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Is A Discriminatory Refusal To Rent An Invasion Of The Right Of Private Occupancy?

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As the I.S.O. "Personal and Advertising Injury" coverage form ("Coverage B") has evolved over the years, one thing has remained constant: claims for wrongful eviction are covered. The modern Coverage B form covers certain enumerated "offenses," one being, "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." I.S.O. Form CG 00 01 12 07. However, the plaintiffs' bar has attempted, with little success, to shoe-horn discriminatory refusal to rent claims under the Fair Housing Act into the "wrongful eviction" offense under Coverage B. This article explores the arguments on both sides of the issue.

The Fair Housing Act, 42 U.S.C. § 3601, *et. seq*. makes it unlawful:

> a. To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> b. To discriminate against any person in terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.
>
> c. To make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation or discrimination.

The majority of courts agree with insurers that a discriminatory refusal to rent claim is not the functional equivalent of a wrongful eviction.

The Majority View

The leading authority for the majority view that refusal to rent is not an "invasion of the right of private occupancy" is the Seventh Circuit Court of Appeals' decision in *United States v. Security Mgmt. Co., Inc*., 96 F. 3d 260 (7th Cir. 1996). The insured in *Security Mgmt*. argued that a refusal to rent property (thus leading to a claimant bringing a Fair Housing Act claim against the insured) was tantamount to either an eviction from the property or a deprivation of the right of private occupancy. *Id*. at 264-265. The district court granted summary judgment, finding that the insurer was obligated to defend and partially indemnify Security Management. Aetna appealed the district court's determination and the Seventh Circuit disagreed. *See id*.

The district court found the "wrongful entry into or invasion of the right of private occupancy" language to be ambiguous. Thus, it applied the time-honored principle that ambiguities in insurance policies must be interpreted in favor of coverage. Neither party claimed that there was a wrongful eviction or wrongful entry, arguing only that the refusal to rent constituted an "invasion of the right of private occupancy." *Id*. The Seventh Circuit found the language unambiguous and therefore gave it its ordinary and commonly accepted meaning. *Id*., citing *Lawver v. Boling*, 238 N.W. 2d 514, 517 (Wis. 1976).

The court recognized that a "right" is generally interpreted as constituting a "legally enforceable claim against another." *Id*. at 265, citing *Black's Law Dictionary* 1189 (5th ed. 1979). Since the prospective tenants seeking to rent the premises did not have any enforceable claim of occupancy at the time they applied for the apartments, their claims could not constitute an invasion of the right of private occupancy. The distinction is critical: while the plaintiffs had a legally enforceable right not to be refused occupancy based on their race, they did not have a legally enforceable right to actually occupy the premises at the time of the alleged "offense." In other words, a right not to be refused occupancy cannot be equated with a right of occupancy. The former prohibits discrimination in selection, whereas the latter involves an actual present legal right to occupy the particular premises at issue.

The *Security Mgmt*. court also rejected the district court's application of the principle of *ejusdem generis*. *Id*. at 265. That principle holds that "where a general term …is preceded or followed by a series of specific terms, the general term is viewed as being limited to items of the same type or nature as those specifically enumerated." *Id*., citing *State v. Campbell*, 306 N.W. 2d 272, 273 (Wis. Ct. App. 1981). The Seventh Circuit rejected the district court's narrow reading of the rule, holding simply that the general and specific terms "need only mesh together in some relevant and appropriate fashion; the terms need not necessarily have all sprung from the same source." *Id*. at 265. The court observed that the terms at issue (wrongful eviction, wrongful entry, and invasion of the right of private occupancy) all stem from the invasion of some right that the person possessed at the time of the offense. Logically, one cannot be wronged by an eviction or entry unless one first has a "right" of occupancy. Thus, the court correctly reasoned that the same right of occupancy must have existed before an individual could have suffered an invasion of the right of private occupancy. The Seventh Circuit also pointed out that the district court repeatedly misstated the language from the policy, referring to it as the "right to private occupancy" as opposed to the "right of private occupancy." *Id*. (Emphasis added). Courts must apply the actual language of the policy, and cannot simply substitute the word "to" for the word "of" when doing so alters the coverage afforded. What a difference a preposition makes.

The lower court also reasoned (incorrectly) that interpreting the term "right of private occupancy" against coverage would make it surplusage. In other words, such a construction would limit the phrase to a "virtually inexistent category of cases" (if not applicable to this scenario, than to what?) The district court then cited a single example -a building manager entering an apartment legally and ransacking it. *Id*. Thus, the district court proved the fallacy of its own argument by immediately citing an example of that which it stated was "virtually inexistent."

For other examples, the Seventh Circuit cited to *Bernstein v. North East Ins. Co*., 19 F.3d 1456 (D.C. Cir. 1994). An invasion of a right of private occupancy could include a breach of the warranty of habitability, nuisance, or cases involving improper restrictions on the number of visitors or hours of ingress or egress. *Bernstein*, 19 F. 3d at 1458. Thus, the district court's myopic view of the universe of situations in which the offense could be triggered could not justify reading the policy so broadly.

Security Mgmt. has been widely followed. *See Kings Pointe Apartments v. State Farm Fire and Cas. Co*., 145 F.3d 1331 (6th Cir. 1998) (holding that refusal to rent claim under Fair Housing Act was not an "invasion of right of private occupancy"); *Rosenberg Diamond Dev. Corp. v. Wausau Ins. Co.,* 326 F. Supp. 2d 472 (S.D. NY 2004) (same); *Powell v. Alemaz, Inc*., 760 A. 2d 1141 (N.J. Super. Ct. App. Div. 2000) (same); *Oak Ridge Park, Inc. v. Scottsdale Ins. Co*., 1999 WL 731417 (E.D. La. Sept. 17, 1999) (same); *see also e.g*., *Winters v. Transamerica Ins. Co*., 194 F. 3d 1321 (10th Cir. 1999) (citing to Security Management in its holding that discrimination claims were not covered).

The Minority View

The alternative position – that these claims should be covered as "personal injury" – is often supported by a line of cases beginning with the Eastern District of Wisconsin's decision in *Gardner v. Romano*, 688 F. Supp. 489, 492-493 (E.D. Wis. 1988). *Gardner*, however, pre-dated the holding in *Security Mgmt.* (which itself applied Wisconsin law). Thus, when the insured relied on *Gardner* in *Gatlin v. Delux Entertainment, LLC*, 2010 WL 1904984 (E.D. Wis. May 10, 2010) to argue that a restaurant's refusal to admit a patron constituted a "wrongful eviction," its claim was rejected. The court in *Gatlin* held that *Gardner* was superseded by *Security Mgmt*., and therefore refused to apply it. *See Gatlin*, 2010 WL 1904984 at *4.

The decision of the Illinois Court of Appeals in *Z.R.L. Corporation v. Great Central Ins. Co*., 510 N.E. 2d 102 (Ill. App. Ct. 1987), held that a patron's claim against a restaurant owner for being ejected from the restaurant based on race was covered as an "invasion of the right of private occupancy." *Id*. at 103-104. However, *Z.R.L. Corp.* really supports *Security Mgmt.* and its progeny. At the time the patron was evicted, he had a legal right of occupancy. Thus, *Z.R.L. Corp*. actually supports the rule that an invasion of the right of private occupancy can only occur after the plaintiff has a vested or present right of occupancy, not merely an expectancy.
In *State Farm Fire & Cas. Co. v. Westchester Investment Co*., 721 F. Supp. 1165 (C.D. Cal. 1989), the court denied partial summary judgment in favor of the insurer. The court noted that there were no California cases on point, and therefore relied upon *Gardner v. Romano*, 688 F. Supp. 489, 492-493 (E.D. Wis. 1988), stating, "[i]n following with the reasoning contained within *Gardner*, the Court finds that there is coverage for a 'personal injury' stemming from a right to privacy [*sic* – should be "private occupancy"] held by a prospective tenant in this matter.'" *Id*. As discussed above, *Gardner* has since been superseded, making reliance on *Westchester Investment* tenuous, at best.

Additionally, in *Clinton v. Aetna Life and Surety Co.*, 594 A. 2d 1046 (Conn. Super. Ct. 1991), the Connecticut superior court, applying Florida law, noted that no Florida court had interpreted the provision "wrongful entry or eviction or other invasion of the right of private occupancy." *Id*. at 1048. Thus addressing an issue of first impression, the court cited to *Westchester Investment* and *Gardner* in support of its holding that the refusal to add a person to a lease because of race triggers the policy's coverage for "personal injury." *Id*. However, the court's decision was based on the doctrine of "reasonable expectations," a doctrine which has since been rejected by the Supreme Court of Florida. *See Deni Associates of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998). Therefore, reliance on *Clinton* would be ill-advised, as its fundamental underpinnings have been utterly eroded.

Finally, *Hobbs Realty & Construction Co. v. Scottsdale Ins. Co*., 593 S.E. 2d 103 (N.C. App. 2004), found coverage for a housing discrimination claim as an invasion of the right of private occupancy. In *Hobbs*, the claimant had booked a beach house for a weekend rental for her daughter and her friends and paid in full in advance by credit card. When the daughter and her friends arrived to pick up the keys, they were not in the box. Hobbs Realty's agent refused to give them the keys to the unit, stating that Hobbs did not rent to "unsupervised teenagers." The agent also was alleged to have made a racial slur and refused to provide the keys to the unit. *Id*. at 105. The North Carolina Appeals court found that, based on *Security Mgmt*., the proper inquiry as to whether a housing discrimination claim constitutes an invasion of the right of private occupancy is whether the party has obtained a legally enforceable right of occupancy at the time of the offense, not whether the party had actual physical occupancy. *Id*. at 108. As in *Z.R.L. Corp.*, while coverage was found to exist, *Hobbs Realty* actually supports the reasoning of the Seventh Circuit in *Security Mgmt.* – that coverage will turn on whether there was an enforceable legal right when the alleged discrimination occurred.

Conclusion

Under the I.S.O. Coverage B form, it is unlikely that a court will find a refusal to rent claim brought under the Fair Housing Act to constitute a wrongful eviction, wrongful entry, or invasion of the right of private occupancy. As the Seventh Circuit correctly observed, the policy covers invasions of the right of private occupancy, not the right to private occupancy. Its logic is unassailable. By contrast, the outlier decisions are based on a case which was held to have been superseded by *Security Mgmt.* and are therefore all of dubious lineage. Those which found coverage also recognize that the right of occupancy must exist at the time of the offense in order to trigger coverage. It is therefore fair to conclude that a discriminatory refusal to rent is not an invasion of the right of private occupancy for Coverage B purposes.