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Infiltration of Secondhand Smoke into Condominiums, Apartments and Other Multi-Unit Dwellings: 2009

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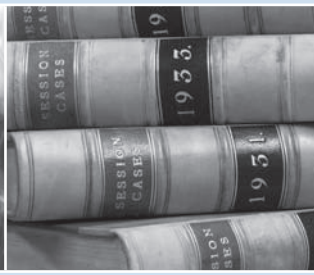

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Infiltration of Secondhand Smoke into Condominiums, Apartments and Other Multi-Unit Dwellings: 2009

Susan Schoenmarklin

Introduction

The demand for smoke-free apartments and condominiums is soaring, spurred by warnings about secondhand smoke from leading health experts. The 2006 Report of the U.S. Surgeon General, *The Health Consequences of Involuntary Exposure to Tobacco Smoke*, cautioned that there is "no risk-free level of exposure to secondhand smoke" and that "even small amounts of secondhand smoke exposure can be harmful."[1] The report included a discussion of the infiltration of secondhand smoke in multi-unit housing and supports the adoption of smoke-free policies.[2] The Centers for Disease Control and Prevention considered the risk of heart attacks from exposure to secondhand smoke substantial enough to warn those at increased risk for coronary heart disease to avoid all indoor environments that permit smoking.[3] In 2005, the California Air Resources Board classified secondhand smoke as a "toxic air contaminant" similar to diesel exhaust and benzene.[4] The Environmental Protection Agency classifies secondhand smoke as a Group A carcinogen, for which there is no safe level of human exposure.[5] For every eight smokers who die from smoking, it is estimated that one nonsmoker dies.[6]

Despite the documented health risks of secondhand smoke, a perception still exists that banning smoking in the individual units of multi-unit housing is illegal. This publication, which debunks such a notion, is an update of the Tobacco Control Legal Consortium's 2004 synopsis on the same topic, and includes recent information on smoke-free housing laws and policies. Section I explains the right of landlords, condominium associations and public housing authorities to prohibit smoking in individual units. Section II provides solutions for private individuals if secondhand smoke is seeping into their dwellings from neighboring units. Finally, section III discusses enforcement concerns expressed by landlords and the advantages of specifically addressing smoking in a lease. This section also provides smoke-free language to use in a lease or in condominium bylaws. A committee of attorneys who represent landlords and tenants developed this model language for the Center for Energy and Environment and the Association for Nonsmokers – Minnesota in Minneapolis, Minnesota.

Key Points

- Landlords and condominium associations may prohibit smoking or refuse to allow smoking for new, and in many cases existing, occupants. There is no judicially recognized "right to smoke" in a multi-unit dwelling, whether the dwelling is privately owned or public housing.
- Residents of multi-unit dwellings have a variety of common law remedies for stopping secondhand smoke infiltration.
- A resident of a multi-unit dwelling who can show that secondhand smoke exposure limits a major life activity can use the federal Fair Housing Act to seek to end the secondhand smoke infiltration.
- Landlords and condominium associations can prohibit smoking in their leases and governing documents, although they may be able to take action even without such language.

Section I – Prohibiting Smoking and Smokers in Private and Public Housing

The law is clear that in all fifty states a landlord may chose to prohibit smoking in individual units as well as in common areas. The law pertains to private landlords, public housing authorities, and other affordable housing owners.

According to a 1992 Opinion of Michigan's Attorney General, "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."[7] In 2008, the Idaho Office of the Attorney General's manual for landlords and tenants stated, "Given the health risks and environmental issues associated with second-hand smoke, more and more landlords are excluding smokers from renting the landlords' property. This is not a discriminatory practice, and Idaho does not have any laws protecting a tenant's 'right' to smoke."[8]

These opinions are relevant to all states. An extensive search of federal and state laws and regulations did not identify any laws or cases preventing landlords from prohibiting smoking. Under common law, a landlord has a right to place certain restrictions on tenants, including restrictions on smoking, as long as the landlord does not violate constitutional or other laws.[9] There is no state or federal constitutional right to smoke.[10]

On July 23, 2003, the Chief Counsel of a Housing and Urban Development (HUD) field office in Detroit issued a letter stating that the right to smoke is not protected under the Civil Rights Act of 1964 or any other HUD-enforced civil rights authorities.[11] She pointed out that nothing in federal law, including the federal Fair Housing Act, prevents landlords from making some or all of their apartment units smoke-free. "Federal law does not prohibit the separation of smoking and non-smoking tenants in privately owned apartment complexes and in fact, does not prohibit a private owner of an apartment complex from refusing to rent to smokers."[12]

On July 17, 2009, HUD issued recommendations strongly encouraging public housing authorities to enact smoke-free policies in their public housing units.[13] A number of other HUD opinions and cases approve the right of a public housing authority to prohibit smoking in properties subject to HUD authority.[14] A January 31, 2007 letter from the Field Office Director of the HUD office in Detroit confirms the right of local housing authorities and private owners of HUD-subsidized housing to adopt smoke-free policies in their buildings. In the letter, the author notes that a number of housing authorities and private landlords have voluntarily adopted smoke-free policies for their HUD-assisted developments, and that these policies were adopted as a result of local efforts rather than by regulation or law.[15]

While administrative authorities and judicial case law recognize the right to prohibit smoking, only one state expressly creates such a right by statute. Utah's state law permits landlords to prohibit smoking within an apartment unit by incorporating such a clause in the lease.[16] Similarly, the Utah Condominium Act allows a condominium association to develop covenants and restrictions that prohibit smoking on the site.[17] Whether a condominium association that had previously permitted smoking in individual units could subsequently vote to prohibit smoking in the entire condominium complex without any special "grandfather" exclusions for the units of smokers is subject to debate. In 2006, a District Court in Colorado upheld the right of a condominium association to enforce retroactively an amendment banning smoking in all units.[18] The issue of grandfathering is discussed at length in a law synopsis from the Tobacco Control Legal Consortium titled *Legal Options for Condominium Owners Exposed to Secondhand Smoke.* The author concludes that courts are likely to enforce smoke-free amendments to condominium documents, even against the wishes

of owners who purchased units when smoking was permissible.[19]

Section II – Remedies for Residents of Multi-Unit Dwellings Adversely Affected by Secondhand Smoke

Landlords and condominium boards not only have the right to prohibit smoking, but in fact may also be liable under a variety of legal theories for failure to prohibit smoking when a tenant or condominium owner is affected by secondhand smoke. In addition, the plaintiff may also take action directly against the smoker. The plaintiff may choose from a variety of options when pursuing a claim against a landlord, condominium board, or the offending smoker, including:

- Voluntary compromises or settlements
- A disability claim with the Department of Housing and Urban Development or its state equivalent
- A small claims court case
- If applicable, a case with a landlord-tenant court
- A traditional lawsuit in state court.

Voluntary Strategies

The first step in any dispute, of course, is to try to resolve the issue without legal action. A tenant or condominium owner adversely affected by secondhand smoke should document the problem, including health effects.[20] A letter from the attending physician attesting to the effect of the secondhand smoke on the resident's health is also very helpful.[21]

The tenant should review the lease or condominium documents[22] to determine if any "nuisance clause" prohibits activities that "unreasonably interfere" with other residents' enjoyment of the premises. Most rental and condominium agreements include some sort of nuisance protection. Nuisance clauses are typically invoked when a tenant objects to loud music, offensive odors, or other significant annoyances, and would arguably apply to smoking if the resulting secondhand smoke causes others discomfort or health problems.

If the seepage problem cannot be resolved in informal discussions with the smoker, the tenant should approach the landlord with the lease language, the physician's letter, and any medical test results. The tenant should emphasize that the landlord has the authority to prohibit or restrict smoking in an individual unit to protect the well-being of another resident.[23] The tenant may ask the landlord to prohibit smoking in the offending unit or pay for the cost of measures to reduce the amount of secondhand smoke entering the non-smoker's unit,[24] or the tenant may seek less comprehensive measures, such as asking the smoker to refrain from smoking on outside patios or in common areas. Aggrieved condominium owners who are unable to resolve their dispute with a fellow condominium owner have recourse to their condominium board and condominium association. The condominium section of the Smoke-Free Environments Law Project website has information on other voluntary strategies.[25]

It should be noted that remedial treatments such as sealing gaps, weather-proofing doors and windows, and adjusting ventilation can reduce but not eliminate secondhand smoke seepage. In 2004, the Center for Energy and Environment, based in Minneapolis, studied air flow in six multi-family buildings. Using a variety of ventilation and air sealing treatments, the Center was able to reduce the transfer of contaminants among some units, but almost one third of units (29 percent) treated had no reduction of contaminants at all.[26] Sealing treatments alone were only marginally effective, reducing secondhand smoke seepage by only three percent in certain buildings.[27]

Although commonly recommended, air cleaners are not effective in removing the minute particles and toxic gases in secondhand smoke.[28] According to the American Society of Heating, Refrigeration and Air-Conditioning Engineers (ASHRAE) – the body that sets the standard for indoor air quality – ventilation technology is insufficient to protect building occupants from secondhand smoke.[29]

Common Law Remedies

The traditional approach in a tenant or condominium owner dispute over secondhand smoke infiltration is court action or the threat of court action. Depending on the rules of the jurisdiction, the suit could be brought in small claims court or in a special housing court, as an alternative to state court. Most cases are settled, with only a handful reported nationally in which a decision was reached on the merits. While ascertaining trends from the limited number of reported cases is difficult, there have been promising developments in recent years. Tenants and condominium owners have successfully brought claims for secondhand smoke seepage using various common law remedies, including breach of the warranty of habitability, breach of the covenant of quiet enjoyment, trespass, constructive eviction, nuisance, negligence, and harassment. This section is limited to those legal theories that have been successful in court to date.[30]

One case involving a variety of legal claims was the 1991 Massachusetts case *Donath v. Dadah*.[31] In that case a tenant sued her landlord alleging negligence, nuisance, breach of warranty of habitability, breach of the covenant of quiet enjoyment, intentional infliction of emotional distress and battery due to secondhand smoke exposure. The plaintiff asserted secondhand smoke from the second floor of the building in which she lived caused asthma attacks, difficulty breathing, wheezing, prolonged coughing, clogged sinuses and frequent vomiting. The plaintiff moved out of the apartment shortly after filing suit. The case was settled for an undisclosed sum of money.

Warranty of Habitability

In all states, even if landlords are not at fault for a problem, they are responsible for ensuring that residential rental properties are fit for human occupancy. The landlord in effect makes a "warranty of habitability" to the tenant for the life of the lease.[32] Plaintiffs in a secondhand smoke case would argue that the presence of secondhand smoke renders their residence unfit for habitation

and constitutes a breach of the lease. The more secondhand smoke exposure affects a plaintiff, the stronger the argument that secondhand smoke is a breach of the warranty of habitability.[33]

In 2004, an Ohio Court of Appeals upheld a lower court ruling that a landlord breached the warranty of habitability by failing to remedy the problem of secondhand smoke caused by a neighboring tenant.[34] The ruling was affirmed even though testimony showed that the landlord made numerous efforts to insulate the nonsmoker's unit from seeping smoke.[35] In the 1992 Oregon case *Fox Point Apt. v. Kipples*,[36] a tenant who was sensitive to secondhand smoke successfully argued that her landlord breached his duty to make her apartment habitable by allowing a smoking tenant to move into the apartment below her. The plaintiff suffered swollen membranes and respiratory problems as a result of the secondhand smoke. A jury unanimously found a breach of habitability, reduced the plaintiff's rent by 50 percent and awarded damages for the plaintiff's medical bills. In New York, a trial court in *Poyck v. Bryant* ruled that a tenant exposed to secondhand smoke seepage from a neighboring unit could bring a claim against the landlord for violating the warranty of habitability.[37] The judge in the ruling said that "while the landlord contends that he had no control over the neighbors…he failed to offer any evidence that he took any action to eliminate or alleviate the hazardous condition."[38]

Covenant of Quiet Enjoyment

Some courts have found that secondhand smoke seepage can constitute a breach of the covenant of quiet enjoyment. The covenant of quiet enjoyment protects a tenant from serious intrusions that impair the character or value of the leased premises.[39] In the 1998 Massachusetts case *50-58 Gainsborough St. Realty Trust v. Haile*,[40] the Boston Housing Court held that secondhand smoke was a serious enough intrusion to breach both the covenant of quiet enjoyment and the covenant of habitability. The plaintiff, whose apartment was situated above a bar, withheld rent for three months because of the drifting secondhand smoke in her apartment. The judge ruled that the amount of smoke from the bar made the apartment "unfit for smokers and nonsmokers alike."[41]

An appellate court also ruled that exposure to secondhand smoke can constitute a breach of the covenant of quiet enjoyment. In the 1994 Ohio case *Dworkin v. Paley*, the court reversed a summary judgment in favor of a landlord who smoked in a two-family dwelling that shared common heating and cooling systems.[42] The tenant alleged that smoke from the landlord's unit caused her physical discomfort and was annoying. In reversing the dismissal, the appellate court said there were "general issues of material fact concerning the amount of smoke or noxious odors being transmitted into appellant's rental unit."[43] Although the court did not rule that a breach of quiet enjoyment occurred, the tenant was given the opportunity to demonstrate at trial that the amount of secondhand smoke was sufficient to qualify as a breach.

While the covenant of quiet enjoyment is derived from landlord/tenant law, it has also been applied for the benefit of the condominium owner. In 2005, a Florida court in *Merrill v. Bosser* found that an owner of a condominium unit who rented his unit to a heavy smoker violated the condominium's covenant of quiet enjoyment.[44] According to the court, "[s]imilar to landlord-tenant situations, the covenant of quiet enjoyment is breached when a party obstructs, interferes with, or takes away from another party in a substantial degree the beneficial use of the property."[45] The covenant was breached, according to the court, because secondhand smoke set off the smoke detector in one instance and in several cases forced the plaintiff's family to leave the condominium and sleep in a different location.[46]

Trespass

The *Merrill* court also found that the smoker's secondhand smoke was "trespassing" on the

plaintiff, and held the condominium owner liable as a landlord for the trespass of his smoking tenant.[47] Trespass is considered to be an improper physical interference with one's person or property that causes injury to health or property.[48] The court noted that a trespass need not be inflicted directly on property, but may be committed by "discharging a foreign polluting matter" beyond the property of the defendant.[49] In Florida, the focus of the tort of trespass is "disturbance of possession."[50] The *Merrill* court held that secondhand smoke that is "customarily part of everyday life" is not a disturbance of possession and therefore not actionable in trespass.[51] However, the court found that the smoke affecting the *Merrill* family was so excessive as to constitute a "disturbance of possession."[52]

There is no legal consensus among the states on whether a *substance* can trespass, and if so, what substances qualify. For example, Alabama courts have found that dust and gas can give rise to trespass, but light and noise cannot.[53] A federal court in New Hampshire questioned whether the spreading of fumes, noise and light falls within the ordinary meaning of wrongful entry of property under the traditional definition of trespass.[54] Also, state statutes vary in their definitions of "trespass."

Constructive Eviction

A landlord's actions in allowing secondhand smoke seepage to take place could be construed as a "constructive" eviction of a tenant. Black's Law Dictionary defines "constructive eviction" as: "A landlord's act of making premises unfit for occupancy, often with the result that the tenant is compelled to leave."[55] The court in *Poyck v. Bryant* ruled that it was "axiomatic" that secondhand smoke could be grounds for a constructive eviction from an apartment if the smoke was "so pervasive."[56] While the court did not specifically rule on the issue of whether constructive eviction had occurred in the case, it ruled that such a claim was legally feasible.[57]

Nuisance

Nuisance law can also be applied to the issue of secondhand smoke infiltration. Several courts have ruled that secondhand smoke can constitute a nuisance under common law, which classifies nuisance as anything that *substantially interferes* with the enjoyment of life or property. A substantial interference is measured by the "definite offensiveness, inconvenience or annoyance to the person in the community."[58] A nuisance claim was successfully used against a landlord in one case[59] and against a smoking tenant in another case.[60] In Utah, secondhand smoke is explicitly listed as a nuisance by statute.[61] The statute defines nuisance 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." This includes tobacco smoke that drifts into an apartment or condominium more than once in each of two or more consecutive seven-day periods. There are no reported opinions in Utah under this statute. In February 1999, however, a non-smoking condominium owner filed suit against a smoker renting from another owner on a month-to-month lease. The case was settled when the smoker's lease was not renewed.[62] In states other than Utah, the issue of whether secondhand smoke

constitutes a nuisance is decided on a case-by-case basis.

In *Merrill v. Bosser*, the court likened secondhand smoke to an "odor" and noted that Florida courts have ruled that certain odors are actionable as a "nuisance."[63] However, the *Merrill* court cautioned that the case involved interference with property on numerous occasions "beyond mere inconvenience or customary conduct."[64] The plaintiff and her family had recurring illnesses due to the smoke and on several occasions were forced out of their condominium.[65]

Courts in states other than Florida have ruled that an odor can qualify as a "nuisance."[66] In 2004, a California trial court in *Babbitt v. Superior Court* stated that "intrusions by smoke and noxious odors are traditionally appropriate subjects of nuisance actions" and found that secondhand smoke from a cigar could constitute a nuisance.[67] In *Babbitt,* a condominium owner sued a neighboring cigar smoker over secondhand smoke drifting into his patio and condominium unit. While the court ruled that as a matter of law secondhand smoke *could* be declared a nuisance, it did not rule on whether the cigar smoke in the case before the court was a nuisance.[68]

As mentioned earlier, in addition to common law protections against nuisance, most leases and condominium agreements contain a standard nuisance clause that prohibits interference with the rights of other residents. In a 2005 Boston Housing case, a jury decided that a standard nuisance clause gave a landlord the right to evict two smoking tenants.[69] The tenants in *Harwood Capital Corp. v. Carey* smoked 40 to 60 cigarettes a day in their rented condominium unit. The jury decided that the tenants had breached the lease under a standard provision that prohibited tenants from engaging in an activity that substantially interfered with the rights of another tenant. The lease did not specifically ban smoking in the unit.

In 1991, a Massachusetts Superior Court ruled that the "annoyance" of smoke from three to six cigarettes a day was **not** a nuisance.[70] According to the court in *Lipsman v. McPherson*, the standard for nuisance was "a substantial effect on an ordinary person." "Plaintiff may be particularly sensitive to smoke, but an injury to one who has specially sensitive characteristics does not constitute a nuisance."[71]

Negligence

The theory of negligence can be used to hold both a landlord and a smoker liable for drifting secondhand smoke. To date, however, no landlord has been found negligent for allowing secondhand smoke seepage. Landlords have a duty under common law to exercise reasonable care in maintaining rental property.[72] A landlord's failure to curb secondhand smoke could be construed as a breach of the duty to exercise reasonable care in maintaining rental property.

A smoker can be held liable if a court decides that exposing a neighboring unit to secondhand smoke is negligent. The standard is failure to exercise the amount of care that a reasonable person would exercise under similar circumstances.[73] In *Babbitt*, the plaintiff argued that "'secondhand smoke' is generally believed to have deleterious effects on human health" and that the "rules of duty and negligence apply in his favor."[74] The court agreed that it was possible for a smoker to be found negligent because "the dangers of 'secondhand smoke' are not imaginary, and the risks to health of excessive exposure are being increasingly recognized in court."[75] However, the court also noted that "this duty of care does not extend indefinitely and in all directions,"[76] and to prove negligence the plaintiff would need to show a "substantial risk of harm" from the secondhand smoke.[77]

Harassment

Another claim used in secondhand smoke and housing cases is harassment. This theory was used by condominium owners, for example, in successfully obtaining an injunction against a

fellow condo owner.[78] The plaintiffs alleged the defendant was harassing them by smoking in a garage located below the owners' condominium. According to the plaintiffs, concern about their exposure to secondhand smoke forced them to leave their residence "for hours at a time." The Superior Court of California issued a restraining order, requiring the defendant to refrain from smoking in his garage.

Unsuccessful Cases

DeNardo v. Corneloup and The Foreman Properties Partnership[79]

Not all smoke-free housing claims are successful. In 2007, the Alaska Supreme Court affirmed a lower court decision dismissing the claims of a tenant who sued his neighbor and later his landlord for exposure to secondhand smoke in his unit.[80] The court said in its opinion that the landlord had not breached the covenant of quiet enjoyment because the plaintiff had not shown that secondhand smoke substantially disturbed his "use of the land."[81] The court reasoned that the landlord was not liable for trespass or nuisance, stating that the landlord had no control over the actions of the smoking tenant, and therefore owed no "duty of care" to the non-smoker.[82] The court also upheld dismissal of these same claims against the smoker on the grounds that no legal precedent existed holding that a tenant owes other tenants a duty to refrain from smoking, absent a lease provision or law.[83]

The plaintiff in this case failed to get any medical evaluation of his condition. Although he claimed to be suffering from a variety of ailments caused by his secondhand smoke exposure, such as anxiety, headaches, sleeplessness and nausea, he admitted that he did not consult a doctor for treatment.[84] He represented himself (pro se), and failed to proceed to trial on the issues of breach of habitability and negligence, even though the lower court did not dismiss these claims.

Zangrando v. Kuder[85]

In 2004, a jury in Ohio decided against a non-smoking condominium owner who was exposed to smoke from the condominium owner next door. Several times a day, the defendant smoked on a front porch shared with the plaintiff's condominium unit.[86] After the condominium association refused to take action, the plaintiff filed a lawsuit seeking damages and an order barring the defendant from smoking on the porch. The defendant moved to another residence after the lawsuit was filed, so secondhand smoke was no longer a problem by the time of the (unfavorable) jury verdict.

The Federal Fair Housing Act

A tenant or condominium owner who is sensitive to tobacco smoke can use the Federal Fair Housing Act ("FHA") to seek relief from secondhand smoke infiltration.[87] The FHA prohibits discrimination in housing against, among others, persons with disabilities, including persons with *severe breathing problems that are exacerbated by secondhand smoke*.[88] The FHA applies to virtually all rental and condominium housing, with the exception of single-family housing rented without the use of a broker and rental buildings with four or fewer units in which the building owner occupies one of the units. In addition to the FHA, states have their own anti-discrimination statutes, which may provide additional protections to those experiencing medical difficulties as a result of secondhand smoke seepage.

Simply showing an adverse health reaction to secondhand tobacco smoke is insufficient proof of a "disability" under the FHA. To use the FHA, the affected person must prove such adverse health reaction substantially limits one or more major life activities.[89] To be "substantial," the impairment must be severe and long-term.[90] A substantial impairment could include difficulty breathing or other ailments, such as a cardiovascular disorder, caused or exacerbated by exposure to secondhand smoke. For a person who suffers from such health effects, secondhand tobacco smoke may pose as great a barrier to access to or use of housing as a flight of stairs poses to a person in a wheelchair.[91]

A person who merely finds secondhand smoke annoying would probably not obtain protection under the FHA.[92] As a California Court of Appeals stated: "To most people tobacco smoke is merely irritating, distasteful or discomforting. Someone who suffers from a respiratory disorder and whose ability to breathe is severely limited by tobacco smoke is, nevertheless, physically handicapped within the meaning of the [Fair Employment and Housing] Act."[93]

The 2003 Massachusetts case *Donnelley v. Cohasset Housing Authority*[94] is instructive. Under a Massachusetts civil rights law modeled after the federal Americans with Disabilities Act, the superior court ruled that a plaintiff who claimed fatigue and itchy eyes when exposed to secondhand smoke did not qualify for protection from secondhand smoke as a disabled person.[95] While not controlling outside of Massachusetts, this ruling exemplifies the high standard plaintiffs need to meet to show their sensitivity to secondhand smoke substantially limits a major life activity.

In determining what constitutes a "disability" under the FHA, courts look to the definition of "disability" in the Americans with Disabilities Act and case law interpreting that definition.[96] In a 1999 case, *Sutton v. United Air Lines*, the Supreme Court ruled that a disabled person who is using a mitigating measure, such as medication, is not disabled under the Americans with Disabilities Act if the person is not experiencing any substantial limitation in a life activity.[97] In 2008, Congress passed amendments to the ADA that broadened the definition of 'disability," explicitly reversing *Sutton*. One provision states that whether an impairment substantially limits a major life activity is to be determined without regard to "the ameliorative effects of mitigating measures."[98]

If an aggrieved tenant or condominium owner successfully proves a disability under FHA and demonstrates that secondhand smoke exacerbates their disability, the landlord must make "reasonable accommodations" in housing to protect the individual from secondhand smoke exposure. Such accommodations could include developing or enforcing a smoke-free policy, either in the building or in the units surrounding the affected non-smoker, repairs to reduce secondhand smoke infiltration, or, in the case of a tenant, a transfer to a unit away from the secondhand smoke. The non-smoker may seek to ban smoking in the common areas of the building, if secondhand smoke is seeping from those areas.[99] Which remedial actions are reasonable and which constitute an "undue hardship" are determined on a case-by-case basis and are likely to vary depending on whether the smoker is living in an apartment or a condominium.[100]

In the case of *In re HUD and Kirk and Guilford Management Corp. and Park Towers Apartment,*[101] HUD approved as a "reasonable accommodation" a conciliation agreement in which an existing building was made smoke-free for future tenants. Current smokers were asked if they would be willing to relocate elsewhere in the building so more areas of the apartment building would be smoke-free.

A transfer to another unit was considered a "reasonable accommodation" in a lawsuit brought by the U.S. Department of Justice against the Seattle Housing Authority (SHA). In 2001, the U.S. Department of Justice sued the SHA for refusing to transfer a tenant with

asthma and allergies to a different unit. The tenant requested a transfer on a number of occasions after she suffered health effects from exposure to secondhand smoke drifting into her unit. The Justice Department determined that the secondhand smoke "substantially limited" her ability to breathe, making her handicapped. By denying her request to move, the Seattle Housing Authority had failed to make a "reasonable and necessary" accommodation to the tenant's handicap.[102]

SECTION III – Advantages to Landlords of Smoke-Free Leases

In a survey of forty-nine owners and managers of multi-family housing in Minnesota, the most commonly raised legal concern with respect to smoke-free housing was the legal recourse owners have to enforce a smoke-free rule.[103] Landlords wanted the authority to evict a tenant for smoking, and wanted their authority to stand up in court.

The Center for Energy and Environment, which co-authored the survey, concluded that landlords offering smoke-free rental properties face a small risk that they could be held to a higher standard of care in the event of a violation of a no-smoking lease.[104] The authors suggested this risk could be avoided by using appropriate lease provisions and suggested model language, drafted in consultation with a legal advisory committee. The committee consisted of attorneys who regularly represent property owners and managers, as well as attorneys who represent tenants or serve as counsel for public housing agencies.

In general, the template language states that the landlord is not a guarantor of smoke-free environments and informs tenants that their assistance with enforcement is needed. The lease also gives tenants a right of action to enforce smoke-free restrictions against fellow tenants or their guests. Finally, the template includes an optional grandfather paragraph for rental units occupied by smokers. Key provisions of the model lease are reprinted below:[105]

> **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 buildings or other parts of the rental community, nor shall Tenant permit any guests or visitors under the control of Tenant to do so.*
>
> **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.*
>
> **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.*

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. 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.*

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 the 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 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.

Conclusion

Smoke-free apartments or condominiums are not only sound health policy, they also make sense legally. Landlords and building owners have the right to prohibit smoking in apartments and condominiums, which protects them from lawsuits over secondhand smoke incursion. Aggrieved residents affected by secondhand smoke allegations have a broad choice of legal actions, ranging from claims under common law to Fair Housing Act complaints.

Tenants and condominium owners have had some success in the various legal venues, and this trend is likely to continue. As evidence of the ill effects of secondhand smoke mounts and more environments become smoke-free, increasing numbers of people will assert their rights to smoke-free living. Landlords and building owners can join this movement by offering smoke-free leases.

About the Author

Susan Schoenmarklin is a Consulting Attorney for the Smoke-Free Environments Law Project.

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Endnotes

1 U.S. Dep't of Health & Human Services, Centers for Disease Control and Prevention, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: Report of the Surgeon General* 11 (2006), *available at* http://www.surgeongeneral.gov/library/secondhandsmoke/report/fullreport.pdf.

2 *Id.* at 632.

3 Terry F. Pechacek & Stephen Babb, *Commentary: How acute and reversible are the cardiovascular risks of secondhand smoke?* 328 Brit. Med. J. 980, 983, April 24, 2004.

4 California Air Resources Board, Findings of the Scientific Review Panel on Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant app. II at 3(2005). In 2007, the Air Resources Board approved a Final Regulation Order identifying secondhand smoke as a Toxic Air Contaminant. California Air Resources Board, Final Regulation Order, Identification of Environmental Tobacco Smoke 1 (2007) (codified as amended at Cal Code Regs. tit. 17, § 93000 (2007)).

5 Press Release, U.S. Environmental Protection Agency, EPA Designates Passive Smoking a "Class A" or Known Human Carcinogen (Jan. 7, 1993).

6 Stanton A. Glantz & William W. Parmley, *Passive Smoking and Heart Disease: Epidemiology, Physiology, and Biochemistry*, 83 Circulation 1, 10 (1991).

7 Mich. Op. Att'y Gen. 6719 (1992).

8 Office of the Att'y Gen. of Idaho, Landlord and Tenant Guidelines 1 (2008).

9 *See* Fagan v. Axelrod, 550 N.Y.S.2d 552, 559 (N.Y. Sup. Ct.1990) (noting that under common law a landlord could prohibit smoking on rental property).

10 *See* Samantha K. Graff, Tobacco Control Legal Consortium, *There is No Constitutional Right to Smoke: 2008* (2d ed. 2008).

11 Letter from Sheila Walker, Chief Counsel, U.S. Dep't of Housing and Urban Dev., Detroit Field Office to James Bergman, J.D., Co-Director, Center for Social Gerontology, Inc. 2 (July 18, 2003), *available at* http://www.mismokefreeapartment.org/hudletter.pdf.

12 *Id.*

13 Non-Smoking Policies in Public Housing, U.S. Dep't of Housing and Urban Dev., Notice: PIH-2009-21 (HA) (July 17, 2009), *available at* http://www.hud.gov/offices/pih/publications/notices/09/pih2009-21.pdf.

14 *See* In re 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); In re Kearney, Nebraska Public Housing Authority Tenant/Unit Assignment According to Smoking Preference Compatibility with Tenant Selection/Assignment Regulations, HUD Opinion (June 27, 1996); In re City of Fort Pierce, Florida Housing Authority, HUD Opinion (July 9, 1996).

15 Letter from Lana J. Vacha, Director, U.S. Dep't of Housing and Urban Dev., Detroit Field Office to Roy Struble (Jan. 31, 2007), a*vailable at* http://www.smokefreeforme.org/documents/hudletter.pdf. The Smoke-Free Environments Law Project has a compilation of HUD letters on the issue of smoke-free housing, and a list of Housing Authorities that have adopted smoke-free policies, at http://www.tcsg.org/sfelp/home.htm. Please note that requirements governing how the change to a smoke-free policy is adopted and implemented in HUD housing are beyond the scope of this synopsis.

16 Utah Code Ann. § 57-22-5 (1)(h) (2008).

17 Utah Code Ann. § 57-8-16 (7)(b) (2008).

18 Christiansen v. Heritage Hills Condominium Association, No. 06CV1256 (Colo. Dist. Ct. Jefferson County 2006).

19 Susan Schoenmarklin, Tobacco Control Legal Consortium, *Legal Options for Condominium Owners Exposed to Secondhand Smoke 7* (2006), *available at* http://tobaccolawcenter.org/documents/lawsynopsis_schoenmarklin.pdf.

20 One method for documenting secondhand smoke in the unit is the placement of a "passive nicotine" monitor in a unit adjacent to the smoker's unit for a month, accompanied by expert analysis of the results. This is a proven tool used in lawsuits and in research settings to measure secondhand smoke. *See* Frank E. Jones, Toxic Organic Vapors in the Workplace 117-18 (1994). A significant drawback is its cost. A recent development is the use of the TSI SidePak to measure airborne particles in multi-unit housing. The SidePak records particulates smaller than 2.5 microns in diameter, which are released in significant amounts from burning cigarettes. While the SidePak has been used for a number of years to measure secondhand smoke in public places, Neil Klepeis, PhD, Consulting Professor at Stanford University, recently developed a protocol for use of the SidePak in multi-unit housing settings. California Clean Air Project, Air Monitoring Protocol No. 1, Secondhand Smoke Drift Between Apartment Units (2008), *available at* ccap.etr.org/base/documents/airmonitoringprotocol.pdf. A number of state health departments own SidePaks, and some make them available to the public. However, some experts, such as James Repace, MSc., a biophysicist and former scientist with the EPA, advise against use of the SidePak due to concerns about false positives in measuring secondhand smoke (i.e. picking

up cooking oils and other non-tobacco substances). *See* Kiyoung Lee et al., *Differential Impacts of Smoke-Free Laws on Indoor Air Quality,* J. Envtl. Health, Apr. 2008, at 24, 28.

21 Public Health Law & Policy, Technical Assistance Legal Ctr., *How Disability Laws Can Help Tenants Suffering from Drifting Tobacco Smoke 3, available at* http://talc.phlpnet.org/pdf_files/0090.pdf.

22 Condominium owners agree to abide by a set of "covenants, conditions and restrictions" (known in some states as a "declaration") that defines the rights and obligations of owners. Schoenmarklin, *supra* note 19, at 2. The condominium rules may also be relevant.

23 *See, e.g.*, Nat'l Multi Housing Council, Property Mgmt., *Update: No Smoking Policies* (Feb. 2008); Susan Schoenmarklin & Jacque Petterson, *Smoke Signals,* Units, Dec. 2007, at 18.

24 For recommendations on reducing secondhand smoke transfer, see Canada Mortgage and Housing Corp., *Solving Odour Transfer Problems in Your Apartment* (Dec. 2006), available at http://www.cmhc-schl.gc.ca/en/co/reho/reho_002.cfm.

25 *See, e.g.,* Susan Schoenmarklin, Smoke-Free Environments Law Project, *Analysis of the Voluntary and Legal Options of Condo Owners Confronted With Secondhand Smoke from Another Condo Unit* (2006), *available at* http://www.tcsg.org/sfelp/memo_06.pdf.

26 Center for Energy and Environment, Reduction of Environmental Tobacco Smoke Transfer in Minnesota Multifamily Buildings Using Air Sealing and Ventilation Treatments, vii (Nov. 2004). "The relative reduction ranged from 29% for the 11 Story building to 43% for the 4 Story building and the [effective contaminant transfer] was reduced for 81% of the treated units." *Id.*

27 *Id.* "After both air sealing and ventilation treatments were complete, three of the six buildings had reductions in the median fraction of inter-unit flow rate of 3% or greater. The fraction for the 11 Story building decreased from 5% to 1% and the 138 Unit building decreased from 11% to 1%." *Id.*

28 U.S. Dep't of Health & Human Services, *supra* note 1, at 636–41.

29 *See* Am. Nat'l Standards Inst., Am. Soc'y of Heating, Refrigerating, & Air Conditioning Engineers, Inc., ANSI/ASHRAE Addendum 62o to ANSI/ASHRAE Standard 62-2001, Ventilation for Acceptable Indoor Air Quality 2–3 (2003), *available at* http://www.ashrae.org/docLib/20048514546_347.pdf (noting that secondhand smoke is present in no-smoking areas); *see also* Am. Nat'l Standards Inst., Am. Soc'y of Heating, Refrigerating, & Air Conditioning Engineers, Inc., Index to Addenda to ANSI/ASHRAE Standard 62.1-2004, Ventilation for Acceptable Indoor Air Quality 3 (2004), *available at* http://www.ashrae.org/content/ASHRAE/ASHRAE/ArticleAltFormat/200542014276_347.pdf (incorporating "Addendum 62o" into recommended standards for indoor areas where smoking is allowed), *superseded by* Am. Nat'l Standards Inst. Am. Soc'y of Heating, Refrigerating, & Air Conditioning Engineers, Inc., ANSI/ASHRAE Standard 62.1-2007, Ventilation for Acceptable Indoor Air Quality (2007).

30 Although plaintiffs have prevailed against offending condominium owners on secondhand smoke claims, thus far no plaintiff has prevailed against a condominium association. For more detailed information on secondhand smoke claims against condominium associations, see Schoenmarklin, *supra* note 19 at 4.

31 No. 91cv179 (Worcester City Hous. Ct. Dept. 1991).

32 *See* Restatement (Second) of Property (Landlord and Tenant) § 5.1 (1977) ("[T]here is a breach of the landlord's obligations if the parties contemplate that the leased property will be used for residential purposes and on the date the lease is made and continuously thereafter . . . the leased property, without fault of the tenant, is not suitable for residential use.")

33 Robert L. Kline, *Smoke Knows No Boundaries: Legal Strategies for Environmental Tobacco Smoke Incursions into the Home Within Multi-Unit Residential Dwelling,* 9 Tobacco Control 201, 204 (2000).

34 Heck v. Whitehurst, 2004 Ohio 4366, ¶ 31 (Ohio Ct. App. 2004).

35 *Id.* at ¶ 29.

36 No. 92-6924 (Or. Dist. Ct. Lackamas County 1992).

37 Poyck v. Bryant, 820 N.Y.S.2d 774, 776–77 (N.Y. Civ. Ct. 2006).

38 *Id.* at 779–80.

39 49 Am. Jur. 2d *Landlord & Tenant* § 481 (2008).

40 No. 98-02279 (Boston Hous. Ct. 1998), *reprinted in* 12 Tobacco Products Liability Reporter 2.302 (1998).

41 *Id.*

42 638 N.E.2d 636 (Ohio Ct. App. 1994).

43 *Id.* at 638.

44 Merrill v. Bosser, No. 05-4239 COCE 53, at 6 (Fla. 17th Cir. Ct. 2005), *available at* http://ash.org/merrillcase.pdf.

45 *Id.* at 6.

46 *Id.*

47 *Id.* at 3.

48 *See* 75 Am. Jur. 2d *Trespass* § 25 (1991).

49 Merrill, No. 05-4239 COCE 53, at 3 (quoting 75 Am. Jur. 2d *Trespass* § 56 (2005)).

50 *Id.*

51 *Id.* (citing 55 Fla. Jur. 2d T*respass §* 9 (2009)).

52 *Id.*

53 *Compare* Garner v. Walker, 577 So.2d 1276, 1277–78 (Ala. 1991) (stating that jury could find trespass based on dust storms) *and* Borland v. Sanders Lead Co., 369 So.2d 523, 529 (Ala. 1979) (finding that sulfoxide gases were sufficient to implicate trespass law) *with* Born v. Exxon Corp., 388 So.2d 933, 934 (Ala. 1980) (stating that light and odor do not evidence trespass).

54 Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 272 (1st Cir. 1990).

55 Black's Law Dictionary 594 (8th ed. 2004).

56 Poyck v. Bryant, 820 N.Y.S.2d 774, 777 (N.Y. Civ. Ct. 2006).

57 *Id.*

58 Keeton et al., *supra* note 60.

59 Merrill, No. 05-4239 COCE 53, at 6.

60 In Harwood Capital Corp. v. Carey, No. 05-SP-00187 (Boston Hous. Ct. June 8, 2005), the *landlord* sued the offending smokers who were his tenants.

61 Utah Code Ann. § 76B-6-1101(3) (West 2008).

62 *See* Douglas Carney, Ctr. for Energy and Env't, Legal Research Regarding Smoke-Free Buildings and Transfer of Envtl. Tobacco Smoke Between Units in Smoking-Permitted Buildings 8, (2002), *available at* http://www.mncee.org/pdf/research/report.pdf.

63 Merrill, No. 05-4239 COCE 53, at 5.

64 *Id.*

65 *Id.*

66 For example, a Nebraska court in ruling on a nuisance claim regarding a hog raising operation said that the "right to have air floating over one's premises free from noxious and unnatural impurities" is an "absolute" right. Flansburgh v. Coffey, 370 N.W.2d 127, 131 (Neb. 1985). An Iowa court upheld a jury award of damages for nausea, inconvenience, and discomfort from odors produced from a sewage plant. Duncanson v. City of Fort Dodge, 11 N.W.2d 583, 585–86 (Iowa 1943).

67 Babbitt v. Superior Court, No. E033448, 2004 WL 1068817, at *3 (Cal. Dist. Ct. App. May 13, 2004). Note that this case is an unpublished opinion, which is not considered binding precedent.

68 *See* Merrill, No. 05-4239 COCE 53, at 5. The Merrill court cited as a standard the case of Wade v. Campbell, 19 Cal. Rptr. 173 (Cal. Dist. Ct. App. 1962), which involved manure piles, slimy ponds, overflowing sewage, dust, flies, and loud nocturnal mooing and mating.

69 Harwood Capital Corp. v. Carey, No. 05-SP-00187 (Boston Hous. Ct. June 8, 2005).

70 Lipsman v. McPherson, No. 191918 (Super. Ct. of Mass., Middlesex 1991), *reprinted in* 6.2 Tobacco Products Liability Reporter 2.345 (1991).

71 *Id.*

72 *See* Restatement (Second) of Property (Landlord & Tenant) § 17.6 (1977).

73 Restatement (Second) of Torts § 283 (1965).

74 *See* Babbitt, No. E033448, at *1.

75 *Id.* at 2.

76 *Id.*

77 *Id.* at 2–3.

78 Layon v. Jolley, No. NSOO4483 (Cal. Super. Ct. Los Angeles County 1996).

79 163 P.3d 956, 958 (Alaska 2007).

80 *Id.* at 957.

81 *Id.* at 960.

82 *Id.* at 961-62.

83 *Id.* at 961.

84 *Id. See* Brief of Appellant at 4, DeNardo v. Corneloup, 163 P.3d 956 (Alaska 2007) (No. S-11703).

85 No. 22448, 2006 WL 826081 (Ohio Ct. App. Mar. 31, 2006) (affirming jury verdict in an unreported decision).

86 *Id.* at *1.

87 Fair Housing Act, 42 U.S.C. §§ 3601–3631 (2007).

88 In a 1992 analysis, the General Counsel of the U.S. Department of Housing and Urban Development concluded that persons suffering from Multiple Chemical Sensitivity Disorder (MCS) and Environmental Illness (EI) could qualify as disabled under the Fair Housing Act. According to the analysis, MCS and EI include secondhand smoke-related illnesses and disorders. Memorandum from Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Dep't of Housing and Urban Dev. to Frank Keating, General Counsel, U.S. Dep't of Housing and Urban Dev. (Mar. 5, 1992), *available at* http://www.mcs-global.org/Documents/PDFs/MCS%20Disorder.pdf.

89 42 U.S.C § 12102(1)(A) (2009).

90 Bragdon v. Abbott, 524 U.S. 624, 639–45 (1998).

91 Smoke-Free Environments Law Project, The Federal Fair Housing Act and the Protection of Persons Who Are Disabled by Secondhand Smoke (2002), *available at* http://www.tcsg.org/sfelp/fha_01.pdf.

92 Memorandum from Carole W. Wilson, *supra n*ote 88.

93 County of Fresno v. Fair Employment & Hous. Comm'n, 277 Cal. Rptr. 557, 563 (Cal. Ct. App. 1991).

94 No. 0100933, 2003 WL 21246199 (Mass. Super. 2003).

95 *Id.* at *10–11.

96 The FHA regulations incorporate the ADA definition of disability. *Compare* 42 U.S.C. § 3602(h) (2009) *with* 42 U.S.C§ 12102(1) (2009). Therefore, a person who qualifies as disabled under the FHA would be considered disabled under the ADA. *See generally* Albertson's, Inc. v. Hallie Kirkingburg, 527 U.S. 555 (1999) (holding that disability must be determined on a case-by-case basis) *and* Cameron v. Cmty. Aid for Retarded Children, Inc., 335 F.3d 60 (2d Cir. 2003) (outlining a prima facie case for disability).

97 527 U.S. 471, 480–84 (1999).

98 42 U.S.C. § 12102(4)(E).

99 Residents who qualify as "disabled" under the FHA would be entitled to "reasonable accommodations" in the public areas of the complex, under Title III of the ADA, which protects the disabled in "public accommodations." *See* Garza v. Raft, holding that federal Fair Housing Act applies to common areas of residential complexes (WL 33882969, at *3 (N.D. Cal. 1999)). *But see* Birke v. Oakwood Worldwide, holding that apartment and condominium residents, regardless if they qualify as "disabled," do not have a cause of action for ADA violations since residential facilities do not constitute "public accommodations" under the Act. 09 C.D.O.S. 409 (2009), No. D203093 (Jan. 12, 2000).

100 Determining what is a "reasonable accommodation" in a condominium complex is complicated as it involves condominium boards as well as the homeowner's association. For more information on the use of the FHA in the context of condominiums, *see* Schoenmarklin, *supra* note 19 at 2.

101 *In re* U.S. Dep't Hous. and Urban Dev. and Kirk and Guilford Mgmt. Corp. and Park Towers Apartments, HUD Case No. 05-97-0010-8, 504, Case No. 05-97-11-0005-370 (1998).

102 The case was later settled with a consent decree stating that the SHA would, among other actions, implement a policy passed by the Seattle Authority's Board of Commissioners making all buildings in the Tri-Court facility smoke free. U.S. v. Seattle Housing Authority, C01-1133L (W.D. Wa., 2002) (consent decree). For a more detailed discussion of the application of the FHA to residents of multi-unit housing, including what may and may not be a reasonable accommodation, consult the fact sheet *How Disability Laws Can Help Tenants Suffering from Drifting Tobacco Smoke*, available on the Technical Assistance Legal Center website at http://talc.phlpnet.org/pdf_files/0090.pdf and *The Federal Fair Housing Act and the Protection of Persons Who are Disabled by Secondhand Smoke*, available on the website of the Smoke-Free Environments Law Project at http://www.tcsg.org/sfelp/fha_01.pdf.

103 Ctr. for Energy and Env't & Ass'n for Nonsmokers – Minnesota, Survey of Multifamily Building Owners and Managers in Minnesota Regarding Movement of Secondhand Smoke in Buildings and Designation of Smoke-free Buildings (Oct. 2001), *available at* http://www.mncee.org/pdf/research/ownersurvey.pdf.

104 *See* Carney, *supra* note 62, at 26–27.

105 *Id.* at 12–13. Reprinted with permission of the Center for Energy and Environment, Aug. 24, 2003.

About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.

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