RCFE providers are all too well aware of the dilemma presented by motorized carts. On the one hand, these carts can be very dangerous. A number of our clients have had serious accidents occur in their communities due to improper use of motorized carts. These accidents have resulted in both licensing deficiencies and in lawsuits. There is little question that providers have an obligation to monitor and control the use of motorized carts in RCFEs in order to fulfill their mandate under Title 22 to provide a safe living environment.

On the other hand, the Americans With Disabilities Act and disability discrimination provisions of the Fair Housing Act prohibit RCFEs from discriminating against people with disabilities and require reasonable accommodation of disabilities.

Nearly a decade ago, our firm successfully defended a congregate provider that had been sued by the Department of Justice regarding its motorized cart policy. In United States v. Hillhaven, 960 F.Supp. 269 (D. Utah, 1997), the Department of Justice had insisted that a congregate senior community could not impose any restrictions on the use of motorized carts. The District Court, however, ruled, as we had argued, that providers could impose reasonable, safety-related restrictions on motorized cart use. The Court reasoned that it would be a perversion of the Fair Housing Act to allow some residents to use motorized carts without limitation when doing so was detrimental to other residents, many of whom were also disabled.

Based on the Hillhaven case, we have routinely advised assisted living providers that they can (indeed that they should) develop motorized cart policies that are designed to balance legitimate safety concerns with the rights of disabled cart users. For example, we have recommended that RCFEs determine the competency of residents (both mental and physical) to handle motorized carts safely and to impose reasonable safety-related use requirements such as limitations on speed.

In early October, the Department of Justice (DOJ) announced that it had reached an agreement with a continuing care retirement community located in Bucks County, Pennsylvania. The CCRC had placed severe restrictions on the use of manual wheelchairs and motorized carts within its campus.

According to the DOJ complaint, the CCRC had banned manual wheelchairs from its dining rooms until February 2005, and continued to ban motorized wheelchairs and scooters from the dining rooms and other public and common use areas. The DOJ also alleged that the CCRC required persons who used scooters to indemnify the community and to submit to an evaluation and training program annually, regardless of their “driving record.”

The agreement entered into between DOJ and the CCRC (which was approved by the District Court) dismantles the community’s policies. In addition, the community was required to pay damages, establish a settlement fund and pay civil penalties (with a combined total in excess of $90,000).

The Pennsylvania case is a good example of bad facts leading to a bad legal outcome. If DOJ’s allegations are true, the CCRC’s outright ban on wheelchairs and motorized carts in the dining room and public rooms is indefensible under the ADA and Fair Housing Act. While the other restrictions imposed by the community appear to be far more reasonable, the community may well have been forced to abandon defensible policies in order to avoid going to trial on policies that would have been impossible to defend.

Notwithstanding the Pennsylvania settlement, we believe that it is appropriate for RCFEs to gauge the competency of motorized cart users to operate their vehicles. RCFEs have a legal obligation to provide ongoing observation and supervision of residents and this obligation extends to motorized cart use. While it may be unnecessary for an RCFE to have formal competency testing on an annual basis, providers should continually monitor the driving skills of motorized cart users and intercede when someone appears to lack the ability to operate a cart safely.

With respect to damage that may be caused by motorized cart users, providers generally have a legal right to obtain reimbursement. Many RCFE admission agreements provide that residents are responsible for damage that they cause to their apartment or to the community beyond normal wear and tear. This type of general provision should be sufficient to cover motorized cart users without the need to single them out for special indemnification. Please note, that DOJ and HUD take the position that the Fair Housing Act precludes providers from requiring that motorized cart users maintain liability insurance.

In sum, the Pennsylvania case underscores the importance of having an appropriate motorized cart policy in place. The case does not suggest that providers cannot impose reasonable safety-related restrictions. It does, however, emphasize that any restrictions that are imposed must in fact be safety-related and that they may be no more restrictive than necessary to meet legitimate safety-related concerns.