



The Role of Insurance in FHA and ADA Violation Claims

By Seth Shapiro, USI Risk Strategist

Over the past several years, multifamily housing developers and owners have been defendants in several lawsuits filed by government enforcement agencies, such as the United States Department of Justice (DOJ), private disability rights organizations, and individuals alleging violations of the Fair Housing Act (FHA) and Americans with Disabilities Act (ADA). Damages and attorneys' fees claimed by plaintiffs in these lawsuits, including costs to modify existing buildings to comply with applicable accessibility guidelines, have created significant financial exposure to the multifamily housing industry.

This article discusses some notable FHA and ADA non-compliance cases, provides an overview of accessibility requirements under the Acts, and reviews two recent rulings that provide guidance with respect to potential coverage for FHA and ADA claims under General Liability insurance policies.

CASES INVOLVING PRIVATE DISABILITY RIGHTS ORGANIZATIONS

In January 2010, the Equal Rights Center (ERC) announced a Fair Housing "Know Your Rights" campaign. The goal of the campaign is to educate immigrants, the LGBT community, and domestic violence survivors about their housing rights. The ERC targets discrimination in housing rentals and sales, home warranty coverage, homeowners insurance, predatory lending, redlining and reverse redlining, and accessible housing for persons with disabilities.

The "Know Your Rights" initiative is the latest salvo by the ERC against multifamily builders and owners. The ERC is not the only private disability rights organization pursuing actions against the multifamily housing industry, but is perhaps the most active and most prominent.

In 2005, the ERC won a major settlement in an FHA case in which the defendant was required to invest about \$20 million to retrofit 100 properties (12,000 units) in sixteen states, training employees and agents in FHA compliance, and agree to three years of probation. The ERC received \$1.4 million in costs and damages.

This success preceded ERC suits against six of the ten largest multifamily builders between 2006 and 2008 for FHA violations. These cases implicated hundreds of thousands of units. Interestingly, the cases brought by the ERC did not result from complaints by disabled individuals. Rather, the Center relied on testing, which found, at some apartment complexes, barriers such as entryway steps, overly narrow doorways, and insufficient turning space in kitchens and bathrooms, that prevented wheelchair users from entering or fully using the apartment units and facilities.

CASES INVOLVING THE DOJ

Prior to the ERC claims, there were several settlements between the Department of Justice and private plaintiffs in FHA/ADA cases. For example:

Date	Settlement
2000	\$325,000 to retrofit interiors of 40 units.
2001	Complete retrofitting of 400 units and common and public areas, enhanced retrofitting on tenant request, e.g., roll-in shower, alarm system, separate cook top and wall oven, and significant retrofitting of all other developments built since March 13, 1991, and a \$300,000 settlement fund.
2003	Retrofitting 416 units, building 420 accessible single-family homes and donating 300 hours of architect's time to assist in design of accessible housing by disability groups.
2004	\$1.5 million payment to settle case and fund retrofitting of 200 units.

FHA AND ADA CONSIDERATIONS FOR MULTIFAMILY DEVELOPERS AND OWNERS

The policy of the FHA, 42 U.S.C. §§3601B3631, is to provide “for fair housing throughout the United States,” including making housing accessible to “handicapped” people.

[N.B. The FHA also prohibits discrimination in the sale or rental of housing on the basis of an individual’s race, color, religion, sex or national origin. 42 U.S.C. §§ 3601-3639.]

The ADA, 42 U.S.C. §§12101 et seq., is a comprehensive civil rights law for people with disabilities. The Department of Justice enforces the ADA’s requirements in three areas:

- Title I Employment practices by units of state and local government;
- Title II Programs, services, and activities of state and local government; and
- Title III Public accommodations and commercial facilities.

Furthermore, Title III of the ADA applies to any (1) public accommodation; (2) commercial facility; or (3) private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes. 28 C.F.R. §36.102.

The ADA supplements the FHA with more stringent regulations in some areas, but does not invalidate or limit the remedies, rights, and procedures of any other federal, state, or local laws, including state common law. For example, the ADA covers all public areas, whereas the FHA covers public areas and private areas such as apartment bathrooms. Further, the regulations implementing the ADA provide for the removal of barriers, which is not required under the FHA.

Guidance for FHA and ADA compliance is beyond the scope of this article. However, it is important to highlight that many of the lawsuits discussed above resulted from lapses by owners or developers, combined with a lack of clarity about accessibility standards. Clarity is critical to compliance, and compliance can help an owner or developer avoid lawsuits, investigations, and settlements that can result in substantial costs for redesign and retrofitting, attorneys’ fees, employee training, fines, and other damages.

If nothing else, owners or developers should proactively assess risks associated with FHA and ADA compliance, and develop and execute plans to manage these risks.

IS THERE INSURANCE COVERAGE FOR THE CONSEQUENCES OF FHA AND ADA NON-COMPLIANCE?

Based on rulings in two recent Texas cases litigated by Haynes & Boone, the answer may be “yes”. In a recent article (Finding the Silver Lining: General Liability Coverage For FHA/ADA Claims, April 20, 2009, Ernest Martin, Jr., Micah Skidmore, Erika Blomquist, Matt Holley, Werner Powers, David Taubefeld), Haynes & Boone attorneys discuss the cases: (1) Trammell Crow Residential Company, et al. v. Old Republic Insurance Company, No. 07-12344, and (2) Trammell Crow Residential Company, et al. v. Virginia Surety Company, Inc., 2008 WL 5062132 (N.D. Tex. Dec. 1, 2008), and reach the conclusion that coverage for damages and attorney’s fees in FHA and ADA claims may be found under the General Liability policy’s Bodily Injury/Property Damage coverage part and the Personal Injury coverage part.

In Trammell Crow Residential Company, et al. v. Old Republic Insurance Company, the court found coverage for “loss of use of tangible property” applied, as the plaintiff claimed she was unable to use her apartment as a result of the defendant’s alleged non-compliance with applicable accessibility guidelines. In addition, the court dismissed the carrier’s argument that there was no “accident” or “occurrence”, as required to trigger coverage under the policy. The court based its position on the fact an FHA claim does not require intent on the part of a developer or owner.

In Trammell Crow Residential Company, et al. v. Virginia Surety Company, Inc., the U.S. District Court imposed on the General Liability carrier a duty to defend a claim alleging FHA and ADA violations. In this case, the court based its ruling on the presence of an “injury”, e.g., discrimination based on physical disability. Of note in this case is the claim was brought by a disability rights group, not a disabled individual. However, under the court’s interpretation of the policy, there was no requirement that a claim be brought by a party who was personally injured as a result of the insured’s actions. A simple allegation of “injury” caused by discrimination due to physical disability was adequate to trigger coverage under the policy.

These cases may provide persuasive precedents for multifamily housing developers and owners seeking insurance recoveries for claims alleging FHA and ADA violations. While not binding, the rulings in the two Texas cases offer a degree of optimism that a defendant in a lawsuit alleging FHA or ADA violations may be able to recover attorneys’ fees and damages under their General Liability policy.

For advice regarding insurance coverage for a specific claim, please contact your insurance broker or counsel.



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