The Refusal to Insure Section 8 Properties Has Disparate Impact Consequences

by Jean Zachariasiewicz

The willingness of insurance providers to issue policies to landlords who accept tenants using Section 8 vouchers[1] is an issue at the intersection of fair housing and the insurance industry that is gaining prominence. Private investigation and action around this issue has taken place across the country in the last few years, as evidenced by lawsuits in state and federal court, and complaints filed with the federal Department of Housing and Urban Development ("HUD").[2] These federal and administrative complaints allege that, once they become aware of the presence of Section 8 tenants at an insured property, the insurance providers have either canceled the existing property insurance policy or required a higher premium in order to continue coverage, and that these actions have a disparate impact on protected groups, such as racial minorities and people with disabilities, thereby violating the Fair Housing Act ("FHA"). And thus far, the federal courts have agreed.[3]

Despite this new focus on insurance industry practices related to subsidized housing, there is very little information available on the subject. The actuarial statistics utilized by underwriters in measuring the risk presented by Section 8 voucher-holders – if such statistics even exist – are not publicly available. And while much has been written about the reasons landlords refuse to participate in the Section 8 program, no similar studies or commentaries exist regarding similar decisions within the insurance industry. However, it is likely that the insurance industry's attitudes are similar to those of landlords and neighborhood residents, where discrimination against voucher-holders is often the result of intertwined negative stereotypes about poverty and race, rather than actual evidence that voucher-holders bring problems like crime or cause property deterioration.[4]

A refusal to insure properties with Section 8 tenants, or charging higher rates for coverage of such properties, creates potentially costly risks for insurance companies. First, these insurance practices likely violate the FHA under a disparate impact theory of liability, due to the demographic statistics regarding voucher-holders versus the Unites States population as a whole. Therefore, the Supreme Court's 2015 affirmation that disparate impact claims are cognizable under the FHA[5] makes these practices ripe for litigation. Second, such policies open insurance companies up to liability under an ever-changing assortment of state and local laws that prohibit source-of-income discrimination in the rental market.

Based on the reasons landlords and communities give for refusing Section 8 tenants, it is likely that insurance companies are using Section 8 status as a proxy for other forms of discrimination, such that these policies function like traditional red-lining, which has long been illegal under the FHA. Accordingly, the insurance industry would better serve itself, its shareholders and customers, and the goal of integrated housing by utilizing different risk factors when performing risk assessments and making Section 8 underwriting decisions. ■

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Endnotes

[1]The Section 8 Existing Housing Program, also known as the Housing Choice Voucher Program, is a federal rental assistance program operated by the Department of Housing and Urban Development ("HUD"). *See* 42 U.S.C. §§ 1437F and 1437(o). It will be referred to in this article as "Section 8."

[2]*Jones v. Travelers Cas. Ins. Co. of Am.*, No. 5:13-cv-02390-LHK-PSG (N.D. Cal. 2013); *Viens, et al. v. Great American Insurance Group, et al.*, No. 3:14-cv-00952-JBA (D. Ct. 2014); *National Fair Housing Alliance v. Travelers Indemnity Company*, No. 1:16-cv-00928 (D. D.C. May 17, 2016); *Fair Housing Continuum, Inc. v. Lloyd's of London, et al.*, HUD File No. 04-14-0859-8; *Brevard Neighborhood Development Coalition, Inc., et al. v. Lloyd's of London, et al.*, HUD File No. 04-14-0858-8.

[3]*See Viens v. Am. Empire Surplus Lines Ins. Co.*, 113 F. Supp. 3d 555, 572 (D. Conn. 2015) (denying defendant's motion to dismiss and holding that plaintiffs' allegations that defendant insurer's refusal to insure landlords with Section 8 tenants had a disparate impact on racial minorities stated a valid FHA claim); *Jones v. Travelers Cas. Ins. Co. of Am.*, No. C-13-02390 LHK, 2015 WL 5091908 (N.D. Cal. May 7, 2015) (denying defendant's motion for summary judgment where plaintiffs alleged that defendant's refusal to insure properties with Section 8 tenants violated the FHA under, *inter alia*, both disparate impact and disparate treatment theories).

[4]*See* Rebecca Tracy Rotem, *Using Disparate Impact Analysis in Fair Housing Act Claims: Landlord Withdrawal from the Section 8 Voucher Program*, 78 Fordham L. Rev. 1971, 1981 (2010); Lisa M. Krzewinski, *Section 8's Failure to Integrate: The Interaction of Class-Based and Racial Discrimination*, 21 B.C. Third World L.J. 315, 322 (2001).

[5]*See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).