



Housing Discrimination & Criminal Background Checks: What Property Managers Need to Know

In my service to clients as a Risk Advisor, I have a unique perspective due to my background as an attorney. By watching various legal actions, I see great opportunity to learn and help better protect the businesses and livelihoods of our clients. Specifically, as it relates to our clients in the affordable housing industry, housing discrimination cases can provide significant insights to guide the development or adjustment of risk management strategies and appropriately tailored insurance programs.

What is Housing Discrimination?

The Fair Housing Act (FHA) was passed fifty years ago to promote equal access to housing opportunities by prohibiting lenders, property managers, and others in the housing industry from discriminating on the basis of race, religion, sex, family status, disability, and national origin.

There are thousands of cases filed every year alleging all forms of housing discrimination. A recent case draws our attention to the area of racial discrimination and provides a reminder to examine the insurance policies that address risks associated with these claims, the appropriate sub-limits, coverages, exclusions, and the various ways policies may handle legal defense costs.

New York City Commission on Human Rights v. PRC Management LLC

In December 2018, the New York City Commission on Human Rights announced the settlement of a FHA complaint against PRC Management LLC (PRC). The complaint alleged PRC, the management company for 100 buildings and 5,000 units across the city, was discriminating against Black and Hispanic individuals by denying housing to anyone with a criminal history without performing individualized analyses. Among other conditions, the settlement stipulated that PRC pay \$80,000 in fines and damages.

Claims like this are not new; however, this case is significant for property managers as it was the first time in recent history that New York investigated the way in which property managers use criminal background searches. While criminal background searches are critical as a part of the vetting process of tenants, property managers can learn the following from this case:

1. Property managers should perform careful due diligence prior to engaging the services of a criminal background search firm.
2. If a criminal background search produces findings which are inconsistent with the applicant's answers on a housing application, further work should be done before making an approval decision.
3. Mishandling criminal background searches can be racially discriminatory and violate the FHA.

Insurance Considerations related to Fair Housing

Coverage for FHA violations can be found in a company's Employment Practices Liability policy or in a separate professional liability/E&O policy for property managers. Policies vary based on insurance carriers, but companies should be aware of the following:

1. Some forms of discrimination may be excluded. Sexual harassment, for example, may be available but may require an endorsement.
2. Certain types of discrimination may contain sub-limits. For example, the policy may have a \$1 million limit with a sub-limit of \$100,000 for sexual harassment. Consider the specific needs and risks of your company.

3. Third Party Discrimination coverage is essential. Sometimes an independent E&O policy may be the only place to find this coverage, but it may be the only way to extend coverage to owners as well as property managers.
4. Often FHA coverage on a standalone property manager's professional liability policy is more robust and comprehensive than when included as part of an EPLI policy.
5. Owners should contractually require property managers to carry independent professional liability coverage. E&O can extend to owners.
6. Fines will not be covered.
7. Legal defense costs are high and can erode policy limits, so the insured may want to purchase additional defense coverage.

Housing Discrimination Risk Management Strategies

When making tenant decisions, property managers and/or property owners need to utilize criminal background checks. However, before categorically denying an applicant based solely on the existence of a criminal history, it is prudent to conduct and document additional due diligence. If a criminal history is found, additional follow-up questions should be asked of the applicant. Once a decision is made, it is crucial to document the reasoning. If in doubt, consult with an attorney before making a decision. Implementing safeguards and sound policies on the front end can create significant savings in the end.

Please [contact me](#) or your [Scott Risk Advisor](#) for further guidance regarding housing discrimination and how to protect your business.

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