acquiring a new home.⁴⁷⁴

b. Insurance

Like mortgage discrimination, home insurance discrimination based on race and national origin appears to be a widespread problem,⁴⁷⁵ but, also as with financial discrimination, this problem is not likely to raise unique issues for older homeseekers. Thus, while race-based FHA violations by home insurance companies may well occur in situations involving seniors, such

471. *Id.* at 1056–57; accord *Webster Bank v. Oakley*, 830 A.2d 139, 152 (Conn. 2003) (agreeing with *Gaona* that § 3604(f)(3)(B)'s reasonable accommodations requirement does not apply to § 3605 claims).

472. *See supra* notes 457 (citing cases holding that § 3604(a) and (b) as well as § 3605 prohibit discrimination in home financing) and 125–26 (noting that the disability-related commands of § 3604(f)(1) and (2) are virtually identical to those for other bases of discrimination contained in § 3604(a) and (b)).

473. *Webster Bank*, 830 A.2d at 152 (quoting *Eva*, 143 F. Supp. 2d at 886); *see also* *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 493 (S.D. Ohio 1976) (holding that while § 3604(a) and § 3604(b) may apply to home-purchase financing, only § 3605 applies when financing is sought for improving a previously acquired dwelling). *But see Hargraves*, 140 F. Supp. 2d at 22 (noting the argument made by the United States as *amicus curiae* that § 3604 as well as § 3605 applies to home equity loans and concluding that this "appears to be a close issue").

474. *See also Giebeler v. M&B Assocs.*, 343 F.3d 1143 (9th Cir. 2003) (holding that § 3604(f)(3)(B) requires waiver of landlord's "no cosigner" requirement to accommodate disabled applicant).

475. *See, e.g.,* INSURANCE REDLINING: DISINVESTMENT, REINVESTMENT, AND THE EVOLVING ROLE OF FINANCIAL INSTITUTIONS (Gregory D. Squires ed., 1997) (reviewing research and legal developments demonstrating the continued existence of widespread discrimination by home insurers based on the racial composition of urban neighborhoods); YINGER, *supra* note 295, at 82–83 (concluding that a growing body of scientific evidence reveals that examples of discrimination and redlining in homeowners insurance reflect systematic behavior rather than isolated incidents).

cases would generally present the same issues and be governed by the same FHA principles as are all other insurance discrimination cases.⁴⁷⁶

With respect to disability cases, however, there are two situations involving home insurance for older persons that may present special issues.⁴⁷⁷ The first involves a claim that a company has violated the FHA by refusing to write insurance for, or by charging higher rates to, disabled persons or to housing providers with disabled tenants. An example is *Wai v. Allstate Insurance Co.*,⁴⁷⁸ where a district court held that the FHA bars insurance companies from refusing to provide standard insurance at ordinary rates to landlords with disabled tenants. The court in *Wai* held that this type of insurance discrimination violated the FHA's "otherwise make unavailable" and "discriminatory terms-and-conditions" provisions as well as its "reasonable accommodations" mandate.⁴⁷⁹ While the claims in *Wai* did not involve senior housing, it seems probable that senior housing would be a natural target for this type of insurance discrimination, because a disproportionately large segment of the residents of such housing are either disabled, perceived to be disabled, or likely to become so.⁴⁸⁰

The second type of noteworthy disability case would be based exclusively on the FHA's "reasonable accommodations" mandate in § 3604(f)(3)(B). Unlike mortgage discrimination, it is clear that this mandate does apply to the provision of home insurance, because the main source of the FHA's condemnation of insurance discrimination is § 3604,⁴⁸¹ thereby making § 3604(f)(3)(B) applicable.⁴⁸² The availability of the reasonable accommodation theory in insurance cases means that the FHA might require waiver of certain standardized rules or practices by insurance companies in disability cases.⁴⁸³

For example, in *Avalon Residential Care Homes, Inc. v. GE Financial Assurance Co.*,⁴⁸⁴ an insurance company was sued under § 3604(f)(3)(B) for

476. See SCHWEMM, *supra* note 6, § 13:15 nn.12-44, at 13-58 to 13-66 and accompanying text; *Id.* § 14:2, nn.6-7 and accompanying text (describing FHA insurance discrimination cases).

477. A third type of FHA claim involving insurance in senior housing arises when a housing provider requires its disabled tenants to obtain insurance against certain risks unique to them as a condition of residency. See, e.g., HUD v. Country Manor Apartments, 2A Fair Hous.-Fair Lending (Aspen Law & Bus.) ¶ 25,156 (HUD ALJ Sept. 20, 2001) (described *supra* note 437 and accompanying text). Because this type of claim involves a FHA violation by a housing provider and not an insurance provider, it is dealt with elsewhere in this Article. See *supra* notes 437-38 and accompanying text.

478. 75 F. Supp. 2d 1, 5-8 (D.D.C. 1999).

479. *Id.*

480. See *supra* notes 32-39 and accompanying text.

481. See *supra* note 458 and accompanying text.

482. See *supra* notes 470-72 and accompanying text.

483. See *supra* notes 381-83 and accompanying text.

484. 72 Fed. Appx. 35 (5th Cir. 2003).

not changing its long-term nursing home care indemnity policy to cover a disabled resident. In a brief opinion, the Fifth Circuit assumed that the FHA's reasonable accommodations provision applied, but held that it was not violated because the defendant offered equal coverage to disabled and nondisabled persons (i.e., neither group was covered).⁴⁸⁵ In concluding that § 3604(f)(3)(B) "does not require [defendant] to modify the content of its policy to give the disabled a choice of homes not offered all policyholders,"⁴⁸⁶ the *Avalon* opinion relied on a decision that had interpreted an ADA provision forbidding businesses from denying people with disabilities "the full and equal enjoyment of [its] goods [and] services" as requiring no more than offering "the disabled access to the *same* products offered to others."⁴⁸⁷

There are two potential problems with the *Avalon* analysis. First, not all courts agree that the ADA provision cited is as limited as the Fifth Circuit held.⁴⁸⁸ Second, *Avalon's* reliance on this ADA provision to interpret the FHA's reasonable accommodations provision seems questionable, for the latter by its terms goes beyond the simple denial of access to require changes in a defendant's "rules, policies, practices, or services" that may be necessary to afford a disabled person equal housing opportunity.⁴⁸⁹ The ADA does, in fact, have a provision similar to § 3604(f)(3)(B),⁴⁹⁰ but it was not the one relied on in *Avalon*.

At the very least, therefore, *Avalon's* narrow interpretation of § 3604(f)(3)(B) seems unlikely to be the last word on the matter. As a result, the type of claim made there—that an insurance underwriter may be required by the FHA to modify the coverage it offers if this may be necessary for a person with a disability to secure a housing unit—may be expected to be presented on a regular basis in the context of housing for older persons.

CONCLUSION

The dramatic rise in America's senior population that is sure to occur in the early decades of the twenty-first century will trigger an unprecedented demand for various types of housing for older persons, virtually all of which will be subject to the federal Fair Housing Act and similar anti-

485. *Id.* at 36–37.

486. *Id.* at 36.

487. *Id.* at 36–37 (citing *McNeil v. Time Ins. Co.*, 205 F.3d 179, 186–87 (5th Cir. 2000) (interpreting ADA provision codified at 42 U.S.C. § 12182(a)).

488. *See Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 31–33 (2d Cir. 1999) (upholding ADA claim against company that refused to sell life insurance to disabled plaintiffs). As the Fifth Circuit has noted, however, the Second Circuit's position in *Pallozzi* has not been adopted by other circuits that have considered the issue. *See McNeil*, 205 F.3d at 188 nn.12–13 (citing decisions from the Third, Sixth, and Seventh Circuits).

489. 42 U.S.C. § 3604(f)(3)(B) (2000).

490. *See* 42 U.S.C. § 12182(b)(2)(A)(ii) (1995).

discrimination laws of scores of states and localities. This means that seniors-only apartment complexes, assisted-living facilities, retirement communities, most nursing homes, and other types of residences of special interest to older persons will generally be forbidden from discriminating on the basis of race, color, national origin, and sex; and on the basis of religion, except for those few facilities that qualify for the FHA's religious exemption; and on the basis of disability, with disability-based claims extending not only to traditional forms of discrimination but also to refusals by housing providers to reasonably accommodate individuals with disabilities. There is substantial reason to believe that much of the senior housing industry is currently oblivious to the FHA's non-discrimination commands, either as a result of ignorance of these commands or outright disagreement with them. Whatever the reason, it seems inevitable that a period of increased litigation will be needed before the industry is made fully aware of and is brought into compliance with the nation's fair housing laws.

The basic ways in which the FHA applies to ALFs, CCRCs, and other types of senior housing are fairly straightforward, particularly with respect to the statute's prohibition of discrimination based on race, color, and national origin. The main issue here will be whether the high degrees of racial discrimination and segregation that have continued to plague America's housing markets despite the FHA's commands to the contrary for over 35 years can be overcome with respect to housing for older persons in the twenty-first century. A related issue is whether the advertising and other marketing techniques used by senior housing will reflect racial and national origin inclusiveness or will instead employ the types of subtly discriminatory messages that FHA case law has condemned in other types of housing.

The FHA's prohibition against sex discrimination, while unlikely to create great difficulties for senior housing providers, may present some hard questions with respect to the admission-and-assignment-of-units process and the "terms and conditions" of residency. Examples include whether certain rooms or floors in a senior housing facility may be segregated by gender and whether certain services or activities may be provided for only one sex.

With respect to religion, the principal question is likely to be which of the many senior housing facilities run by nonprofit religious-oriented organizations are closely enough tied to a formal religious entity to qualify for the FHA's religious exemption and thus are allowed to limit admission to members of their own faith. Clearly, a large proportion of such facilities will not meet this test, meaning that they—along with all other senior housing—will be fully subject to the FHA's mandates against religious discrimination. For these developments, particularly those with some religious affiliation, other key issues will be whether they can describe themselves using a religious name or can offer single-faith religious services without violating the FHA.

The FHA's disability mandates may result in some of the most dramatic changes in the way many senior housing providers operate, for their clientele is virtually certain to include many residents and would-be residents whose age-related and other impairments entitle them to the protection of these mandates. Fifteen years of FHA precedents have clearly established that housing providers are generally barred by the statute from making inquiries about an applicant's health and also from requiring an "ability to live independently" as a condition of residency. These mandates may be resisted by senior housing developments that either seek to provide substantial health-related services or, on the other end of the spectrum, want to project an atmosphere for "active seniors" that is significantly different from that of a full-care nursing facility. The inevitable clash between these segments of the senior housing industry and the FHA can only be resolved by fundamental changes either in the way such housing is operated or the way the FHA is interpreted. Beyond these basic admission-eligibility issues, a large number of additional cases are likely to arise as a result of the FHA's mandate that "reasonable accommodations" must be made for applicants and residents with disabilities, which will require changes in numerous rules and practices currently in place at many senior housing facilities, ranging from limits on the use of electric wheelchairs to certain financial restrictions.

This Article has identified some of the more important ramifications of the FHA's applicability to senior housing. We readily acknowledge that our list of possible applications may not be exhaustive. We are confident only that the types of issues highlighted here will become increasingly important as America's population ages in the years ahead. As these FHA issues arise and are dealt with by individual seniors and those who provide housing and housing-related services for them, the overriding question will be whether America's older population ends up living in housing that is segregated by race, national origin, religion, and disability or whether such residential ghettos will be replaced by the "truly integrated and balanced living patterns" that proponents of the FHA envisioned decades ago.⁴⁹¹

491. See *supra* note 113 and accompanying text.