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Tenant Discrimination Coverage

Introduction

Property Owners and their managers have an exposure to claims where a tenant, former tenant or applicant for tenancy alleges discrimination on the basis of race, age, sex, nationality or religion. This exposure is heightened for residential owners and managers and can extend to individuals who own and lease rental properties. This “tenant discrimination” exposure is usually not covered in commercial general liability or employment practices liability insurance policies.

In this article, we will look at the policy language in an ISO commercial general liability coverage form and typical employment practices liability forms to see how they address “tenant discrimination”. In addition, we will look at the coverage found in a standalone policy specifically written to cover tenant discrimination.

Relevant Insurance Policy Language

Commercial General Liability

Nowhere in the standard ISO Commercial General Liability Coverage Form CG 00 01 12 07 edition is the term discrimination mentioned, used or defined. However, the form does provide personal and advertising injury liability under Coverage B. 1. Insuring Agreement, which states:

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of personal and advertising injury to which this insurance applies.

Personal and advertising injury is defined in the CG 00 01 12 07 edition as:

“injury, including consequential "bodily injury", arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;*
- b. Malicious prosecution;*
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;*
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;*
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;*
- f. The use of another's advertising idea in your "advertisement"; or*
- g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".*

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When we consider each of the covered offenses above, we find that none of these include coverage for “tenant discrimination”. Some insurers go one step further and specifically endorse their commercial general liability policies to exclude all forms of discrimination coverage.

Employment Practices Liability

This coverage is written on non-standard policy forms which vary greatly from insurer to insurer in format, language and coverage intent. How insurers deal with tenant discrimination coverage under these non-standard forms vary as well. We will examine three (3) different insurer’s policy forms.

1. US Liability Insurance Company’s DO-101 (04/07) Coverage Part B. Employment Practices Liability form defines discrimination as:

E. "Discrimination" means:

- (1) The termination of an employment relationship;*
- (2) A demotion or failure to hire or promote any individual; or*
- (3) Any other limitation or classification of an Employee or applicant for employment which would deprive any individual of employment opportunities or adversely affect any individual's status as an Employee;*

because of race, color, religion, age, sex, disability, pregnancy, national origin, marital status, sexual orientation or other protected class or characteristic established under applicable federal, state, or local statute, ordinance, regulation or order.

This language limits discrimination coverage to employment related matters only and does not include any reference to tenant discrimination. Even the Third Party Discrimination coverage in this policy form uses the above definition of “Discrimination” to reinforce that this policy form is only covering employment related discrimination.

2. National Union Fire Insurance Company of Pittsburg, Pa Employment Practices Liability form 76180 (6/05) does not define discrimination so we must look to the definition of wrongful act which reads in part:

(h) "Wrongful Act(s)" means any actual or alleged: ...

- (3) discrimination (including, but not limited to, discrimination based upon age, gender, race, color, national origin, religion, sexual orientation or preference, pregnancy, or disability);*

The policy form provides this coverage to the Insured only and the policy would have to be endorsed with third party coverage to extend coverage to customers and clients of the Insured. Assume that the policy we are reviewing includes Third Party Coverage Endorsement 76186 (7/03) which states:

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The definition of Wrongful Act is amended by adding the following at the end thereof:

With respect to any customer or client of the Company, whether individually or as a class or group, Wrongful Act shall mean only any actual or alleged discrimination, sexual harassment or violation of an individual's civil rights relating to such discrimination or sexual harassment, whether direct, indirect intentional or unintentional.

The two references above to “discrimination” are the only references in the National Union policy form or the cited endorsement. It is not a defined term and there are no insuring agreements or exclusions which address discrimination or tenant discrimination. The policy language is silent on this issue. As a rule, when a policy is silent on a coverage issue, it means that the policyholder will have to fight the insurer to obtain coverage when a claim arises.

3. XN Risk - Property Manager Employment Practices Liability Insurance form US_8_04_PMEP_05-06-2008 A. Insuring Clause states:

A. Insuring Clause

Underwriters shall pay on behalf of the Assureds Loss resulting from any Claim made during the Certificate Period for a Wrongful Act or a Tenant Wrongful Act which is reported to Underwriters pursuant to Section E. of this Coverage Section.

Where the policy defines tenant wrongful act as:

13. Tenant Wrongful Act means any actual or alleged Tenant Discrimination, Tenant Harassment, or Wrongful Eviction by an Assured.

and defines tenant discrimination as:

11. Tenant Discrimination means the taking of any adverse or differential action against the Assured's tenant, legal occupant or any non-Employee because of race, color, religion, age sex, disability, pregnancy, sexual orientation or national origin, or any other basis prohibited by federal, state or local law by any Assured with regard to tenancy, including application for tenancy, at a Covered Property.

There is clear intent to provide coverage for tenant discrimination in this standalone policy form designed specifically for property managers. This form is the exception to what we found when we reviewed other employment practices liability policy forms.

Tenant Discrimination

These policy forms are designed specifically to address tenant discrimination exposures. NAS Insurance Services - Tenant Discrimination Legal Expense and Loss Reimbursement Insurance form P1801TDLX-03/09 specifically defines an insured event as follows:

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*Insured Event shall mean: 1) any lawsuit initiated against any **Insured** by a tenant, former tenant or applicant for tenancy alleging discrimination on the basis of race, color, religion, age, sex, pregnancy, national origin, sexual orientation, familial status or disability, or any other basis prohibited by federal, state or local law; or 2) any charge with the United States Department of Housing and Urban Development or any state or local agency responsible for the administration of state fair housing laws against any **Insured** by a tenant, former tenant or applicant for tenancy alleging discrimination on the basis of race, color, religion, age, sex, pregnancy, national origin, sexual orientation, familial status or disability, or any other basis prohibited by federal, state or local law.*

This policy form provides a very specific definition of what it will and will not cover. This is true of the other tenant discrimination policy forms we reviewed.

Summary

For the most part, commercial general liability and employment practices liability insurance policies do not provide “tenant discrimination” coverage. While there are the exceptions and it is possible for these policy forms to be modified to pick up this exposure, we recommend that all property owners and managers undertake a thorough review of their existing insurance policies to determine what coverage is in place for tenant discrimination. Then an appropriate action plan can be set up to effect tenant discrimination coverage as needed on the appropriate insurance policies for your company.

Please visit our web site: www.bladesrisk.com