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**LEGAL RESEARCH REGARDING  
SMOKE-FREE BUILDINGS  
AND  
TRANSFER OF ENVIRONMENTAL TOBACCO SMOKE  
BETWEEN UNITS IN SMOKING-PERMITTED BUILDINGS**

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2. Legal Research Case Cites – Landlord-Tenant
3. Michigan Attorney General Opinion No. 6719, May 4, 1992
4. Legal Research Case Cites – Non Landlord-Tenant
5. Utah Statutes and Rules
6. Minnesota Statutes and Rules
7. Duluth City Code

## EXECUTIVE SUMMARY

As discussed in detail in this report, the law regarding smoke-free apartment buildings and the movement of environmental tobacco smoke (ETS) in apartment buildings is still developing. However, a summary of the law, relevant trends, and the consensus recommendation of the author of this report and the legal advisory committee for this project (which included attorneys who routinely represent property owners and managers, tenants, and the public housing sector) is as follows:

1. A landlord can include use restrictions, such as a no-use-of-tobacco restriction, in its lease.
2. Minnesota has an administrative finding, with support from the Attorney General's office, backing this right of a landlord to include a no-use-of-tobacco clause in its lease. There is similar law in other states.
3. The U.S. Department of Housing and Urban Development (HUD) has also supported this right of a landlord to include a no-use-of-tobacco clause in its lease, including leases of federally subsidized housing.
4. In some cases involving serious ETS problems, landlords have faced suits where tenants have sought to terminate their lease or have sought to hold the landlord responsible for failing to prevent another tenant's smoke from entering the sensitive tenant's unit. HUD has resolved at least one suit by a tenant complaining of ETS by starting to create no-smoking buildings in the complex. Although the law in this area is far from settled, the risk of suit, and potential liability for landlords, merits property owners taking a closer look at offering smoke-free options.
5. Carefully drafted leases, such as the one proposed in Part 2, *infra*, can limit the landlord's exposure to such ETS claims while also benefiting the landlord in other ways (reducing smoke-related damage to building materials, possibly reducing fire insurance premiums, attracting the 47% of tenants who are especially interested in no-smoking complexes, etc.).
6. Civil rights suits by smokers who have applied for jobs and been rejected because of their smoking have been dismissed. Although these cases are few in number, the few holdings indicate that being a smoker/smoking is not a disability within the meaning of various civil rights laws.
7. The chief risk for a landlord offering a smoke-free alternative is the risk that smoke-sensitive tenants will seek to hold the property owner or manager to a higher standard of care and, in turn, argue that the landlord has promised a higher air quality for the building. The author of this report and the legal advisory committee felt this risk could be adequately addressed by language in a carefully drafted lease to warn applicants and residents that the landlord is not a guarantor of a smoke-free environment, to inform tenants that their assistance in enforcing the smoke-free provisions is needed, and to limit

the landlord's responsibilities to taking reasonable steps to enforce the smoke-free terms of the lease. An important part of our recommendations in the Model Smoke-Free Lease Addendum, and in proposed legislation discussed in this report, is to give tenants a right of action to enforce smoke-free restrictions against fellow tenants or their guests who violate the rules or lease covenants in a smoke-free rental community. The author of this report and the legal advisory committee strongly recommend that the Minnesota Legislature adopt the proposed amendment to the Minnesota landlord-tenant statute that would create a tenant action against another tenant for smoking in these circumstances. The remedy proposed would allow a tenant injured by another tenant's violation of the no-smoking rules to seek relief in the same division of the district courts as hears eviction actions. The committee felt this proposed statute and remedy would be welcomed by landlords, who may be reluctant to bring an eviction action or terminate the lease in response to a contested smoking complaint, and by tenants, since it would give a remedy to a complaining tenant who alleges he or she has been injured by ETS.

In short, landlords who do nothing (ignore the issue of smoking) face a growing likelihood of suits by tenants suffering from ETS. Whether or not these suits or claims will be successful remains an unsettled legal question in the State of Minnesota. Tenants have been successful in some cases in other states in recovering rent abatement or in having their lease judicially terminated. It appears that landlords who choose to offer no-smoking options, or to limit smoking in part of their communities, may reduce their risks of such suits without exposing themselves to civil rights claims by smokers.

## INTRODUCTION

The Center for Energy and Environment (CEE) and the Association for Nonsmokers – Minnesota (ANSR) are conducting a research project focused on environmental tobacco smoke (ETS) in apartment buildings. “Clean Indoor Air in Apartments – Researching Effective Strategies” is funded by the Minnesota Partnership for Action Against Tobacco (MPAAT), a non-profit public foundation funded by proceeds from the Minnesota tobacco settlement.

Renters make up a quarter of Minnesota households, and about 80% of rental households live in multi-unit buildings. In a survey of Minnesota renters conducted as part of this project,<sup>1</sup> 48% of respondents reported that, at times, tobacco smoke odors get into their current apartment from elsewhere in or around the building. Ten percent said this occurs often or most of the time. Thirty-seven percent of those experiencing secondhand smoke transfer said it bothers them a lot or so much they are thinking of moving. Forty-seven percent of households were extremely or very interested in living in a building where smoking is prohibited.

The goal of this project is to build a sound base of knowledge that will facilitate two types of actions to reduce renters’ exposure to environmental tobacco smoke (ETS) in their homes:

- designation of smoke-free apartment buildings, and
- treatment of smoking-permitted buildings to minimize transfer of ETS among units.

The project includes five major applied research activities:

1. Qualitative interviews of multifamily building owners and managers, to identify the barriers and information needs owners face in addressing this problem;
2. A survey of Minnesota renters (discussed briefly above) to quantify the extent of perceived problems with ETS transfer and assess the marketability of smoke-free rental housing;
3. Technical legal research to summarize relevant law, develop a model smoke-free lease clause, and identify potential changes to statutes, ordinances and regulations that would facilitate smoke-free rental housing and reductions in ETS transfer in smoking-permitted housing;
4. Buildings research to measure contaminant dispersal and air movement between units in multifamily buildings before and after building treatments;
5. Financial analysis to quantify the relative economics of smoke-free properties.

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<sup>1</sup> CEE and ANSR. 2001. *Survey of Minnesota Renters regarding Secondhand Smoke Movement in Apartment Buildings and Interest in Smoke-Free Buildings*. CEE/TR01-2-MF. Minneapolis, MN: Center for Energy and Environment and Association for Nonsmokers -- Minnesota. [www.mncee.org](http://www.mncee.org), Indoor Air Quality, Multifamily Buildings.

This report summarizes the results of the third research activity, the legal research. This report has three objectives:

The first is to summarize the status of the law with regard to designation of smoke-free buildings and taking or failing to take actions to minimize ETS transfer in smoking-permitted buildings.

The second is to develop a model smoke-free lease clause and/or related legal agreements that will provide a meaningful level of assurance of smoke-free homes to renters while holding the risk to property owners in providing smoke-free rental housing under current law to a level that will encourage smoke-free designation.

The third is to develop recommendations for changes to statutes, ordinances and regulations that would further facilitate smoke-free lease clauses.

In addition, we address specific research questions, outlined by CEE and ANSR in their proposal to MPAAT, in the following different areas of law:

- Landlord-tenant/contract law.
- Civil rights law.
- Negligence/tort law and negligence laws.
- Nuisance laws and environmental rights laws.

## **RESEARCH METHODOLOGY**

### **Primary Source Materials**

Research was conducted using the following online sources: Lexis-Nexus, Google.com, Yahoo and Lois Law, using key words Environmental Tobacco Smoke, Secondhand Tobacco, Smoke-free Environments, Smoke-free Apartments, Smoke-free Leases, Smoke-free Workplaces, Smoke-free Public Places, Tobacco Smoke Nuisance, Tobacco Smoke Liability, Tobacco Smoke Negligence, Tobacco Smoke Warranty of Habitability, Tobacco Smoke Breach of Quiet Enjoyment, Tobacco Smoke Breach of Lease, Smoker's Rights and Tobacco Smoke Discrimination. These searches were directed to all state and federal statutes and regulations, as well as reported cases.

Research was conducted using the following print material to identify material identical to that identified in the online search: American Law Reports (A.L.R.) and American Jurisprudence (Am.Jur.).

### **Publications**

- a. E. L. Sweda, Jr., "Summary of Legal Cases Regarding Smoking in the Workplace and Other Places, July, 2001, Northeastern University School of Law
- b. "Mold in Apartment Buildings," July 19, 2001, National Multi Housing Council
- c. "Smoke Knows No Boundaries," R. L. Kline Northeastern University School of Law, February, 2000

- d. Friedman on Leases, Fourth Edition
- e. Restatement (Second) of Property (Landlord and Tenant)
- f. State Laws on Tobacco Control - U.S. 1998, National Center for Disease Control, Uniform Residential Landlord and Tenant Act
- g. "The Ethics of Smoking Regulations," Pope, 61 U. Pitt. L. Rev. 419
- h. "Blowing Smoke: Do Smokers Have a Right?," 1998, 86 Geo.L.J. 783

## Interviews

Because much of this area is in development and may be subject to policy and position statements taken by public authorities, such as Attorneys General and state and city health departments, the researcher conducted many interviews and inquiries by telephone with sources including:

- a. Minnesota Department of Health
- b. U.S. Department of Housing and Urban Development: Betty Parks, Assistant General Counsel, Office of General Counsel.
- c. State of Utah Attorney General
- d. Salt Lake County Office of Attorney General
- e. Michael Stout, Salt Lake City attorney for plaintiff in Parish v. MacFarlane (see Appendix, Item 2)
- f. Edward L. Sweda, Jr., Senior Attorney, Tobacco Control Resource Center, Northeastern University School of Law, Author of "Summary of Legal Cases Regarding Smoking in the Workplace and Other Places"
- g. Edward Alterisio, Attorney, Tobacco Prevention Program, New Hampshire Department of Health and Human Services
- h. Massachusetts Attorney General
- i. Personnel in the 10 largest Minnesota cities concerning non-smoking ordinances: Minneapolis, St. Paul, Duluth, Rochester, Bloomington, Brooklyn Park, Plymouth, Eagan, Coon Rapids, Burnsville

## Websites

The following websites were searched for relevant material.

- a. [www.tenantnet.com](http://www.tenantnet.com) (New York Housing Court cases).
- b. [www.nolo.com](http://www.nolo.com) (a landlord and tenant site).
- c. [www.nmhc.org](http://www.nmhc.org) (National Multi Housing Council).
- d. [www.irem.org](http://www.irem.org) (Institute of Real Estate Management).
- e. [www.hud.gov](http://www.hud.gov) (U.S. Department of Housing and Urban Development).
- f. [www.TobaccoControl.neu.edu](http://www.TobaccoControl.neu.edu) (Northeastern University comprehensive site on tobacco control issues).
- g. [www.ash.org](http://www.ash.org) (Action on Smoking and Health).
- h. [www.no.smoke.org](http://www.no.smoke.org) (Americans for Nonsmokers Rights).
- i. [www.cdc.gov](http://www.cdc.gov) (Centers for Disease Control and Prevention).

- j. [www.fairhousing.jmls.edu](http://www.fairhousing.jmls.edu) (John Marshall Law School Fair Housing Legal Support Center - database).
- k. [www.fairhousing.com.legal](http://www.fairhousing.com.legal) (National Fair Housing Advocate).
- l. [www.hudnlha.com](http://www.hudnlha.com) (National Leased Housing Association).
- m. [www.smokefreeapartments.org](http://www.smokefreeapartments.org).
- n. [www.nosmoke.org/ordcount](http://www.nosmoke.org/ordcount) (database of Ordinances in USA)
- o. [www.lungusa.org](http://www.lungusa.org) (American Lung Association - Comprehensive Guide to State Tobacco Control Laws in US).
- p. [www.laws.findlaw.com](http://www.laws.findlaw.com).
- q. [www.tobacco.org](http://www.tobacco.org) (Comprehensive Listing of Tobacco Related Websites).
- r. [www.pacificnet.net](http://www.pacificnet.net) (Smoke-free Air For Everyone).
- s. [www.oah.state.mn.us/aljBase](http://www.oah.state.mn.us/aljBase)

## **Committee Input**

The legal research was conducted by the author of this report with ongoing advice, consultation, and recommendations from a legal advisory committee that included attorneys who regularly advise property owners and managers, serve as tenant attorneys and advocates or serves as counsel for public housing agencies, as well as representatives from the Center for Energy and Environment and the Association for Nonsmokers-Minnesota. The committee communicated frequently by telephone and e-mail and met on four separate occasions to review drafts of the report, proposed model legislation and Model Smoke-free Lease Addendum, and to otherwise contribute to the final report and proposals. In addition to the author, the attorney members included:

- Paul R. Birnberg – HOME Line (non-profit organization providing advocacy and information for tenants in Minnesota)
- Michael F. Driscoll – Office of the City Attorney, City of St. Paul, MN (Counsel to the Public Housing Agency of the City of Saint Paul)
- Donna E. Hanbery - Hanbery, Neumeyer & Carney, P.A. (firm that regularly advises multifamily property owners and managers)
- Lawrence R. McDonough – Legal Aid Society of Minneapolis, Inc. (non-profit firm providing free civil legal services to people with low incomes, senior citizens, and people with disabilities)

The representatives of CEE and ANSR were:

- Martha J. Hewett – Center for Energy & Environment
- Sandra D. Sandell – Association for Nonsmokers-Minnesota

## **SUMMARY OF THE LAW**

### **Status of the Law with regard to Designation of Smoke-Free Buildings**

Under the common law, it is well established that the parties to a lease may restrict the use to which the lessee may put the demised premises, as long as such restrictions are not contrary to

the law, e.g., creating a monopoly or in violation of civil rights.<sup>2</sup> In addition, cases under civil rights laws or disability laws state that smoking is not a right protected under these laws, nor is addiction to smoking a disability entitling a smoker to the right to smoke.

It should be noted that Minnesota has a so-called “smoker’s rights law.” M.S.A. 181.938. However, this law is limited to the employment setting. It states that an employer may not refuse to hire a job applicant or discipline or discharge an employee because that person engages in or has engaged in the use or enjoyment of lawful consumable products, including cigarettes, out of the work place during non-working hours. This statute contains several exceptions to the rule. For example, an employer could restrict smoking in non-working hours if it relates to a bona fide occupational requirement and is reasonably related to employment activities or responsibilities of a particular employee or group of employees. An additional exception is where the employer’s restriction of smoking during non-working hours is necessary to avoid a conflict of interest or the appearance of a conflict of interest with any responsibilities owed by the employee to the employer.

Under existing State and Federal law, owners of apartment buildings are free to adopt a no-smoking policy with regard to an apartment complex, including the individual residential units, the common areas within the building such as hallways, entranceways and laundry rooms, and the exterior grounds of the apartment building. This is true of both private and public housing.

With regard to private housing, only two states, Minnesota and Utah, have legislation affirmatively allowing owners to prohibit smoking not only in the apartment complex, but in the individual residents’ units. The Minnesota Clean Indoor Air Act<sup>3</sup> (MCIAA) bans smoking in “public places” including “common areas of rental apartment houses.” Although the MCIAA does not expressly say the individual apartment unit can be made smoke-free, the Minnesota Department of Health takes the position, with support from the Attorney General’s office in an unreported opinion, that individual apartment units can be made smoke-free. While opinions of the Attorney General are not binding on the Minnesota Supreme Court, they are entitled to careful consideration. County of Hennepin vs. County of Houston, 229 Minn. 418, 39 N.W.2d 858 (1950). The State Commissioner of Health is given express statutory authority to adopt rules necessary and reasonable to implement the provisions of the Minnesota Clean Indoor Air Act. The Department of Health has issued a policy statement that apartment owners can expressly prohibit smoking in an individual apartment unit.<sup>4</sup>

In Utah, a landlord is specifically permitted by statute to ban smoking within an apartment unit by incorporating such a clause in the lease.<sup>5</sup> In addition, Utah is the only state that by statute identifies ETS as a nuisance.<sup>6</sup> Under the statute, a nuisance is defined as “anything which is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.” The definition of nuisance

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<sup>2</sup> 32 Am.Jur. Landlord and Tenant, § 205, and Fagan vs. Axelrod, 550 N.Y.S.2d 552, 561 (Sup. 1990).

“Authorizing the owner or operator of an indoor area to entirely prohibit smoking in that area effects no change from the common law right of an owner of private property to curtail smoking on his premises, . . . .”

<sup>3</sup> M.S.A. 144.411 to 144.417.

<sup>4</sup> See Appendix, item 1.

<sup>5</sup> Utah Code §57-22-5-1(h).

<sup>6</sup> Utah Code §78-38-1(3).

includes “tobacco smoke that drifts into any residential unit a person rents, leases, or owns from another residential or commercial unit and this smoke drifts in more than once in each of two or more consecutive seven day periods.” This nuisance statute may be enforced by way of a civil action by any person including neighboring tenants or the landlord whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance. An action may be brought against the person generating the smoke or against a renter who permits or fails to control the generation of tobacco smoke from his unit. An action may be brought against the landlord only: (a) if the lease provides that the affected unit will not be the subject of the nuisance of drifting tobacco smoke, and (b) the complaining renter has provided the landlord with a written statement indicating that tobacco smoke is creating a nuisance in his or her unit, and (c) the landlord knowingly allows the continuance of the nuisance after receipt of the written notice. The statute provides that not only may damages be awarded, but that the nuisance may be enjoined. The statute further provides that a neighboring tenant affected by the nuisance, the landlord and the county attorney or city attorney may maintain an action to abate the nuisance by eviction of the tenant. There are no reported cases in Utah under this statute. However, a case was filed in February, 1999 by a nonsmoking condominium owner against a smoker renting from another owner on a month-to-month lease. The case was settled by not renewing the smoker’s lease.<sup>7</sup>

The State of Michigan does not have specific legislation permitting the prohibition of smoking in privately owned apartment complexes, but it does have an opinion of its Attorney General that states in part:

It is my opinion, therefore, that neither state nor federal law prohibits a privately-owned apartment complex from renting only to non-smokers or, in the alternative, restricting smokers to certain buildings within an apartment complex.<sup>8</sup>

With regard to public housing, the U. S. Department of Housing and Urban Development (HUD) has in three separate rulings stated that a public housing authority may restrict or prohibit smoking in public housing, or properties subject to HUD authority.<sup>9</sup> HUD Opinion dated July 9, 1996 to Housing Authority of the City of Fort Pierce, Florida. In affirming this nonsmoking policy, HUD stated that the right to smoke is not a right protected under the Civil Rights Act of 1964, or any other HUD enforced civil rights authorities, and because neither smokers nor non-smokers are groups that receive special recognition under the Civil Rights Act of 1964, the restriction of smoking in public housing would not violate Section 1.4. In addition, HUD recognized two policy reasons in support of the ban on smoking: 1) that the existing HVAC air

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<sup>7</sup> See Appendix, item 2, Parish v. MacFarlane.

<sup>8</sup> See Appendix, item 3, Michigan Attorney General Opinion No. 6719, May 4, 1992.

<sup>9</sup> The following are the three separate rulings:

(1) In Re: U.S. Department of Housing and Urban Development (HUD) and Kirk and Guilford Management Corp. and Park Towers Apartments, HUD Case No. 05-97-0010-8, 504 Case No. 05-97-11-0005-370 (1998). (This case involved private housing subject to HUD regulation.)

(2) HUD Opinion dated June 27, 1996, Re Kearney, Nebraska Public Housing Authority Tenant/Unit Assignment According to Smoking Preference Compatibility with Tenant Selection/Assignment Regulations.

(3) HUD Opinion dated July 9, 1996 to Housing Authority of the City of Fort Pierce, Florida.

system inadequately filtered the air in the apartment complex, thus allowing poorly filtered air to pass from smoker's unit into non-smokers' adjacent units, creating health hazards, and 2) that the apartment complex was experiencing vacancy problems because it was difficult to remove the smoke smell and residue when preparing a unit for a new non-smoking resident, thus presenting financial burdens on a public housing project. Although these HUD decisions do not carry the weight of judicial decisions, they are significant because HUD has the authority to enforce the Fair Housing Act, Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Americans With Disabilities Act of 1990. These laws cover most housing situations, with limited exceptions for owner-occupied buildings with no more than four units and single family housing rented without the use of a broker.

### **Status of the Law concerning Taking or Failing to Take Action to Minimize ETS Transfer in Smoking-Permitted Buildings**

The most common legal theories asserted against a landlord by a tenant regarding environmental tobacco smoke are (1) negligence; (2) breach of warranty of habitability; (3) breach of covenant of quiet enjoyment; (4) nuisance; and (5) trespass. The theory of negligence is based on the premise that the property owner owes a common law legal duty to tenants to ensure that the property is fit for human habitation and to ensure that the quality of indoor air is safe for the residents. The warranty of habitability dictates that the landlord must provide residential rental premises fit for human occupation. The covenant of quiet enjoyment assumes that the tenant is free from serious intrusions that impair the character and value of the leased premises. Nuisance is defined as an invasion of one's use or enjoyment of property even if the wrongdoer is not physically present on the property. Trespass is considered to be an improper physical interference with one's person or property that causes injury to health or property.

We could identify only 17 cases reported nationally relating to environmental tobacco smoke in apartments, condominiums, or commercial property.<sup>10</sup> Of these 17 cases, three (discussed previously) involved administrative decisions by HUD concerning smoke-free apartments, rather than judicial decisions.

Of the remaining 14 cases, two were decided at the appellate court level. One of these appellate court decisions held that the matter was moot because the appellants, both tenants, had moved from the building after the appeal was taken. The other appellate court case, Dworkin v. Paley, 638 N.E.2nd 636 (Ohio Ct. App. 1994), was a suit by a tenant against his landlord (who was also his downstairs neighbor). The appellate court held that if the tenant could prove that sufficient smoke and noxious odors were transferred from the landlord's downstairs unit into the tenant's upstairs unit, he had a right to terminate his lease early.

The remaining trial court cases were disposed of as follows:

- Three were settled before trial
- Four cases have not reported decisions
- The remaining cases were disposed of as follows:

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<sup>10</sup> See Appendix, item 2.

- ◆ One case involved the issuance of a restraining order against a neighboring tenant to refrain from smoking in his garage, which was the source of the environmental tobacco smoke affecting the plaintiff.<sup>11</sup>
- ◆ One case involving neighboring tenants was decided against the plaintiff because the “annoyance of smoke from three to six cigarettes per day is not substantial and would not affect an ordinary person, and that plaintiff may be particularly sensitive to smoke, but an injury to one who has specially sensitive characteristics does not constitute a nuisance.”<sup>12</sup>
- ◆ In another case, a tenant sued the landlord for breach of habitability for environmental tobacco smoke and the jury determined that the plaintiff’s rent should be reduced by 50% and that the defendant would be responsible for plaintiff’s doctors’ bills.<sup>13</sup>
- ◆ In another case, the asthmatic plaintiff/tenant lived above commercial space rented by a nightclub. The landlord was unable to make the nightclub owner take steps to reduce or regulate ETS transmission from the nightclub into the tenant’s unit. The court entered judgment for 100% rent abatement for the three months at issue in the case in favor of the tenant.<sup>14</sup>

These cases are few in number. Only two have been decided at the appellate level, and these two appellate cases both involve unique facts that make them of marginal precedential value. However, they do suggest trends in the law and point to various theories that may be asserted by tenants to seek relief, ranging from termination of a lease or rent abatement to damages for personal injuries.

## **MODEL SMOKE-FREE LEASE ADDENDUM**

A task in this report is to develop a Model Smoke-Free Lease Addendum that will provide a meaningful level of assurance of smoke-free homes to renters while holding the risks to property owners to a level that will encourage smoke-free designation. This Smoke-Free Lease Addendum will give express recognition to the legal right of a landlord to designate a building as smoke-free, including the tenant’s individual unit. This right of the landlord is based on the common law right of an owner of property to restrict the activities therein, as long as the restriction does not violate any existing law with regard to tenants’ rights. Secondly, this Smoke-free Addendum is created in awareness that HUD has specifically stated that a public housing authority has the ability to designate a building entirely smoke-free, and that this principle does not infringe upon any rights of an individual to smoke. This Addendum contains a policy statement that recognizes the known health effects of secondhand smoke and also that the smoke-free policy reduces costs for maintenance, cleaning, redecorating and fire insurance.

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<sup>11</sup> Layon, et al. v. Jolley, et al., Case No. NS004483, Superior Ct. of Calif., Los Angeles County (1996).

<sup>12</sup> Lipsman v. McPherson, 6.2 TPLR 2.345, 19 M.L.W. 1605 No. 90-1918 (Middlesex, MA, Superior Court, 1991).

<sup>13</sup> Fox Point Apt. v. Kippes, No. 92-6924 (Clackamas County (OR) Dist. Ct. 1992).

<sup>14</sup> 50-58 Gainsborough St. Realty Trust v. Haile, et al., 13.4 TPLR 2.302, No. 98-02279, Boston Housing Court (1998).

The policy statement acknowledges that the Addendum is consistent with public policy. The Addendum further sets out the separate responsibilities of landlord and tenant, with the tenant having the responsibility of advising its guests of the policy and of reporting violations to the landlord in written form. The landlord's responsibility is to post no-smoking signs in conspicuous places on the property and to take reasonable steps to enforce the smoke-free terms of its lease. The disclaimer paragraph is designed to acknowledge that the success of the program is dependent upon voluntary compliance by the tenant and its guests and that the smoke-free policy does not necessarily guarantee that air quality standards in the building will be any higher than at any other rental property. The disclaimer basically says that the smoke-free policy is a step in the right direction but it is no absolute guarantee of perfection.

The Model Smoke-free Lease Addendum recommended by the Committee begins on the next page.

### **Model Smoke-Free Lease Addendum**

Tenant and all members of Tenant's family or household are parties to a written lease with Landlord (the Lease). This Addendum states the following additional terms, conditions and rules which are hereby incorporated into the Lease.

A breach of this Lease Addendum shall give each party all the rights contained herein, as well as the rights in the Lease.

- 1. Purpose of No-Smoking Policy.** The parties desire to mitigate (i) the irritation and known health effects of secondhand smoke; (ii) the increased maintenance, cleaning, and redecorating costs from smoking; (iii) the increased risk of fire from smoking; and (iv) the higher costs of fire insurance for a non-smoke-free building;
- 2. Definition of Smoking.** The term "smoking" means inhaling, exhaling, breathing, or carrying any lighted cigar, cigarette, or other tobacco product or similar lighted product in any manner or in any form.
- 3. Smoke-Free Complex.** Tenant agrees and acknowledges that the premises to be occupied by Tenant and members of Tenant's household have been designated as a smoke-free living environment. Tenant and members of Tenant's household shall not smoke anywhere in the unit rented by Tenant, or the building where the Tenant's dwelling is located or in any of the common areas or adjoining grounds of such building or other parts of the rental community, nor shall Tenant permit any guests or visitors under the control of Tenant to do so.
- 4. Tenant to Promote No-Smoking Policy and to Alert Landlord of Violations.** Tenant shall inform Tenant's guests of the no-smoking policy. Further, Tenant shall promptly give Landlord a written statement of any incident where tobacco smoke is migrating into the Tenant's unit from sources outside of the Tenant's apartment unit.
- 5. Landlord to Promote No-Smoking Policy.** Landlord shall post no-smoking signs at entrances and exits, common areas, hallways, and in conspicuous places adjoining the grounds of the apartment complex.
- 6. Landlord Not a Guarantor of Smoke-Free Environment.** Tenant acknowledges that Landlord's adoption of a smoke-free living environment, and the efforts to designate the rental complex as smoke-free, do not make the Landlord or any of its managing agents the guarantor of Tenant's health or of the smoke-free condition of the Tenant's unit and the common areas. However, Landlord shall take reasonable steps to enforce the smoke-free terms of its leases and to make the complex smoke-free. Landlord is not required to take steps in response to smoking unless Landlord knows of said smoking or has been given written notice of said smoking.

- 7. Other Tenants are Third-Party Beneficiaries of Tenant's Agreement.** Tenant agrees that the other Tenants at the complex are the third-party beneficiaries of Tenant's smoke-free addendum agreements with Landlord. (In layman's terms, this means that Tenant's commitments in this Addendum are made to the other Tenants as well as to Landlord.) A Tenant may sue another Tenant for an injunction to prohibit smoking or for damages, but does not have the right to evict another Tenant. Any suit between Tenants herein shall not create a presumption that the Landlord breached this Addendum.
- 8. Effect of Breach and Right to Terminate Lease.** A breach of this Lease Addendum shall give each party all the rights contained herein, as well as the rights in the Lease. A material breach of this Addendum shall be a material breach of the lease and grounds for immediate termination of the Lease by the Landlord.
- 9. Disclaimer by Landlord.** Tenant acknowledges that Landlord's adoption of a smoke-free living environment, and the efforts to designate the rental complex as smoke-free, does not in any way change the standard of care that the Landlord or managing agent would have to a Tenant household to render buildings and premises designated as smoke-free any safer, more habitable, or improved in terms of air quality standards than any other rental premises. Landlord specifically disclaims any implied or express warranties that the building, common areas, or Tenant's premises will have any higher or improved air quality standards than any other rental property. Landlord cannot and does not warranty or promise that the rental premises or common areas will be free from secondhand smoke. Tenant acknowledges that Landlord's ability to police, monitor, or enforce the agreements of this Addendum is dependent in significant part on voluntary compliance by Tenant and Tenant's guests. Tenants with respiratory ailments, allergies, or any other physical or mental condition relating to smoke are put on notice that Landlord does not assume any higher duty of care to enforce this Addendum than any other landlord obligation under the Lease.

**LANDLORD**

**TENANT**

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**Optional Paragraph for Existing Rental Communities that Adopt “No-smoking Policies”**

- 10. Effect on Current Tenants.** Tenant acknowledges that current tenants residing in the complex under a prior lease will not be immediately subject to the No-smoking Policy. As current tenants move out, or enter into new leases, the smoke-free policy will become effective for their unit or new lease.

## **RECOMMENDATION FOR CHANGES TO STATUTES, ORDINANCES AND REGULATIONS THAT WOULD FURTHER FACILITATE SMOKE-FREE LEASE CLAUSES**

### **Introduction**

As mentioned above, with the exception of Utah, no states or municipalities have any statutes or ordinances that provide for the prohibition or regulation of smoking within the individual renter's unit, as opposed to the common areas. Utah addresses this issue in the following three separate statutes:

1. In the "Fit Premises Act" the tenant is required to "comply with all appropriate requirements of the rental agreement with the owner and the renter, which may include either a prohibition on or the allowance of, smoking tobacco products within the residential rental unit, or on the premises or both." Utah Code 57-22-5, Subd. 1H.
2. The "Utah Nuisance Act" includes within the definition of nuisance tobacco smoke that drifts into any residential unit from another residential or commercial unit. The Act provides that an action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and the injured party may enjoin the nuisance and may recover damages. Utah Code 78-38-1, Subd. 3.
3. The "Utah Condominium Act" specifically provides that the condominium bylaws may contain restrictions prohibiting smoking. Utah Code 57-8-16, Subd. 7.

By way of comparison to Utah, Minnesota has the following statutes that relate to the subject matter but do not specifically provide for smoke-free apartments:

1. Landlords and Tenants, M.S.A. Chapter 504B, deals with a broad scope of landlord and tenant matters and would be a likely chapter to amend to address smoke-free housing issues.
2. Minnesota Clean Indoor Air Act, M.S.A. Sections 144.411 - 144.417 regulates smoking in public places, including the common areas of rental apartment buildings, but does not regulate smoking within the resident's unit. The Minnesota Department of Health takes the position in its published policy statements that apartment owners are free to designate entire buildings as smoke-free, although there is no express authority to that effect in the statute or in the rules. This Act could be amended to specifically regulate smoking in apartment units.
3. Nuisance, Trespass, Waste; Damages, M.S.A. Chapter 561: This statute would need significant revision to cover secondhand smoke in apartment buildings in a manner similar to the Utah nuisance statute. In addition, such an amendment to the nuisance statute would run contrary to the legislative intent in confining landlord/tenant matters to M.S.A. 504B.

The approach recommended in this report is to amend the Minnesota Clean Indoor Air Act to make it clear that a multi-unit building can be designed as a nonsmoking dwelling and to amend M.S.A. 504B to define as a “violation” the failure to enforce no-smoking rules or no-smoking leases and to create a right of action by one tenant against another for smoking in a nonsmoking building.

The Committee considered, and rejected, proposals that Minnesota adopt a statute similar to the one in Utah defining tobacco smoke as a nuisance and creating rights outside of the general landlord-tenant laws of M.S.A. 504B to enjoin or collect damages for a nuisance.

The Committee recommended the following amendments to Minnesota Statutes:

### **Proposed Amendments to Minnesota Clean Indoor Air Act**

#### **144.411 Citation.**

Sections 144.411 to 144.417 may be cited as the Minnesota Clean Indoor Air Act.

#### **144.412 Public policy.**

The purpose of sections 144.411 to 144.417 is to protect the public health, comfort and environment by prohibiting smoking in areas where children or ill or injured persons are present, and by limiting smoking in public places and at public meetings to designated smoking areas.

#### **144.413 Definitions.**

Subd. 1. **Scope.** As used in sections 144.411 to 144.416, the terms defined in this section have the meanings given them.

Subd. 2. **Public place.** “Public place” means any enclosed, indoor area used by the general public or serving as a place of work, including, but not limited to, restaurants, retail stores, offices and other commercial establishments, public conveyances, educational facilities other than public schools, as defined in section 120A.05, subdivisions 9, 11, and 13, hospitals, nursing homes, auditoriums, arenas, meeting rooms, and common areas of rental apartment buildings, but excluding private, enclosed offices occupied exclusively by smokers even though such offices may be visited by nonsmokers.

Subd. 3. **Public meeting.** “Public meeting” includes all meetings open to the public pursuant to section 13D.01.

Subd. 4. **Smoking.** “Smoking” includes carrying a lighted cigar, cigarette, pipe, or any other lighted smoking equipment.

<Proposed Amendment>

Subd. 5. **Non-smoking apartment.** “Non-smoking apartment” means residential premises in a multiunit building, including but not limited to the apartment and any associated balcony, patio, garage, yard, storage area or other area designated smoke-free, where the lease for said premises prohibits smoking.

**144.414 Prohibitions.**

Subd. 1. **Public places.** No person shall smoke in a public place or at a public meeting except in designated smoking areas. This prohibition does not apply in cases in which an entire room or hall is used for a private social function and seating arrangements are under the control of the sponsor of the function and not of the proprietor or person in charge of the place. Furthermore, this prohibition shall not apply to places of work not usually frequented by the general public, except that the state commissioner of health shall establish rules to restrict or prohibit smoking in factories, warehouses, and those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.

Subd. 2. **Day care premises.** Smoking is prohibited in a day care center licensed under Minnesota Rules, parts 9503.0005 to 9503.0175, or in a family home or in a group family day care provider home licensed under Minnesota Rules, parts 9502.0300 to 9502.0445, during its hours of operation.

Subd. 3. **Health care facilities and clinics.** (a) Smoking is prohibited in any areas of a hospital, health care clinic, doctor’s office, or other health care-related facility, other than a nursing home, boarding care facility, or licensed residential facility, except as allowed in this subdivision.

(b) Smoking by patients in a chemical dependency treatment program or mental health program may be allowed in a separated well-ventilated area pursuant to a policy established by the administrator of the program that identifies circumstances in which prohibiting smoking would interfere with the treatment of persons recovering from chemical dependency or mental illness.

(c) Smoking by participants in peer reviewed scientific studies related to the health effects of smoking may be allowed in a separated room ventilated at a rate of 60 cubic feet per minutes per person pursuant to a policy that is approved by the commissioner and is established by the administrator of the program to minimize exposure of nonsmokers to smoke.

Subd. 1. **Public places.** No person shall smoke in a public place or at a public meeting except in designated smoking areas. This prohibition does not apply in cases in which an entire room or hall is used for a private social function and seating arrangements are under the control of the sponsor of the function and not of the proprietor or person in charge of the place. Furthermore, this prohibition shall not apply to places of work not usually frequented by the general public, except that the state commissioner of health

shall establish rules to restrict or prohibit smoking in factories, warehouses, and those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.

<Proposed Amendment>

Subd. 1a. **Non-smoking apartments.** No person shall smoke in a non-smoking apartment.

**144.415 Designation of smoking areas.**

Smoking areas may be designated by proprietors or other persons in charge of public places, except in places in which smoking is prohibited by the fire marshal or by other law, ordinance or rule.

Where smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent nonsmoking areas. In the case of public places consisting of a single room, the provisions of this law shall be considered met if one side of the room is reserved and posted as a no-smoking area. No public place other than a bar shall be designated as a smoking areas in its entirety. If a bar is designated as a smoking area in its entirety, this designation shall be posted conspicuously on all entrances normally used by the public.

**144.416 Responsibilities of proprietors. Public places, non-public places.**

1. The proprietor or other person in charge of a public place shall make reasonable efforts to prevent smoking in the public place by

- (a) posting appropriate signs;
- (b) arranging seating to provide a smoke-free area;
- (c) asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke; or
- (d) any other means which may be appropriate.

**144.4165 Tobacco products prohibited in public schools.**

No person shall at any time smoke, chew, or otherwise ingest tobacco or a tobacco product in a public school, as defined in section 120A.05, subdivisions 9, 11, and 13. This prohibition extends to all facilities, whether owned, rented, or leased, and all vehicles that a school district owns, leases, rents, contracts for, or controls. Nothing in this section shall prohibit the lighting of tobacco by an adult as a part of a traditional Indian spiritual or cultural ceremony. For purposes of this section, an Indian is a person who is a member of an Indian tribe as defined in section 260.755 subdivision 12.

**144.417 Commissioner of health, enforcement, penalties.**

Subd. 1. **Rules.** The state commissioner of health shall adopt rules necessary and reasonable to implement the provisions of sections 144.411 to 144.417, except as provided for in section 144.414.

Subd. 2. **Penalties.** Any person who violates section 144.414 or 144.4165 is guilty of a petty misdemeanor.

Subd. 3. **Injunction.** The state commissioner of health, a board of health as defined in section 145A.02, subdivision 2, or any affected party may institute an action in any court with jurisdiction to enjoin repeated violations of section 144.416 or 144.4165.

<Proposed Amendment>

Subd. 3. **Injunction.** The state commissioner of health, a board of health as defined in section 145A.02, subdivision 2, or any affected party may institute an action in any court with jurisdiction to enjoin repeated violations of sections 144.414, subd. 1a, 144.416 or 144.4165.

<Proposed Amendment>

**144.418 Municipal ordinances.**

Nothing in this chapter shall be construed to supersede or in any manner affect a municipal smoking ordinance provided that the provisions of such ordinances are at least as protective of the rights of nonsmokers as the provisions of this chapter.

**Proposed Amendments to Minnesota Landlord-Tenant Statutes**

1. Add the following new section:

**504B.387 TENANT ACTION AGAINST ANOTHER TENANT FOR SMOKING.**

Subd. 1. A residential tenant may bring an action pursuant to Minn. Stat. § 144.417, subd. 3 in the same division of the district court as an eviction as defined in section 504B.001 subd. 4 is brought provided that the alleged repeated violations which the residential tenant seeks to enjoin occurred in a residential building.

Subd. 2. If the residential tenant in an action described in subdivision 1 proves by a preponderance of the evidence that he or she was injured by the repeated violations, the court may enter judgment for money damages in an amount sufficient to compensate the residential tenant for the repeated violations in addition to awarding injunctive relief.

Subd. 3. The court administrator shall provide a simplified, form complaint for use by such plaintiffs.

2. Change M.S.A. § 504B.001, Subd. 14 by adding a fourth definition of violation to read:

[Minn. Stat. § 504B.001, Subd. 14] “Violation” means:

(4) failure to enforce no-smoking rules or no-smoking leases in the residential building.

## **Non-Smoking Ordinances in the Five Largest Minnesota Cities**

One of the tasks in this report was to report on the status of smoke-free leases under the ordinances in the largest cities in Minnesota. The five largest cities in Minnesota are, in order of population: 1) Minneapolis, 2) St. Paul, 3) Duluth, 4) Rochester, 5) Bloomington. With the exception of Duluth, these cities do not have specific ordinances addressing smoking but did report that they rely upon the Minnesota Clean Indoor Air Act to address this issue.

Duluth has adopted a clean air ordinance that is similar to the Minnesota Clean Indoor Air Act insofar as it deals only with public places. It does not address apartment buildings.<sup>15</sup> The Duluth ordinance incorporates the Minnesota Clean Indoor Air Act and provides that smoking in Duluth shall be prohibited anywhere where smoking is prohibited under the Minnesota Clean Indoor Air Act. Accordingly, if the proposed amendment to the Minnesota Clean Indoor Air Act is passed, these five cities would follow the amended statute.

## **PRIMARY RESEARCH QUESTIONS RELATING TO SEVERAL DIFFERENT AREAS OF THE LAW**

### **Landlord-Tenant/Contract Law**

1. Are there state statutes or municipal ordinances addressing the issue of ETS transfer in multi-family housing?

As noted above, with the exception of Utah and Minnesota, there are no state statutes dealing with this issue. Although there are numerous municipal ordinances dealing with smoking in restaurants and the workplace, there are no reported ordinances dealing with ETS transfer in multi-family housing.

2. Absent any specific statutes, does a landlord have a duty to address a smoking complaint?

Yes, to the extent that the problem complained of may give rise to an action such as constructive eviction, breach of implied covenants of habitability, quiet enjoyment, nuisance, or other standard landlord-tenant covenants.

3. In smoking-permitted buildings (buildings without “smoke-free leases”), what type of claims have tenants pursued against a landlord or fellow tenant relating to smoking, such as constructive eviction, breach of implied covenants of habitability, quiet enjoyment, nuisance, or other standard landlord-tenant covenants, and what have been the results?

See cases cited in the section on “Status of the Law Concerning Taking or Failing to Take Action to Minimize ETS Transfer in Smoking-Permitted Buildings.”

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<sup>15</sup> Duluth Legislative Code, Chapter 28, Article VII.

4. Are there any state statutes or municipal ordinances that specifically enable landlords to have smoke-free buildings?

Yes, the Utah statute specifically grants to landlords the ability to have a smoke-free building.<sup>16</sup> There are no reported ordinances that grant such authority. Although the Minnesota Clean Indoor Air Act does not specifically address the question, the Minnesota Department of Health takes the position that a landlord can make an apartment building smoke-free.

5. In buildings with smoke-free leases, or other rules and regulations regarding smoking, have landlords brought cases to enforce such provisions? For example, is violation of a smoking rule in a tenant's unit, common area, etc. by either a tenant, a member of tenant's household or a guest "material noncompliance" or other satisfactory grounds to terminate a lease in market rate housing? Is the situation different for public or publicly-assisted housing than for market housing?

There are no reported cases on this issue for market rate housing, although given the scientific evidence on the damages caused by tobacco smoke and the fact that under the common law, a landlord has a right to prohibit smoking, it follows that smoking would constitute a "material non-compliance" of a smoke-free lease.

With regard to public or publicly assisted housing, HUD has in three opinions stated that smoking can be prohibited in the residence unit and common areas.<sup>17</sup>

6. Are there cases where tenants have pursued claims against owners or property managers arising from a landlord's failure to enforce a lease or rule provision against smoking in units or common areas against other tenants or guests?

There are no reported cases on this issue.

7. Are there cases where tenants have pursued claims against other tenants for not following no-smoking rules?

There are no reported cases on this issue. However, tenants have sued other tenants under common law theory of nuisance and negligence.

8. In analogous situations, such as pet-free buildings, are there cases where tenants have pursued claims against owners or property managers arising from a landlord's failure to enforce a lease or rule provision against other tenants or guests, and what has been the outcome?

There are no reported cases responsive to this issue.

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<sup>16</sup> Utah Code §57-22-5, subd. 1H.

<sup>17</sup> See footnote 9, *supra*.

9. Do the cases or laws in this area suggest ways that owners can offer smoke-free housing, and tenants can enjoy a reasonable assurance of smoke-free living, yet owners' exposure to claims arising from violation of the rule can be limited to acceptable levels?

There are no reported cases on this issue. However, the Utah nuisance statute limits claims against landlords to those situations where the landlord fails to take action after being given proper notice of the tenant's complaint that smoke has drifted into his/her unit more than once in each of two or more consecutive seven day periods.

Utah is the only state that by statute expressly grants the authority to an owner to prohibit smoking within a residential rental unit and also in its nuisance act covers tobacco smoke that drifts into any residential unit from another residential unit.

The legal committee giving input on this report worked hard to propose model laws for the State of Minnesota that would allow a landlord to offer smoke-free housing, provide tenants with a reasonable assurance of smoke-free living, and yet reasonably limit the landlord's exposure to claims from violations of no-smoking restrictions. The model lease addendum proposed by the Committee requires the landlord to take reasonable steps to enforce the no-smoking restrictions. It puts existing tenants and applicants on notice that the landlord is not promising a higher or safer standard of air quality. To give tenants an additional remedy against smoking violations, the Committee recommended that a separate right of action be created to give a residential tenant a right to seek injunctive relief and damages against a fellow tenant who is violating the no-smoking restrictions. By giving tenants the right to police the building and take actions against each other, the Committee felt the goal of advancing no-smoking options for tenants while limiting the obligation of landlords to play "big brother," achieved a good balance.

10. Are there regulations, restrictions, or case law relating specifically to smoking, or less specifically to general landlord rules and regulations, that would limit a landlord's right to eliminate or restrict smoking in public or publicly-assisted housing?

No. HUD in three separate rulings has stated that smoking can be prohibited in public housing, and that the right to smoke is not a right protected by the constitution or any other laws.<sup>18</sup>

11. Are there any state laws, real property doctrines, or cases relating to townhouses, condominiums or other planned unit development communities that may be relevant to the issues in rental housing?

Yes. The Utah statute on nuisance expressly covers townhouses or condominiums (Utah Code 78-38-1, Subd. 3). In addition, the Utah Condominium Act allows the townhouse or condominium association to develop covenants and restrictions that prohibit smoking on the site (Utah Code 57-8-16, Subd. 7).

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<sup>18</sup> See footnote 9, *supra*.

12. Are there cases in related industries (hotels and restaurants, commercial rental property) where smoke-free options have been available as a market alternative or as a matter of law that are relevant in terms of enforcement actions, claims of harm due to non-enforcement or other issues?

There are no reported cases in these industries where affected persons have sued the establishment for breach of a smoke-free policy. There are two reported cases involving office buildings where the tenants sued the landlord for negligence in failing to eliminate the nuisance of tobacco smoke from adjacent tenants. The case of Weil, Gotchal & Manges, L.L.P. v. Longstreet, was settled when the landlord and the offending tenant agreed to remedy the smoke problem. 13.4 TPLR 3.188, Supreme Court of the State of New York, (1998). The outcome of the second case, Contract Management Services, Inc. v. Kuykendahl Joint, Inc. and Kamen Management, Inc., District Court, Harris County, Texas, No. 93-006228 (1993), has not been reported.

### **Civil Rights Law**

1. Are there cases where state statutes restricting or prohibiting smoking in public areas, or private restrictions in private buildings, have been challenged based on a disability theory?

There are no reported cases dealing with this exact issue, although there are cases in employment settings stating that “smoking is not a handicap within the meaning of the HCRA (Michigan Handicappers’ Civil Rights Act) and specifically that nicotine addiction is not synonymous with handicap.” The Court compared the HCRA’s definition of handicap with that in the Americans With Disabilities Act and the Rehabilitation Act of 1973 and concluded that “even if Plaintiff’s addiction to nicotine affected his ability to choose not to smoke and limited his body’s ability to be without discomfort when not smoking, it did not substantially limit his life’s major activities.” Stevens v. Inland Waters, Inc. and Rusch, 220 Mich. App. 212, 559 N.W. 2d 61, 6 AD cases 490 (1996).

2. Are there cases finding that addiction to smoking or dependence on smoking is a disability entitling the smoker to reasonable accommodation?

There are no reported cases on this issue in the housing area. See the previous question regarding similar matters in the workplace.

3. Are there any cases or claims involving discrimination where an attempt has been made to link smoking to other protected classes such as another type of disability, e.g., “mental illness,” national origin, age, religion (e.g., ceremonial use of tobacco, incense or other smoking materials), low income recipients of public assistance, etc.? What have been the results?

There are no reported cases on these issues.

4. For either smoking as a disability or smoking linked with other disabilities, does public agencies' high burden in the area of reasonable accommodation under the Americans with Disabilities Act (ADA) impose any special restrictions that could limit a landlord's right to eliminate or restrict smoking in public or publicly-assisted housing?

There are no reported cases on this issue.

5. Are there cases where tenants have pursued claims against owners or property managers on the grounds that a disability (such as asthma) entitles them to reasonable accommodation in the form of minimized exposure to ETS from other units? Does ADA impose a higher burden on public agencies to accommodate those with a disability?

A tenant with a respiratory condition aggravated by her neighbor's secondhand smoke was entitled to reasonable accommodation under section 504 of the Rehabilitation Act of 1973 as amended, and the Fair Housing Act of 1968 as amended in a HUD administrative case. In Re: U.S. Department of Housing and Urban Development (HUD) and Kirk and Gilford Management Corp. And Park Towers Apartments, HUD case no. 05-97-0010-8, 504 case no. 05-97-11-0005-370 (1998). The matter was resolved in a conciliation agreement approved by HUD that provided:

- a. That the apartment complex would go smoke-free beginning with new tenants, however, current tenants would not be affected by the no-smoking policy.
- b. The Complainant will be offered the opportunity to move to a different area of the building as units become available
- c. The landlord agrees not to knowingly place a smoker in units directly adjacent to or directly below Complainant's current unit or her new unit.
- d. The landlord will remove the mop boards in Complainant's unit, seal any gaps behind those boards and replace the mop boards once the work is completed.
- e. Complainant is granted permission to install a second air conditioner at her own expense in an area and manner subject to the approval of the landlord.
- f. The landlord agrees to enforce the no-smoking policy by conspicuously posting the premises with "No-smoking" signs and by taking action against violators including eviction proceedings.

There are no reported cases suggesting that the ADA imposes a higher burden on public agencies to accommodate persons with disabilities.

6. Are there cases where smoking prohibitions or restrictions have been challenged based on a theory of disparate impact on persons with disabilities (either smoking or smoking-linked) as opposed to direct discrimination against the disability; if so, what reasons have been argued as compelling business reasons for landlords/employers to prohibit or restrict smoking? What have been the results?

There are no reported cases on this issue. In housing, the common law rule is that landlords have a right to prohibit smoking,<sup>19</sup> and that smoking is not a right protected under the U.S. Constitution or federal law.

7. Is there a significant legal distinction between being a smoker and actually smoking? Have landlords been subject to discrimination claims by smokers based on inquiries about whether or not they are a smoker, screening based on whether or not a person is a smoker, etc. as opposed to the prohibition of the act of smoking?

There is a legal distinction between being a smoker and actually smoking. There are no reported cases on owners being subject to discrimination claims by smokers based on inquiries about whether or not they are a smoker or screening based on whether or not a person is a smoker. The three HUD rulings cited above have stated that smokers are not being discriminated against but the act of smoking is being prohibited. In the ruling dated June 27, 1996 regarding Kearney, Nebraska Public Housing Authority, HUD stated that where the landlord had buildings in its apartment complex that had been designated as smoking-permitted and buildings that were designated as “smoke-free”, it was permissible to ask new applicants to state their smoking preference on the application for housing. Smokers would be permitted to occupy the smoke-free building as long as they complied with the smoke-free policy.

8. Does designating portions of a building nonsmoking and other portions smoking-permitted engender any unique civil rights? If engineering considerations suggest that smoking-permitted areas should be located in particular parts of the building (e.g., the top floor) to minimize ETS transfer to nonsmoking areas, are there civil rights concerns if applicants are questioned about their smoking habits and preferences? Are there steering concerns with telling smokers they must occupy a higher floor apartment? What if, for example, a smoking tenant with a walking disability requests a lower floor unit?

In the HUD opinion dated June 27, 1996 concerning the Kearney, Nebraska Public Housing Authority, HUD stated that handicapped persons must have the same housing choice as non-disabled. If the top floor is smoking permitted, disabled persons must be given the option to live in that area, and if the disability deprives a person access to that area, reasonable accommodation must be provided for the disabled smoker to enjoy the smoking option available to the non-disabled.

This case also states that it is permissible to ask applicants about their smoking habits and preferences. This enables applicants to be assigned to the waiting list based on their preference for either a smoking or smoke-free unit. A smoker should not be rejected if the smoker agrees to abide by the no-smoking policy.

9. Are there civil rights cases related to laws prohibiting smoking in public areas, government space, etc. that have been challenged under any theory (e.g., disability)? What has been the outcome?

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<sup>19</sup> Fagan v. Axelrod. 146 Misc.2d 287, 550 N.Y.S.2d 559 (1990).

We are not aware of any civil rights cases, but it has been determined that addiction to smoking is not a disability allowing a person to smoke in smoke-free areas. See next paragraph.

10. Are there civil rights cases related to smoking in the area of employment law that may be relevant to the issue in rental housing?

Yes. Employers have been able to reject smokers for employment even though they don't smoke in the course of their employment on the theory that they present health issues and additional costs to the employer. In the Matter of Fortunoff Fine Jewelry & Silverware, Inc. v. New York State Division of Human Rights, et.al, 62 N.Y.S. 2d, 710 (1968). The Court stated, "smokers are not entitled to protection against discrimination as 'addicts' or as 'disabled persons', even if they smoke only in their own homes and not on the job. This is so because the prospective employee's status as a smoker outside of the workplace, without more, does not constitute a disability within New York's anti-discrimination law. In Kurtz v. City of North Miami, 653 So. 2d 1025 (1995), the Court ruled that government employers can refuse to hire smokers and that smokers have no "legitimate expectation of privacy" regarding their smoking. The Court further ruled that there is "no state or federal constitutional right to smoke". In January, 1996, the U.S. Supreme Court declined to hear Kurtz's appeal. In Stevens v. Inland Waters, Inc. and Rusch, 559 N.W. 2d 61 (1996), the Michigan Court of Appeals affirmed the employer's policy of hiring non-smokers and stated that smoking is not a handicap and that nicotine addiction is not synonymous with handicap. The Court compared the Michigan statute definition of handicap with that in the Americans with Disabilities Act and the Rehabilitation Act of 1973 and concluded that "even if Plaintiff's addiction to nicotine affected his ability to choose not to smoke and limited his body's ability to be without discomfort when not smoking" it did not substantially limit his life's major activities.

The only relevant Minnesota case appears to be State by Cooper v. Sports and Health Club, No. HR-82-005-RL (Minn. Office of Administrative Hearings, 1989).<sup>20</sup> In this discrimination case, a job applicant was asked whether she smoked and also a host of religious questions. Her application was rejected. The Administrative Law Judge credited the sports club's testimony that it rejected all applications by smokers. Therefore, the Administrative Law Judge reasoned that even though the applicant was told that smoking was "unChristian," and thus she was rejected, this was not religious discrimination because even an apparently devout smoking Christian would have been rejected. The rejection based on smoking alone was not otherwise illegal discrimination. (But see, M.S.A. Section 181.938 (1994). By statute, Minnesota has made it a prohibited practice to "refuse to hire a job applicant or discipline or discharge an employee because the employee engages in or has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment takes place off the premises of the employer during non-working hours." "Lawful consumable products" is defined to include tobacco. Under the statute, an employer can prohibit smoking on the work site, but cannot refuse to hire or discipline a smoker for non-

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<sup>20</sup> Available at <http://www.oah.state.mn.us/aljBase/17000108.rp.htm>.

work activities unless the employer can show it is a bona fide occupational requirement or is necessary to avoid a conflict of interest.)

## **Negligence/Tort Law**

1. What types of negligence/tort claims have tenants pursued against landlords or other tenants such as personal injury claims related to failure to protect tenant from exposure to environmental tobacco smoke or to smoking as a fire hazard, or claims of damage to property related to environmental tobacco smoke?

See cases cited in the section titled, “Status of the Law Concerning Taking or Failing to Take Action to Minimize ETS Transfer in Smoking-Permitted Buildings”.

2. Are there analogous negligence/tort issues (e.g., lead paint) in rental housing that may be relevant to the issue of environmental tobacco smoke?

Yes. Mold contamination in apartments has given rise to numerous lawsuits against landlords for personal injury and property damage. The majority of these actions were based on negligence, warranty of habitability and breach of contract. These mold cases are more widely reported than ETS cases and offer insights into the issue of causation, e.g. has the action or inaction of the landlord actually caused the claimed injury? In ETS claims, as in mold infestation claims, it is difficult for the injured party to prove causation. As a result, medical or scientific evidence must be offered as proof, and such evidence must meet the strict evidentiary standards imposed upon expert witnesses.

3. In offering a smoke-free building or units, does a landlord subject itself to implied warranty claims or to a higher standard of care under negligence law than would apply to smoking-permitted properties? For example, would offering a smoke-free building create an implied warranty that the property will meet a higher standard of safety, or will be free from smoke irritants? Are there ways that any additional obligations or higher duties can be limited?

A landlord offering a smoke-free building would be under an obligation to assure that all incoming tenants would be aware of the smoke-free policy, that all leases would contain a prohibition on smoking, that the no-smoking policy would be conspicuously posted about the apartment building and that all landlord’s employees would be knowledgeable about the smoke-free policy, and the tenants would be under an obligation to report all violations of the smoke-free policy. The failure of the landlord to meet any of these obligations could give rise to a breach of the smoke-free representation.

The landlord’s liability for having a smoke-free building could be minimized by adopting a state statute that is similar to the Utah Nuisance Statute that covers tobacco smoke that drifts into any residential unit a person rents from another residential or commercial unit and in cases where smoke: (a) drifts in more than once in each of

two or more consecutive seven (7) day periods; and (b) creates a condition that is injurious to health, offensive to the senses or an obstruction of the free use of property so as to interfere with the comfortable enjoyment of life or property. The statute would further require that the landlord is not responsible for the nuisance unless the landlord has received a written statement from the complaining tenant indicating that tobacco smoke is creating a nuisance for the tenant and knowingly allows continuance of the nuisance after receipt of the written notice.

In addition to or in the absence of such a statute, the apartment lease could provide: that the success of a smoke-free policy is dependent upon the cooperation of all of the tenants; that the landlord's obligation under the smoke-free policy is to assure that all tenants have smoke-free leases and that the premises are posted as no-smoking; and that the landlord will take action against offending tenants only after receipt of written notices concerning violations.

There are no reported cases suggesting that by creating a smoke-free building the landlord would be held to a higher standard of care under negligence law based on implied warranty claims.

4. In analogous situations such as pet-free buildings, what claims have been brought by persons with pet sensitivities or animal allergies when a tenant violates the no-pets rule or a landlord makes an exception, and what have been the results?

There are no reported cases on this issue.

5. Are there any practical strategies, such as providing disclaimers on the owner's obligation to enforce smoke-free requirements, that would limit exposure to negligence, breach of contract, personal injury, or similar warranty claim?

Yes, the Model Smoke-free Lease Addendum herein.

6. Are there any negligence/tort cases in related industries that may be relevant to the issues in rental housing?

There are reported cases involving condominiums where a condominium owner has sued a fellow owner and/or the condo association. In Layon et.al. v. Jolley, et.al., case no. NS004483, Superior Court of California, Los Angeles County (1996), a condo owner obtained a restraining order against a neighboring owner to prohibit that owner from smoking in his garage where the smoke drifted into the Plaintiff's unit. This case was decided on the theory of harassment.

There is one reported case involving a tenant in a commercial office building suing a neighboring tenant and the landlord for breach of contract, nuisance, trespass and negligence. The Plaintiff, a law firm, later dropped the suit because the landlord and the offending tenant agreed to remedy the smoke problem. Weil, Gotschal &

Manges, L.L.P., v. Longstreet Associates, L., et.al., 13.4 TPLR, 3.188 Supreme Court of the State of New York (1998).

With regard to hotels and motels, there are no reported cases on this issue.

### **Nuisance Laws and Environmental Rights Laws**

1. Are there cases where it has been argued that property owners (or smoking tenants) have a duty to minimize or mitigate secondhand smoke under theories of legal nuisance or existing environmental OSHA laws? What have been the results?

There are no reported cases on the issue of a property owner's duty to minimize or mitigate secondhand smoke under theories of public nuisance or under existing environment OSHA laws.

### **Questions Raised by Multifamily Building Owners in Owner Interviews**

As part of the overall research project, interviews were conducted with 49 owners and managers of multifamily housing in Minnesota. One question they were asked was, "What legal issues concerning smoke-free buildings and/or secondhand smoke would you like to know more about?" The issues they raised are listed and answered below.

1. The most commonly raised issue was the legal recourse owners have to enforce a smoke-free rule. Is smoking in a smoke-free building a breach of the lease? Can the owner terminate the lease and evict the tenant? Will they have any clout behind them when they go into court? How much do they have to do to prove someone is smoking before they take action?

Assuming that the lease, or related rules and regulations, prohibit smoking, the act of smoking should be a breach of the lease allowing the owner to terminate the lease and evict the tenant.

Will they have any clout if they go into court? The lease should specifically state that a violation of the no-smoking clause would be a breach of the lease and grounds for termination thereof.

How much do they have to do to prove someone is smoking before they can take action? The burden of proof is on the landlord to establish this breach and like other behavioral violations of a lease, it will be necessary to have witnesses with firsthand knowledge to testify to the breach. Witnesses could testify to observing the tenant or the tenant's guest in the act of smoking or the fact that tobacco smoke was escaping from open windows or into the hall around the door frame.

2. Fourteen percent of owners wanted to know whether smoke-free designation would constitute discrimination against smokers or discrimination against lower income people because more lower income people smoke.

The answer to this is no. Numerous courts and HUD say that smoking is not a protected right.<sup>21</sup>

3. Fourteen percent of owners wanted to know what liability they would have if they had a smoking-permitted building and someone claimed to have become sick from secondhand smoke. Could an owner be sued if people smoked in their building if someone got cancer or otherwise got sick? Could a tenant take another tenant to court? Where does an owner's liability fall and what do they need to do to cover themselves if secondhand smoke is traveling to other units from a tenant who smokes? Would the owner be covered if he or she had responded reasonably to address secondhand smoke complaints at the time but nevertheless someone who had lived in the building for three or four years developed lung cancer 15 years later and claimed it was caused by secondhand smoke in the building?

There are no reported cases dealing with the specific situation where a building is designated as smoking-permitted and someone might have gotten sick from secondhand smoke. If the building is specifically designated as a smoking-permitted building, that fact should be made clear in the tenant applications, in tenant leases, and by way of signs posted in conspicuous places in the building. While it is possible that a waiver could be enforced against an adult tenant, however, it is unlikely that minors could be bound by their adult parents' waiver and consequently the landlord would be exposed to a possible claim for failing to make the premises fit for all tenants. These issues become even more complex when a tenant in the building develops a smoke-sensitive disability and requests a reasonable accommodation. Presumably, the ADA would require some reasonable accommodation be made for the smoke sensitive tenant even though the tenant knowingly moved into a building that was specifically designated as a smoking building.

4. Ten percent of owners wanted to know what liability they would have if they said a building was smoke-free and somebody smoked in it. How much risk or liability is there? Would the landlord or the renter who smokes or allows someone to smoke in their apartment be liable? If a city has fines for smoking in a common area, who would be fined if someone smoked there - the landlord or the person who smokes? What happens if someone smokes in a smoke-free building and how much liability is there on the landlord?

The landlord should attempt to minimize his liability in this situation by incorporating in the lease the items mentioned in the Model Smoke-free Lease Addendum, herein.

Would the landlord or the renter who smokes or allows someone to smoke be liable? Both the renter and the landlord would be liable under a nuisance statute similar to the one adopted in Utah. Each would have separate obligations, and potential liabilities, under the proposed Model Smoke-free Lease Addendum and statutory amendments included in this report.

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<sup>21</sup> See footnote 9, *supra*.

If a city has fines for smoking in a common area, who would be fined for smoking—the landlord or the smoker? In most of the ordinances that have been adopted nationally, the smoker would be the individual fined and the landlord would be subject to a fine in most cases only if the landlord knowingly tolerated people smoking in the common area.

5. Six percent of owners wanted to gauge the relative amount of liability for an owner who has smoke-free buildings versus an owner who has smoking-permitted buildings.

This is a difficult question to answer due to the lack of history with smoke-free buildings. However, a reasoned opinion would be that a smoke-free building would significantly lower the landlord's risk of liability for claims made involving secondhand smoke. By designating a building as "smoke-free," a landlord has taken steps to eliminate the cause of the problem and should only be liable if the landlord fails to properly enforce the policy.

6. Four percent of the owners wanted to know what HUD's position was on this issue or what the regulations would be relative to public housing admissions.

HUD has stated in three administrative opinions that smoking may be prohibited.<sup>22</sup>

7. Four percent of owners wanted to know whether there are any statutes regarding smoke-free designations so that owners would know what to do and how to do it, or legislation that specifically permits segregation of smokers.

With regard to statutes specifically designating buildings as "smoke-free", there is no statute specifically on point in Minnesota, however, the Minnesota Department of Health has published guidelines supporting the Department's position that the landlord may designate an entire building as "smoke-free." See Appendix, item 1.

There is no known legislation either in Minnesota or nationally that specifically permits segregation of smokers. Any such legislation creating a smoking-only area would discriminate against smoke-sensitive persons and would be in violation of the 1990 Americans With Disabilities Act (ADA) and the Rehabilitation Act of 1973.

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<sup>22</sup> See footnote 9, *supra*.