

# OF ASTHMA AND ASHTRAYS: EXAMINING THE RIGHTS OF AND EXPLORING WAYS TO PROTECT MAINE TENANTS LIVING IN MULTI-UNIT RENTAL HOUSING WHO ARE INVOLUNTARILY EXPOSED TO SECONDHAND TOBACCO SMOKE IN THEIR HOMES

*Amy K. Olfene*

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## OF ASTHMA AND ASHTRAYS: EXAMINING THE RIGHTS OF AND EXPLORING WAYS TO PROTECT MAINE TENANTS LIVING IN MULTI-UNIT RENTAL HOUSING WHO ARE INVOLUNTARILY EXPOSED TO SECONDHAND TOBACCO SMOKE IN THEIR HOMES

Amy K. Olfene\*

### I. INTRODUCTION

Toxins found in tobacco smoke<sup>1</sup> are deadly, and there is no safe level of exposure.<sup>2</sup> Secondhand smoke contains over 7,000 chemicals, 69 of which are known to cause cancer in humans.<sup>3</sup> In fact, the U.S. Environmental Protection Agency (“EPA”) has declared secondhand tobacco smoke a Group A carcinogen, a rating “reserved for those compounds or mixtures which have been shown to cause cancer in humans, based on studies in human populations.”<sup>4</sup> Exposure to tobacco smoke can cause a number of diseases and ailments in both smokers and nonsmokers, including heart disease, emphysema, and sudden infant death syndrome; in addition, such exposure can exacerbate existing illnesses, such as asthma and respiratory infections.<sup>5</sup> In the United States, nearly 50,000 nonsmokers die each year as a result of exposure to secondhand smoke.<sup>6</sup> In short, exposure to

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1. “Tobacco smoke” in this article will be used interchangeably with “secondhand smoke,” “passive smoke,” and “environmental tobacco smoke” to accommodate the various titles given to what is essentially a combination of “mainstream smoke,” which is exhaled by smokers using tobacco products, and “sidestream smoke,” which is the smoke that results from directly burning the end of a cigarette, cigar, or other ignitable tobacco product. See Cara L. Thomas, *Butt Out! Controlling Environmental Tobacco Smoke in Condominiums*, PROB. & PROP., May/June 2008, at 11, 11.

2. U.S. PUB. HEALTH SERV., U.S. DEP’T OF HEALTH & HUMAN SERVS., HOW TOBACCO SMOKE CAUSES DISEASE: THE BIOLOGY AND BEHAVIORAL BASIS FOR SMOKING-ATTRIBUTABLE DISEASE: A REPORT OF THE SURGEON GENERAL iii (2010) [hereinafter TOBACCO SMOKE CAUSES DISEASE].

3. *Id.* at 17.

4. *Health Effects of Exposure to Secondhand Smoke*, U.S. EPA, <http://www.epa.gov/smokefre/healtheffects.html> (last updated Nov. 30, 2011).

5. See *Health Effects of Secondhand Smoke*, CTRS. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/secondhand\\_smoke/health\\_effects/index.htm](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/health_effects/index.htm) (last updated June 10, 2013). See also AMY HELBURN, *ASTHMA REG’L COUNCIL OF NEW ENG., A CASE FOR SMOKE-FREE HOUSING* 4 (Laurie Stillman & Steven Ridini eds., 2007), available at <http://asthmaregionalcouncil.org/uploads/Healthy%20Homes/SmokeFreePaperFINALcolor.pdf> (reporting that children exposed to secondhand smoke in the home are 44% more likely to suffer from asthma). See generally TOBACCO SMOKE CAUSES DISEASE, *supra* note 2.

6. *Toll of Tobacco in the United States of America*, CAMPAIGN FOR TOBACCO-FREE KIDS (July 30, 2013), <http://www.tobaccofreekids.org/research/factsheets/pdf/0072.pdf>.

“passive”<sup>7</sup> tobacco smoke presents substantial health risks, despite an individual’s choice not to smoke.

To combat the health hazards associated with exposure to secondhand smoke, states, communities, businesses, and individuals throughout the U.S. are choosing to ban smoking in a growing number of indoor settings. For example, Maine has become a state where smoke-free living is the norm, not the exception. Nearly all workplaces<sup>8</sup> and public places<sup>9</sup> are statutorily designated smoke-free spaces, and over the years smoking rates have declined dramatically.<sup>10</sup> By 2010, only 18% of Maine adults were current smokers.<sup>11</sup>

However, despite having some of the nation’s strongest smoke-free air laws,<sup>12</sup> Maine residents continue to be exposed to secondhand smoke, especially in the home.<sup>13</sup> Unlike workplaces and public places, the State does not regulate smoking in private homes,<sup>14</sup> nor does it require property owners to prohibit smoking in

7. “Passive smoking” is defined as “the involuntary inhalation of tobacco smoke (as from another’s cigarette) especially by a nonsmoker.” *Passive Smoking*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/passive%20smoking> (last visited Sept. 11, 2013).

8. See generally 22 M.R.S.A. § 1580-A (2004 & Supp. 2012) (referred to as the Workplace Smoking Act of 1985).

9. See generally *id.* §§ 1541-1550 (referred to, collectively, as the Public Place Smoking Law).

10. For example, Maine’s adult smoking rate declined from 30% in 1997 to 21% in 2005, and youth smoking rates declined by 60% in the same period. *Maine Facts*, P’SHP FOR A TOBACCO-FREE ME., [http://www.tobaccofreemaine.org/explore\\_facts/Maine\\_facts\\_and\\_stats.php](http://www.tobaccofreemaine.org/explore_facts/Maine_facts_and_stats.php) (last visited Aug. 30, 2013) [hereinafter *PTM Tobacco Facts*].

11. *Adult Tobacco Use in Maine*, P’SHP FOR A TOBACCO-FREE ME., [http://www.tobaccofreemaine.org/explore\\_facts/documents/25-07-11ADULTfactsheet.pdf](http://www.tobaccofreemaine.org/explore_facts/documents/25-07-11ADULTfactsheet.pdf) (last visited Aug. 30, 2013) [hereinafter *PTM Adult Tobacco Use*].

12. See AM. LUNG ASS’N, STATE OF TOBACCO CONTROL 2013, at 92 (Jan. 2013), available at <http://www.stateoftobaccocontrol.org/sotc-2013-report.pdf> (awarding Maine a grade of “A” for its statewide restrictions on smoking). See also OFFICE ON SMOKING & HEALTH, U.S. DEP’T OF HEALTH & HUMAN SERV., TOBACCO CONTROL STATE HIGHLIGHTS, 2010, at 89 (2010) [hereinafter TOBACCO CONTROL STATE HIGHLIGHTS] (stating that “Maine has a smoke-free law that provides for strong protection against exposure to secondhand smoke in workplaces and public places”).

13. See, e.g., *PTM Tobacco Facts*, *supra* note 10 (stating that 44,864 Maine children live in a home with a smoker and limited rules related to smoking inside the home, and that 25% of Maine adults report exposure to secondhand smoke at work, despite laws barring smoking in the workplace); *Breathe Easy in Maine*, P’SHP FOR A TOBACCO-FREE ME., [http://www.tobaccofreemaine.org/breathe\\_easy/index.php](http://www.tobaccofreemaine.org/breathe_easy/index.php) (last visited Aug. 30, 2013) [hereinafter *PTM Breathe Easy*] (reporting that 53% of high school students reported having been in the same room as a person smoking in the prior week); *Toll of Tobacco in Maine*, CAMPAIGN FOR TOBACCO-FREE KIDS, [http://www.tobaccofreekids.org/facts\\_issues/toll\\_us/maine](http://www.tobaccofreekids.org/facts_issues/toll_us/maine) (last updated June 8, 2012) (reporting that approximately 79,000 Maine children continue to be exposed to secondhand tobacco smoke in the home). Also of note: while nearly 77% of multi-unit residents in Maine reporting have a smoke-free home rule, it is estimated that upwards of 35% of those living in multi-unit dwellings continue to experience secondhand smoke infiltration into their units. See Brian A. King et al., *National and State Estimates of Secondhand Smoke Infiltration Among U.S. Multiunit Housing Residents*, 15 NICOTINE & TOBACCO RESEARCH 1316, 1319, tbl. 1 (2013).

14. See Neil S. Shankman, *Where There is Smoke . . . There is Litigation*, SHANKMAN & ASSOCS. LEGAL CENTER (Oct. 9, 2007), [http://www.shankmanlegal.com/print/MAOMA\\_smoke.pdf](http://www.shankmanlegal.com/print/MAOMA_smoke.pdf) (stating that “[t]here is nothing in the law that requires a landlord to forbid tenants from smoking in their rooms”). It should be noted, however, that there are state laws and regulations that place restrictions on smoking behavior in private residential settings to some degree, including residential homes used for daycare or babysitting services. See 22 M.R.S.A. § 1542(2)(J) (2004 & Supp. 2012). In addition, facilities with one or more residential units licensed by the Maine Department of Health and Human Services is a

rental units.<sup>15</sup> For example, 72% of Maine adults choose to ban smoking in their own homes,<sup>16</sup> but only 47% of Maine tenants report living in a rental building that prohibits smoking.<sup>17</sup> Thus, not surprisingly, although the majority of Maine households have adopted voluntary smoke-free policies,<sup>18</sup> low-income individuals continue to be exposed at much higher rates than the general population.<sup>19</sup>

*But why the discrepancy?* Nonsmokers have successfully advocated for smoke-free workplace and public place restrictions in Maine, but these prohibitions on indoor smoking do not extend to rental units.<sup>20</sup> However, this does not mean that secondhand smoke exposure in multi-unit housing hasn't posed problems. While 78% of current smokers and 89% of nonsmokers agree that people should be protected from secondhand smoke,<sup>21</sup> smokers continue to enjoy their ability to smoke in the privacy of their home.<sup>22</sup> Thus, the same conflicts between smokers and nonsmokers, which led to restrictions on smoking at workplaces and in public places, are being seen in the housing environment as well.<sup>23</sup>

Multi-unit rentals, however, provide unique challenges to arguments that “a man’s home is his castle,”<sup>24</sup> a castle in which the government should refrain from intruding. For example, when an individual smokes in a single-unit, detached home, only the home’s occupants are impacted; but when a smoker lights up in a multi-unit building, everyone in the building is potentially exposed to their tobacco smoke.<sup>25</sup> Smoke can travel from floor to floor, unit to unit through cracks in the

business facility for the purposes of the Workplace Smoking Act, and the laws governing smoking in the workplace apply “during the period of time that an employee is physically present to perform work there.” 22 M.R.S.A. § 1580-A(2)(A), (C-3) (Supp. 2012).

15. There are no laws requiring a landlord to adopt a policy that prohibits smoking in residential apartment units; however, landlords are free to do so. *See* ME. ATT’Y GEN., MAINE CONSUMER LAW GUIDE § 14.18 (Sept. 18, 2012) (stating that “[l]andlords can certainly ban smoking on the premises”).

16. PTM *Breathe Easy*, *supra* note 13.

17. *Smoke-Free Housing Evaluation Conducted*, THE LINK (Healthy Me. P’ships, P’ship For A Tobacco-Free Me., Augusta, Me.), Fall 2011, at 6 [hereinafter THE LINK 2011].

18. *See also* TOBACCO CONTROL STATE HIGHLIGHTS, *supra* note 12, at 90 (“In Maine, . . . an increasing number of families have [smoke-free home rules]”).

19. Ctrs. for Disease Control & Prevention, *Vital Signs: Nonsmokers’ Exposure to Secondhand Smoke — United States, 1999–2008*, 59 MORBIDITY & MORTALITY WKLY. REP. 1141, 1142 (2010).

20. However, Maine’s restriction on smoking in public places may limit smoking in common areas of apartment buildings, which may include hallways, laundry rooms, and stairwells. *See* ME. ATT’Y GEN., *supra* note 15, at § 14.18.

21. *Exposure to Secondhand Smoke in Maine*, P’SHP FOR A TOBACCO-FREE ME., [http://www.tobaccofreemaine.org/explore\\_facts/documents/25-07-11SECONDHANDfactsheet.pdf](http://www.tobaccofreemaine.org/explore_facts/documents/25-07-11SECONDHANDfactsheet.pdf) (last visited Aug. 30, 2013) [hereinafter PTM SHS *Factsheet*].

22. *See* Thomas, *supra* note 1.

23. David B. Ezra, “*Get Your Ashes Out of My Living Room!*”: *Controlling Tobacco Smoke in Multi-Unit Residential Housing*, 54 RUTGERS L. REV. 135, 137 (2001).

24. *See, e.g.*, Ann H. Zgrodnik, *Smoking Discrimination: Invading an Individual’s Right to Privacy in the Home and in the Workplace?*, 21 OHIO N.U. L. REV. 1227, 1247-48, 1254 (1995) (discussing, within a context of privacy law, a balance of “rights” of smokers and nonsmokers).

25. *See* AM. SOC’Y OF HEATING, REFRIGERATING, & AIR-CONDITIONING ENGINEERS, INC. (ASHRAE), ASHRAE POSITION DOCUMENT ON ENVIRONMENTAL TOBACCO SMOKE § 5.0 (approved Oct. 22, 2010; affirmed June 25, 2013), [https://www.ashrae.org/File%20Library/docLib/About%20Us/PositionDocuments/ASHRAE\\_PD\\_Environmental\\_Tobacco\\_Smoke\\_2013.pdf](https://www.ashrae.org/File%20Library/docLib/About%20Us/PositionDocuments/ASHRAE_PD_Environmental_Tobacco_Smoke_2013.pdf) (concluding that “[a]t present, the only means of effectively eliminating health risk associated with indoor exposure is to ban smoking activity”).

walls and ceilings, ventilation systems, electrical outlets, doors, and windows<sup>26</sup> as upwards of 65% of air is exchanged between units.<sup>27</sup> Thus, a tenant's decision to ban smoking in their unit does not guarantee that they won't be exposed to secondhand smoke.<sup>28</sup>

Though outside the scope of this Comment, it should be noted that—while smoking is a legal activity for adults<sup>29</sup>—there is no “right” to smoke.<sup>30</sup> It is well established that an individual's status as a smoker does not afford them constitutional protections,<sup>31</sup> nor are smokers seen as a protected class under the Maine Human Rights Act.<sup>32</sup> Furthermore, there are no laws prohibiting a landlord from adopting a smoke-free policy,<sup>33</sup> and legislative bodies are free to implement restrictions on smoking activities.<sup>34</sup>

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26. NAT'L CTR. FOR HEALTHY HOUS., REASONS TO EXPLORE SMOKE-FREE HOUSING 2 (2009), available at [http://www.nchh.org/Portals/0/Contents/NCHH\\_Green\\_Factsheet\\_Smokefree.pdf](http://www.nchh.org/Portals/0/Contents/NCHH_Green_Factsheet_Smokefree.pdf).

27. See CTR. FOR ENERGY & ENV'T, REDUCTION OF ENVIRONMENTAL TOBACCO SMOKE TRANSFER IN MINNESOTA MULTIFAMILY BUILDINGS USING AIR SEALING AND VENTILATION TREATMENTS vi (Nov. 2004), available at <http://www.mncee.org/getattachment/5ccac4ed-4764-4251-9f68-e3429356dbab>.

28. See Karen M. Wilson et al., *Tobacco-Smoke Exposure in Children Who Live in Multiunit Housing*, 127 PEDIATRICS 85, 90 (2011) (stating that “disseminated tobacco smoke from multiunit apartments may contribute to the actual exposure of children. In addition, there are likely to be many adult nonsmokers who also are exposed to tobacco smoke by this mechanism.”).

29. 22 M.R.S.A. § 1555-B(5-A) (2004).

30. See SAMANTHA K. GRAFF, TOBACCO CONTROL LEGAL CONSORTIUM, THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE 2 (2d ed. 2008) (“The Constitution does not explicitly mention smoking. Therefore, if there were a constitutional right to smoke, it would have to fall under the umbrella of one of the recognized constitutional rights. People who claim a right to smoke usually rely on one of two arguments: (1) that smoking is a personal liberty specially protected by the Due Process Clause, or (2) that the Equal Protection Clause extends special protection to smokers as a group. Neither of these claims is legally valid. Since smoking is not a specially protected constitutional right, the Constitution does not bar the passage of local, state, or federal smoke-free laws and other restrictions on smoking.”)

31. See, e.g., *Fagan v. Axelrod*, 550 N.Y.S.2d 552, 559 (N.Y. App. Div. 1990) (“There is no more a fundamental right to smoke cigarettes than there is to shoot-up or snort heroin or cocaine . . . or run a red-light.”).

32. See SFHousing, *The Smoke-Free Housing Coalition of Maine*, YOUTUBE (Oct. 10, 2007), <http://www.youtube.com/watch?v=qIT9wAvQ20w> [hereinafter SFH Video] (explanation by former Maine Attorney General Steve Rowe that smoke-free policy adoption does not violate the Maine Human Rights Act as “that law does not recognize smokers as a protected class”).

33. ME. ATT'Y GEN., *supra* note 15, at § 14.18. See also Ezra, *supra* note 23, at 158 (stating that it is legal for property owners and housing managers to pass regulations that have the effect of prohibiting smoking in residential settings); SUSAN SCHOENMARKLIN, SMOKE-FREE ENV'TS LAW PROJECT, ANALYSIS OF THE AUTHORITY OF HOUSING AUTHORITIES AND SECTION 8 MULTIUNIT HOUSING OWNERS TO ADOPT SMOKE-FREE POLICIES IN THEIR RESIDENTIAL UNITS 1 (2005) (“[A] ban on smoking for new tenants who move into public or Section 8 housing is permissible in all 50 states.”); 6719 MICH. OP. ATT'Y GEN. 144, SEPARATION OF SMOKERS AND NON-SMOKERS IN PRIVATELY-OWNED APARTMENT COMPLEXES (1992) (expressing that “neither state nor federal law prohibits a privately-owned apartment complex from renting only to nonsmokers, or in the alternative, restricting smokers to certain buildings within the complex”); 8 OFFICE OF THE ATT'Y GEN. OF IDAHO 2, LANDLORD AND TENANT GUIDELINES (2012) (stating that “[g]iven 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.”).

34. See *Austin v. Tennessee*, 179 U.S. 343, 346 (1900) (stating that states have the authority to regulate, and even prohibit, the sale and use of tobacco products).

Indeed, legislatures have, for years, been passing laws and resolutions to protect people from involuntary exposure to secondhand smoke.<sup>35</sup> More recently, evidence as to the impacts of secondhand smoke on human health has prompted government agencies to begin promoting access to smoke-free multi-unit housing.<sup>36</sup> However, with the exception of a few municipalities in California that have adopted explicit ordinances barring smoking in multi-unit housing,<sup>37</sup> most local and national efforts to increase the availability of smoke-free housing have focused on voluntary measures. Maine is no exception, with efforts to increase the supply of smoke-free housing being driven primarily by public health advocates through education and outreach.<sup>38</sup> While these groups have effectively raised awareness of the significant risks associated with smoking in multi-unit housing, Maine's statutory and common law continues to provide little support for protecting tenants. Thus, there remain questions as to whether, and how, Maine tenants living in multi-unit housing can use the law to protect themselves from secondhand smoke exposure, and where they are exposed, what remedies are available to them.

This Comment addresses the impacts and limitations of voluntary efforts to protect tenants from secondhand smoke exposure in multi-unit housing; existing protections for individuals living in multi-unit housing who may be exposed to secondhand smoke; theories of civil liability and remedies available to tenants

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35. See generally The Journal's Editorial Staff, *Synopsis of State Case and Statutory Law*, 3 YALE J. HEALTH POL'Y L. & ETHICS 157 (2002) (providing a synopsis on state laws related to workplace and public place smoking bans).

36. The federal Centers for Disease Control and Prevention, U.S. Environmental Protection Agency, and the Department of Health and Human Services have each issued, both formally and informally, guidance and opinions to landlords on the adoption of smoke-free policies in multi-unit housing. See, e.g., NAT'L CTR. FOR ENVTL. HEALTH, HEALTHY HOMES MANUAL: SMOKE-FREE POLICIES IN MULTIUNIT HOUSING (2013), available at [http://www.cdc.gov/healthyhomes/Healthy\\_Homes\\_manual\\_WEB.pdf](http://www.cdc.gov/healthyhomes/Healthy_Homes_manual_WEB.pdf); *Smoke-Free Homes*, U.S. EPA, <http://www.epa.gov/smokefree> (last visited Oct. 14, 2012); *Smoke-Free Multifamily Housing*, U.S. DEP'T HOUS. & URBAN DEV. <http://portal.hud.gov/hudportal/HUD?src=/smokefreetoolkits1> (last visited Sept. 14, 2012); U.S. DEP'T OF HOUSING & URBAN DEV., *Smoke-Free Policies in Public Housing, Notice: PIH-2012-25* (May 29, 2012), available at [portal.hud.gov/huddoc/12-25pihn.pdf](http://portal.hud.gov/huddoc/12-25pihn.pdf). Maine agencies and quasi-governmental bodies have also been involved in efforts to increase awareness of, and access to, smoke-free housing throughout the state. See, e.g., Press Release, MaineHousing & Smoke-Free Hous. Coal. of Me., *MaineHousing Takes Steps to Protect Mainers' Health* (Mar. 21, 2007), available at <http://www.no-smoke.org/document.php?id=540>; MAINE HOUSING SEARCH.ORG, <http://mainehousingsearch.org> (last visited Sept. 6, 2013) (MaineHousingSearch.org is a free online resource for listing and locating rental housing in Maine. According to the site it was "[i]nitially funded by MaineHousing and the Maine Department of Health and Human Services with ongoing support from partners such as the Smoke-Free Housing Coalition of Maine and the Maine Department of Environmental Protection," and search criteria includes the building's status as smoke-free or not.).

37. See AM. FOR NONSMOKERS' RIGHTS FOUND., U.S. LOCAL LAWS AND POLICIES RESTRICTING OR PROHIBITING SMOKING IN PRIVATE UNITS OF MULTI-UNIT HOUSING 1-2 (July 8, 2013), <http://www.no-smoke.org/pdf/smokefreemuh.pdf> (listing twelve California municipalities with total bans on smoking in market-rate housing).

38. See generally SMOKE-FREE FOR ME, [www.smokefreeforme.org](http://www.smokefreeforme.org) (last visited Sept. 6, 2013) ("The Smoke-Free Housing Coalition of Maine is a non-profit group comprised of over 50 public health advocates, tenants, landlords, property managers, environmental health professionals and many others. [Their] mission, through education, advocacy and policy change, is to protect residents in multi-unit housing from involuntary exposure to secondhand smoke. [The Coalition has] been working with housing authorities, private landlords, developers, tenants and other housing professionals since 2004.").

exposed; and recommendations for legislative intervention to ensure that tenants living in multi-unit rental housing are protected from involuntary exposure to secondhand smoke. Part II reviews Maine's smoke-free air laws and assesses whether these laws provide a foundation for expanding protections to those living in multi-unit housing. Part III of this Comment provides background on Maine's voluntary effort to increase awareness and access to smoke-free multi-unit housing. Part IV examines the enforcement of voluntary policies and statutory barriers to remedies for tenants involuntarily exposed to secondhand smoke. Part V reviews whether existing statutory and common law provide any remedy to Maine tenants involuntarily exposed, and Part VI concludes with recommended changes policymakers can make for the purpose of protecting tenant health and safety.

## II. EXISTING STATE LAWS PROHIBITING SMOKING IN INDOOR SETTINGS

Maine's first law regarding smoking was enacted in 1897; however, most legislation concerning tobacco use and smoke has been passed since 1981.<sup>39</sup> Over the years, the State of Maine has enacted laws to limit exposure to secondhand smoke,<sup>40</sup> reduce youth access to tobacco,<sup>41</sup> encourage and support smokers to quit,<sup>42</sup> and establish comprehensive tobacco prevention and control programs.<sup>43</sup> Essentially, Maine has established a set of laws and regulations to reduce tobacco use and keep youth from starting,<sup>44</sup> demonstrating the intent of lawmakers to promote smoke-free and tobacco-free living. As a result, fewer Maine people have

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39. See generally 1 ME. COAL. ON SMOKING OR HEALTH, TOBACCO PREVENTION AND CONTROL IN MAINE (Sept. 2008), available at <http://www.slideshare.net/HPPofME/maine-tobacco-control-timeline-18972008>.

40. See, e.g., 22 M.R.S.A. § 1580-A (2004 & Supp. 2012) (banning smoking in workplaces, generally); *id.* §§ 1541-1550 (banning smoking in public places, generally); *id.* § 1578-B (prohibiting smoking in the building and on the grounds of elementary and secondary schools).

41. See, e.g., 22 M.R.S.A. § 1547 (Supp. 2012) (prohibiting anyone under the age of 18 from entering a tobacco specialty shop unless accompanied by parent or legal guardian); *id.* §§ 1555-A, 1555-B (2004 & Supp. 2012) (making it a civil violation for anyone under the age of 18 to purchase, possess, or use tobacco products, or offer false identification in an effort to obtain such items, or for anyone to offer to sell, furnish or give away a tobacco product to a person under the age of 18); *id.* §§ 1557, 1557-A (providing that the District Court may suspend or revoke the retail tobacco license of any licensee who violates a state law or rule related to the sale of tobacco products); *id.* § 1560-D (Supp. 2012) (banning the sale of certain flavored cigarettes and non-premium cigars).

42. See, e.g., 36 M.R.S.A. § 4365 (2004) (establishing the cigarette excise tax); 22 M.R.S.A. § 1560 (Supp. 2012) (barring the sale or furnishing of nicotine laced water).

43. See, e.g., 22 M.R.S.A. § 272 (2004 & Supp. 2012) (establishing a statewide program within the Maine Center for Disease Control and Prevention to conduct an ongoing media and public awareness campaign that includes information on quitting smoking; provide grants for funding community and school-based programs aimed at tobacco prevention and control; monitor and evaluate prevention and treatment programs; and increase law enforcement efforts to improve compliance with laws regarding the transportation, distribution, and sales of tobacco products).

44. These laws were highly effective. Between 1988 and 2009, Maine's adult smoking rate declined by more than 34%. RESEARCH & PROG. SERVS. UNIT, AM. LUNG ASS'N, TRENDS IN TOBACCO USE tbl.8 (July 2011), available at <http://www.lung.org/finding-cures/our-research/trend-reports/Tobacco-Trend-Report.pdf> (citing CDC BRFSS data). Smoking among Maine high school students dropped by approximately 43% between 1999 and 2009. See *Youth Tobacco Use in Maine, P'SHIP FOR A TOBACCO-FREE ME.*, [http://www.tobaccofreemaine.org/explore\\_facts/documents/25-07-11YOUTHfactsheet.pdf](http://www.tobaccofreemaine.org/explore_facts/documents/25-07-11YOUTHfactsheet.pdf) (last visited Sept. 21, 2013) [hereinafter PTM *Youth Tobacco Use*].

reported being exposed to secondhand smoke at work, in public, and even in their home as overall smoking rates have dropped in recent years.<sup>45</sup>

*A. The Workplace Smoking Act of 1985*

One of the most comprehensive attempts to eliminate secondhand smoke exposure has been through Maine's Workplace Smoking Act of 1985<sup>46</sup> and its accompanying rules.<sup>47</sup> Since 1985, the Workplace Smoking Act has been amended, and strengthened, to include a wide range of prohibitions on smoking in workplace environments.<sup>48</sup> Under the regulations promulgated under the Workplace Smoking Act, smoking is barred in all enclosed areas including common areas,<sup>49</sup> private offices<sup>50</sup> and in employer-owned and leased vehicles used by employees.<sup>51</sup> Smoking may be allowed outdoors, but only in areas at least 20 feet from entryways, doors, or windows.<sup>52</sup> The law also states that employers are responsible for establishing (or negotiating through a collective bargaining process) a written smoke-free policy that complies with the law.<sup>53</sup> Employers, however, are not preempted from establishing policies that go beyond what is required under the law.<sup>54</sup> Specifically, the law's stated purpose and effect is "to protect the employer and employees from the detrimental effects of smoking by others," and thus "the policy must prohibit smoking indoors . . . , prevent environmental tobacco smoke from circulating into enclosed areas and prohibit smoking outdoors except in designated smoking areas."<sup>55</sup> In essence, the Workplace Smoking Act seeks to protect workers from involuntary exposure to secondhand smoke; it represents the legislature's effort to protect the health of nonsmokers who might otherwise be forced to work in environments where their coworkers, or patrons, are smoking.<sup>56</sup>

The legislature's intention to protect nonsmokers from secondhand smoke, while preserving an individual's choice to smoke, was clarified in 1991 when the Maine State Legislature enacted 26 M.R.S.A. § 597, which prohibits employers from requiring, as a condition of employment, that an employee refrain from smoking.<sup>57</sup> This legislation appeared to send the message that smoke-free laws

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45. See PTM *Breathe Easy*, *supra* note 13.

46. 22 M.R.S.A. § 1580-A (2004 & Supp. 2012).

47. See generally 10-144 C.M.R. ch. 250 (2013) (rules relating to smoking in the workplace).

48. For a history of amendments to Maine's Workplace Smoking Act of 1985, see AMY OLFENE & BECKY SMITH, ME. PUB. HEALTH ASS'N, HISTORY AND OVERVIEW OF TOBACCO POLICY INITIATIVES IN MAINE (2011), available at <http://www.slideshare.net/HPPofME/history-and-overview-of-tobacco-policy-initiatives-in-maine-1897present>.

49. 10-144 C.M.R. ch. 250, § 2(C).

50. See *id.* § 2(A), (G).

51. See *id.* § 2(A), (D).

52. 22 M.R.S.A. § 1580-A(2)(A-2) (Supp. 2012). See also 10-144 C.M.R. ch. 250, § 2(D).

53. 22 M.R.S.A. § 1580-A(3) (2004 & Supp. 2012). See also 10-144 C.M.R. ch. 250, § 3.

54. *Id.* § 3(B) (providing that "[t]he employer's written policy may prohibit smoking throughout the entire business facility").

55. 22 M.R.S.A. § 1580-A(3) (2004 & Supp. 2012).

56. See Jessica Niezgoda, *Kicking Ash(Trays): Smoking Bans in Public Workplaces, Bars, and Restaurants Current Laws, Constitutional Challenges, and Proposed Federal Regulation*, 33 J. LEGIS. 99, 99-100 (2006).

57. 22 M.R.S.A. § 597 (2004) ("An employer . . . may not require . . . any employee or prospective employee [to] refrain from using tobacco products outside the course of that employment or otherwise

were about eliminating exposure, not penalizing those addicted to tobacco, while continuing to create an environment that strongly supported a smoke-free lifestyle.

### *B. The Public Place Smoking Law*

In addition to prohibitions against smoking in workplaces, Maine has expanded the scope of secondhand smoke protection by enacting a number of restrictions on smoking in public places. Maine's Public Place Smoking Law,<sup>58</sup> as it is collectively known, applies to places into which the public is invited or allowed,<sup>59</sup> including stores, restaurants, and bars.<sup>60</sup> The law also applies to government offices<sup>61</sup> and public transportation (e.g., buses, taxi cabs).<sup>62</sup> In recent years, the law has expanded even further, now covering smoking in outdoor eating areas<sup>63</sup> and vehicles where minors under the age of sixteen are present.<sup>64</sup> A violation of the Public Place Smoking Law constitutes a civil violation that may result in a fine of up to \$100.<sup>65</sup> Like the Workplace Smoking Act, the intent behind the Public Place Smoking Law appears to be protecting individuals from involuntary exposure to secondhand smoke in the places everyone should have the right and freedom to enjoy.

### *C. Setting the Stage for Banning Smoking in Multi-Unit Rental Housing*

Both Maine's Workplace Smoking Act and Public Place Smoking Law exempt residential areas from the prohibition against smoking,<sup>66</sup> but there are several exceptions that demonstrate the State's concern for protecting people living and working in residential spaces from involuntary exposure. For example, the Public Place Smoking Law applies to home based day-care facilities<sup>67</sup> and foster homes where children are present (or may be present within a 12 hour window).<sup>68</sup> The Workplace Smoking Act bars smoking in units within residential facilities licensed by the Maine Department of Health and Human Services when an employee is physically present to perform work there,<sup>69</sup> in nursing homes,<sup>70</sup> and in a residential

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discriminate against any person . . . for using tobacco products . . . as long as the employee complies with any workplace policy concerning use of tobacco.”)

58. The Public Place Smoking Law is a collection of provisions found within Chapter 262 of Title 22 of Maine Revised Statutes. *Id.* §§ 1541-1550 (2004 & Supp. 2012).

59. *Id.* § 1541(4) (a “public place” is defined as “any place not open to the sky into which the public is invited or allowed”).

60. “Smoking in enclosed areas of public places is prohibited unless there is a specific exception in the law.” HEALTHY ME. P'SHIPS., ME. CTR. FOR DISEASE CONTROL & PREVENTION, SUMMARY: MAINE LAWS AND RULES RELATED TO SECONDHAND SMOKE 3 (2010).

61. 22 M.R.S.A. § 1541(4) (2004).

62. *Id.*

63. 22 M.R.S.A. § 1550 (Supp. 2012).

64. *Id.* § 1549.

65. 22 M.R.S.A. § 1545 (2004 & Supp. 2012).

66. *See id.* § 1580-A(2)(A) (“A business facility does not include any workplace or portion of a workplace that also serves as the employee’s or employer’s personal residence.”); *id.* § 1541(4) (“a private residence is not a public place”).

67. *Id.* § 1542(2)(J).

68. *Id.* § 1542(1).

69. *See id.* § 1580-A(2)(A), (C-3) (Supp. 2012); 10-144 C.M.R. ch. 250, § 2(O).

unit—such as a house or apartment—that is used as a business facility when an employee is present and actively working at the location.<sup>71</sup>

*1. Applicable Provisions of the Workplace Smoking Act and Public Place Smoking Law*

It is well established and accepted that, under their police powers, states and municipalities may enact laws that protect the public health of their citizens.<sup>72</sup> The Workplace Smoking Act and Public Place Smoking Law have, in seeking to eliminate involuntary exposure to what science has shown to be a serious health hazard, done just that.

Given the impact and scope of these laws, the Workplace Smoking Act and Public Place Smoking Law set strong precedent, and frameworks, for prohibiting smoking in Maine's stock of rental housing. Each law sets out provisions and rules for protecting individuals from involuntary exposure to secondhand smoke and places a strong emphasis on protecting vulnerable populations.<sup>73</sup> Collectively, the laws require employers to implement smoke-free policies<sup>74</sup> and provide notice to guests and the public that smoking is prohibited.<sup>75</sup> If a workplace, establishment open to the public, or an individual in either of these venues is found to be in violation of either law, they can be deemed to have committed a civil violation and face monetary penalties.<sup>76</sup> While neither set of laws broadly prohibits smoking in residential units, they each include express bans on smoking in particular residential venues for the purpose of protecting employees and children living and working in residential spaces.<sup>77</sup>

By applying similar logic, restrictions, and enforcement mechanisms that have been placed on businesses and public establishments to rental housing, Maine could effectively require that every person living in a multi-unit rental be protected from involuntary exposure to secondhand smoke in their home.<sup>78</sup> An option for

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70. 22 M.R.S.A. § 1580-A(2)(A) (2004 & Supp. 2012).

71. HEALTHY ME. P'SHIPS., *supra* note 60, at 4.

72. *Lawton v. Steele*, 152 U.S. 133, 136 (1894) (“It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance.”). *See also* *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019-20 (8th Cir. 2012) *cert. denied*, 133 S. Ct. 2354 (2013) (holding a municipal ordinance prohibiting outdoor smoking on public property did not violate equal protection where it was rationally related to legitimate government interest in preserving and protecting public health, safety and welfare and the municipality reasonably believed that there was no risk-free level of exposure to secondhand smoke).

73. The laws both contain special provisions, already outlined in an earlier portion of this article, prohibiting smoking in day-care centers, foster homes, nursing homes, hospitals, and DHHS-licensed residential facilities.

74. 22 M.R.S.A. § 1580-A(3) (2004 & Supp. 2012).

75. *See id.* §§ 1543 (2004), 1580-A(3).

76. *See id.* §§ 1545, 1580-A.

77. *See id.* § 1580-A(2)(A), (3); 10-148 C.M.R. ch. 16, § 9(K)(1) (2013). *See also* 22 M.R.S.A. § 1542(2)(J) (2004 & Supp. 2012).

78. It is worth noting that in a 2011 survey of Maine landlords, 8% said that the presence of a state law would make it easier for them to implement smoke-free policies. CRITICAL INSIGHTS, SMOKE-FREE HOUSING PREFERENCES: SURVEY OF MAINE LANDLORDS AND TENANTS, SUMMARY OF REPORT FINDINGS, SMOKE-FREE HOUSING COALITION OF MAINE 39 (2011).

achieving such a goal includes broadening—by amendment to the existing statutes—the scope of these laws to incorporate residential multi-unit buildings.

*2. Amending the Public Place Smoking Law to Improve Access to Smoke-Free Housing*

Residential multi-unit buildings include common areas, shared by the residents of the building, and individual units. To limit involuntary exposure to secondhand smoke in the home of Maine tenants, the legislature could amend the Public Place Smoking Law to include provisions prohibiting smoking in both the shared spaces and individual units of multi-unit residential buildings. However, if the goal is to eliminate exposure, a comprehensive ban on smoking in and around the building, not just a ban on smoking in common areas, must be realized.<sup>79</sup>

*a. Common Areas*

Multi-unit buildings are composed of individual units as well as common areas. Common areas are those that the landlord retains control and responsibility for, though all tenants may use them.<sup>80</sup> Thus, in determining whether the Public Place Smoking Law can, and should, be amended to include multi-unit residential buildings, the first question for determination is whether common areas are already covered as “public places” under Maine law.

Some interpret the Public Place Smoking Law to prohibit smoking in all lobbies, hallways, laundry rooms, and other spaces held outside the exclusive control of the tenant.<sup>81</sup> However, neither the law itself, nor its complementary regulations, clearly state that it applies so broadly. The Maine Attorney General’s Office has merely stated that “there is an *argument* that a building’s common areas must be smoke free [under] Maine’s Public Place[] Smoking Law,” but there is no case law, statute, or regulation on point in direct support of the proposition.<sup>82</sup> The argument that the Attorney General is likely pointing to is that common areas of apartment buildings are spaces where “the public is invited and allowed,” which, as defined by the Public Place Smoking Law, are spaces where smoking is prohibited.<sup>83</sup> Thus, it is arguable that, given that common areas are not specifically

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79. See ASHRAE, *supra* note 25; JAMES REPACÉ, REPACÉ ASSOC., INC., MEASUREMENTS OF OUTDOOR AIR POLLUTION FROM SECONDHAND SMOKE ON THE UMBC CAMPUS 9 (2005), available at <http://www.repace.com/pdf/outdoorair.pdf> (stating that “smoking in proximity to doorways or air intakes might easily be inducted into the building through [sic] posing both acute and chronic threats to building occupants.”)

80. See BLACK’S LAW DICTIONARY 251 (9th ed. 2009).

81. See Shankman, *supra* note 14 (stating that, “[g]enerally speaking, the common areas of buildings must be smoke free pursuant to Maine’s Public Places Smoking law, Title 22 M.R.S.A. §1542.”). Note that common areas—held outside the exclusive control of the tenants—are deemed to be under the control of the landlord. *Chiu v. City of Portland*, 2002 ME 8, ¶ 11, 788 A.2d 183.

82. ME. ATT’Y GEN., *supra* note 15 (emphasis added).

83. 22 M.R.S.A. § 1541(4) (2004 & Supp. 2012); see, e.g., *Tenants’ Rights, SMOKE-FREE HOUS. COAL. OF ME.* (2013), <http://www.smokefreeforme.org/tenant.php?page=Tenants%27+Rights> (stating that “[c]ommon areas of any building into which the public is invited or allowed must be smoke-free under Maine’s public places smoking law”).

excluded from the law,<sup>84</sup> they are covered by it. An alternative argument might be that where Maine Human Rights Act requires that “common use portions of the dwellings are readily accessible to and usable by people with . . . disabilities,”<sup>85</sup> it is presumed these areas must be free from toxic substances such as secondhand smoke. However, both arguments contain the same weakness: they are based on interpretations neither the Court nor the legislature has made. As for the latter argument, the language of the Maine Human Rights Act appears merely to protect persons with disabilities; it does not create a blanket requirement that landlords must enforce nonsmoking policies in all common areas of apartment buildings.<sup>86</sup>

Thus, it is necessary for the legislature, the administration, or the courts to clarify whether Maine’s Public Place Smoking Law does in fact prohibit smoking in all “common areas” of multi-unit residential buildings. Such an interpretation could be accomplished by expanding the definition of “public places” under 22 M.R.S.A. § 1541 to include common areas of apartment buildings.<sup>87</sup> This was the step taken by the Minnesota Legislature in 2007 when it adopted an amendment to the Minnesota Clean Air Act, which defined a “public place” as “any enclosed, indoor area used by the general public, including, but not limited to, . . . *common areas of rental apartment buildings.*”<sup>88</sup> Thus, if the intention of the legislature is to include these areas under the Public Place Smoking Law, the law itself should be amended to specifically include such language. Such a change would effectively clarify the application of the Public Place Smoking Law to these shared spaces. However, as for protecting tenant health generally, such a change marks only the first step; in order to effectively protect tenant health, the legislature must also tackle the issue of smoking in individual units of the building.

#### *b. Multi-Unit Buildings, Generally*

Moving beyond merely protecting residents from exposure in common areas, the state could also enact a more expansive protection against involuntary exposure in residential units. For instance, the legislature could include within Maine’s Public Place Smoking Law a new section outlining a prohibition against smoking in all areas within multi-unit rental housing, including individual units. Under this new provision, the legislature could define the venues to which residential smoking bans would apply, crafting language that expressly limits prohibitions on smoking to multi-unit residential buildings rented to tenants.<sup>89</sup> If so desired, the legislature could also restrict the provision’s application and scope by limiting civil liability under the law; in other words, whether the law applies only to landlords who fail to

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84. HEALTHY ME. P’SHPIS., *supra* note 60.

85. 5 M.R.S.A. § 4582-C (3)(A)(1) (2013).

86. Discussion of potential claims under the Maine Human Rights Act are addressed in more detail *see infra* Part V.B.2

87. The current definition of “public places” can be found at 22 M.R.S.A. § 1541(4).

88. MINN. STAT. ANN. § 144.413 (West 2013) (emphasis added).

89. For example, Maine’s implied warranty and covenant of habitability statute defines “dwelling unit” as “mobile homes, apartments, buildings or other structures, including the common areas thereof, which are rented for human habitation.” 14 M.R.S.A. § 6021 (2003 & Supp. 2012). A similar, albeit narrower, definition could be adopted by the legislature for defining residential rental spaces for which smoking is prohibited.

enforce a prohibition on smoking, or whether to place civil liability on tenants and guests who violate the law by lighting up indoors. In addition, the legislature could require a plaintiff-tenant make a *prima facie* showing of actual damages, such as cognizable harm to one's health or personal property, before remedy could be sought.<sup>90</sup> The legislature could then decide whether the enforcement provision of 22 M.R.S.A. § 1548 is to apply—which would allow the Office of the Attorney General to enforce the law—or whether to provide an alternative means for enforcing the provision.<sup>91</sup> Given that the Office of the Attorney General enforces other provisions with the Public Place Smoking Law,<sup>92</sup> and its Consumer Protection Division handles many housing related issues between landlords and tenants,<sup>93</sup> the Office of the Attorney General would be a logical source of enforcement for the new provision. However, the legislature may also choose to delegate enforcement responsibility to the Department of Health and Human Services, Center for Disease Control and Prevention, which is charged with fining employers for violations of the Workplace Smoking Act.<sup>94</sup> Either way, both agencies have experience investigating violations of smoke-free indoor air laws, and thus contain the expertise necessary for enforcement of the (potential) new provision.

The legislature may also want to consider eliminating enforcement through state agencies altogether, choosing rather to encourage compliance by providing tenants with an express private right of action against landlords and tenants who violate a statutory ban on smoking in multi-unit housing<sup>95</sup> This would take away the administrative burden of enforcing a smoking prohibition in the more than 160,000 rental households throughout the state.<sup>96</sup> However, a likely concern would be that, by shifting the burden away from the administrative agencies, the judicial

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90. Such a standard would be consistent with the requirements for a *prima facie* showing of common law negligence. See text accompanying *infra* note 182.

91. 22 M.R.S.A. § 1548 (Supp. 2012) (stating that the “Attorney General may bring an action to enforce this chapter in District Court or Superior Court and may seek injunctive relief, including a preliminary or final injunction, and fines, penalties and equitable relief and may seek to prevent or restrain actions in violation of” the Public Place Smoking Laws).

92. *Id.*

93. See Office of the Me. Att’y Gen., *Housing (Houses, Apartments, Mobile Homes)*, MAINE.GOV, <http://www.maine.gov/ag/consumer/housing/index.shtml> (last visited Sept. 21, 2013).

94. 22 M.R.S.A. § 1580-A(4) (Supp. 2012) (stating that the Maine Department of Health and Human Services (previously referred to as the “Bureau of Health” has authority to enforce provisions of this section.”). Local health officers, who are officers within the Department of Health and Human Services, Office of Local Public Health, may serve as an appropriate investigation and enforcement body for this proposed law. They are currently charged with enforcing the provisions of Maine public health nuisance law as well. See 22 M.R.S.A. § 1561 (2004) (stating that “[w]hen any source of filth whether or not the cause of sickness is found on private property and deemed to be potentially injurious to health, the owner or occupant thereof shall, within 24 hours after notice from the local health officer, at his own expense, remove or discontinue it”).

95. Note that this would arguably require the repeal of 14 M.R.S.A. § 6030-E(4)(B) (Supp. 2012) (restricting private causes of action by tenants against landlords for violations of a smoking policy by other tenants). Part IV.B discusses this barrier at length.

96. *American Community Survey: Physical Housing Characteristics for Occupied Housing, 2011 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_11\\_1YR\\_S2504&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_S2504&prodType=table) (last visited Sept. 21, 2013).

system would become the ultimate bearer of the law's compliance mechanism. While these concerns are not without some merit, it is unlikely that the judicial system would see a surge in lawsuits as a result of smoke-free housing violations. For example, enforcement of voluntary policies has not proven to be an substantial issue, with landlords who have adopted smoke-free policies experiencing far fewer compliance issues than initially anticipated.<sup>97</sup> In addition, most people living in rental housing do not have the means to afford legal representation and are less likely to take violators to court where remedies stand to be quite limited.<sup>98</sup> In combination, these factors suggest that, if the legislature were to include a private right of action in any law prohibiting smoking in multi-unit rentals, it is doubtful it would result in an increase in litigation between landlords and tenants. In the same vein, where tenants experience damages to either their health or property as a result of involuntary exposure, they should not be left without options.<sup>99</sup> A remedy is necessary, and whether that remedy is by way of a private cause of action, or government enforcement, policymakers must evaluate how best to address the fact that the majority of Maine tenants are being exposed to secondhand smoke in their homes.<sup>100</sup>

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The majority of Americans spend more time at home than they do at their workplace or at other public establishments;<sup>101</sup> thus, if the goal of the legislature is to protect Maine residents from involuntary exposure, then the protections given to people in workplaces and public settings should be extended to those living in multi-unit rental housing.

While steps have been taken to increase availability of smoke-free multi-unit housing through voluntary measures, more than 50% of Maine tenants are left without access to smoke-free homes.<sup>102</sup> By expanding existing protections afforded to employees and the public in nearly all non-residential environments to multi-unit housing residents, Maine policymakers can help dramatically decrease involuntary exposure to secondhand smoke.

### III. CURRENT EFFORTS TO IMPROVE ACCESS TO SMOKE-FREE HOUSING IN MAINE

Even though the State of Maine has a history of protecting people in workplaces and public places, the Maine legislature has never entertained a bill that

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97. AMY OLFENE, SMOKE-FREE HOUS. N.E., CLEAR ADVANTAGES OF SMOKE-FREE MULTI-UNIT HOUSING 25 (2010), available at <http://www.slideshare.net/SmokeFreeHousingNE/smokefree-housing-nersc> (stating that 86% of New England housing authority executives and property managers surveyed reported that they were not experiencing any compliance issues following the implementation of a smoke-free policy in their residential buildings).

98. Violations of the Workplace Smoking Act result in fines of no more than \$100, unless the violator has a pattern of noncompliance with the law, and the fine only increases to \$1,500. 22 M.R.S.A. § 1580-A(4).

99. These issues are fully addressed in Parts 0 and 0.

100. See Brian A. King et al., *supra* note 13, at 1319, tbl. 1.

101. *Charts from the American Time Use Survey*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/tus/charts> (last modified July 10, 2013).

102. See THE LINK 2011, *supra* note 17, at 6.

would effectively amend the Public Place Smoking Law in a way that would extend its protections to multi-unit rental housing. Nonetheless, the Public Place Smoking Law and Workplace Smoking Law have had an (anticipated) residual impact on voluntary residential smoking bans. By 2011, nearly half of Maine landlords reported owning a building with a smoke-free policy,<sup>103</sup> and all of Maine's public housing authorities have since adopted some form of smoke-free policy for the units they own and manage,<sup>104</sup> despite the fact that there are no laws that require landlords to prohibit smoking on their properties. However, this voluntary approach has led to a variety of different types of policies, leaving some of Maine's most vulnerable populations exposed and with little recourse against the landlord or smoking tenant where smoking is allowed or smoke-free policies are neither followed nor unenforced.<sup>105</sup>

#### A. *The Voluntary Smoke-Free Housing Movement*

In early 2004, no public housing authority had a smoke-free policy in place,<sup>106</sup> and in 2007 only 61% of Maine landlords were aware that smoke-free policy adoption was a legal option available to them.<sup>107</sup> At the same time, surveys showed an overwhelming majority of tenants living in Maine rental housing—smokers and nonsmokers included—preferred to live in a smoke-free environment.<sup>108</sup> The discrepancy between the number of tenants seeking a smoke-free environment and the availability of smoke-free housing became the focus of public health efforts after community health programs began receiving a surge in calls from multi-unit

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103. See CRITICAL INSIGHTS, *supra* note 78, at 32.

104. In January 2011, Maine became the first state in which all public housing authorities had implemented a smoke-free policy, impacting more than 12,000 low-income tenants. Katherine Q. Seelye, *Increasingly, Smoking Indoors Is Forbidden at Public Housing*, N.Y. TIMES, Dec. 18, 2011, at A25.

105. Policies not only vary between private market and public housing, but often from property to property. Policies may be incorporated into leases, added as lease addendums, incorporated into house rules, or simply communicated as a request of the landlord without any formal restriction on smoking behavior. This, of course, leads to enforcement issues, and the language and implementation of a smoke-free policy can impact the remedial action available to both landlords and tenants if the policy is violated.

106. In September 2004, Auburn Housing Authority became the first housing authority in Maine, and one of the first in the nation, to adopt a smoke-free policy. See *Housing Authorities/Commissions which Have Adopted Smoke-Free Policies*, SMOKE-FREE ENV'TS LAW PROJECT, CTR. FOR SOC. GERONTOLOGY, available at <http://www.tcsg.org/sfelp/SFHousingAuthorities.pdf> (last updated Jan. 20, 2011).

107. SMOKE-FREE HOUS. COAL. OF ME., SMOKE-FREE HOUSING 2009 ROBOCALL SURVEY 6 (2009), available at <http://www.slideshare.net/breatheeasy/smoke-free-housing-2009-robocall-survey-report-final-01-10> [hereinafter SFH ROBOCALL]. But see CRITICAL INSIGHTS, *supra* note 78, at 41 (reporting that by 2011, 75% of landlords were aware of the legality of smoke-free policy adoption).

108. 70% of tenants in a July 2011 survey, when asked, "all things being equal, I would choose a smoke-free rental house or apartment over a place that allows smoking," agreed with the statement. CRITICAL INSIGHTS, *supra* note 78, at 24. See also NAT'L CTR. FOR HEALTHY HOUS., *supra* note 26, at 1; Janet Spencer, *More Apartment Complexes Going Smoke-Free*, BANGOR DAILY NEWS, Sept. 28, 2006, at 7 (stating that 78% of Maine tenants surveyed, smokers and nonsmokers alike, stated that they would prefer to live in a smoke-free environment).

housing tenants complaining about incursion of smoke from adjacent units.<sup>109</sup> These agencies, which had focused their work on chronic disease prevention, including education on the health impacts of tobacco use and smoke exposure,<sup>110</sup> and the Maine Department of Health and Human Services found themselves with little in the way of information or advice for tenants, making it all the more obvious that state tobacco laws contained a major loophole that was resulting in thousands of people involuntarily exposed in their homes every year.

However, as outreach and educational efforts began to expand, so did evidence supporting smoke-free policy adoption. Not only could tenants and advocates point to the health impacts of secondhand smoke as a valid reason for landlords to adopt smoke-free policies, but they could also cite the fact that smoking in apartment buildings is a fire and safety hazard<sup>111</sup> and increases costs of repairs and maintenance.<sup>112</sup>

As a result, landlords were beginning to acknowledge the financial benefits of policy adoption,<sup>113</sup> and what had started as a response to tenant health concerns grew into an effort to help landlords protect their bottom-line. Landlords were finding that the cost of turning over units in which tenants had smoked was three-to-five times that of the turnover of units where nonsmokers had lived or where smoking had not been allowed.<sup>114</sup> Agents and landlords were also finding that it

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109. See P'SHIP FOR A TOBACCO-FREE ME., PARTNERSHIP FOR A TOBACCO FREE MAINE ANNUAL REPORT FOR 2010, at 19 (2010), available at <http://www.maine.gov/dhhs/mecdc/population-health/hmp/ptm/documents/PTM-Annual-Report-2010.pdf> (explaining that efforts by public health agencies in Maine to address smoke-free housing began in 2002 in response to calls from tenants living in multi-unit rentals seeking assistance with smoke incursion that was exacerbating existing chronic respiratory conditions, and causing difficulty breathing).

110. Local Healthy Maine Partnerships (HMPs) are programs supported by a collaborative of the Maine Department of Health and Human Services Maine Center for Disease Control and Prevention, Maine Office of Substance Abuse, and the Maine Department of Education, which exist within 28 districts to promote healthy living and provide education on preventing chronic disease. HEALTHY ME. P'SHIPS., <http://www.healthymainepartnerships.org> (last visited Sept. 21, 2013).

111. Richard E. Taylor, Me. Fire Marshal's Office, *Fire Fatality in Maine, 1983 – 1992: An Analysis of Who Died, When, Where, How and Why: What are the Implications for Fire Safety Policy in Maine?*, ME. TOPICAL FIRE RESEARCH SERIES, Sept. 2007, at 5, available at <http://www.maine.gov/dps/fmo/documents/TopicalSeriesVIII.pdf> (stating that careless disposal of smoking materials resulted in more residential fatalities in Maine than any other determinable cause).

112. It is estimated that Maine landlords can save anywhere from \$700 to \$2100 on the turnover of their units by prohibiting smoking indoors. See *Older Adult Fact Sheet*, SMOKE-FREE HOUS. COAL. OF ME. (Mar. 2008), <http://www.smokefreeforme.org/documents/Older%20Adult%20Fact%20Sheet%2005.08.pdf>. See also *Maine Public Housing Authorities to be Smoke Free*, WABI TV5, Aug. 1, 2011, <http://www.wabi.tv/news/22324/maine-public-housing-authorities-to-be-smoke-free> (stating that “[o]fficials say the smoking ban will also save property owners between \$500 and \$5,000 per unit at turnover, stating smoke can ruin carpets, appliances and furniture.”).

113. See, e.g., SFH Video, *supra* note 32 (Maine landlords discussing the financial incentive and rationale for adopting a smoke-free policy).

114. See NAT'L CTR. FOR HEALTHY HOUS., *supra* note 26, at 2 (outlining 2009 data on the cost of rehabilitating units where smoking is allowed as opposed to units where smoking is prohibited). See also Michael K. Ong et al., *Estimates of Smoking-Related Property Costs in California Multiunit Housing*, 102 AM. J. PUB. HEALTH 490, 492 (2012) (reporting results of the first systematic estimate of smoking-related costs in multi-unit housing. The study, which was conducted in California between

was harder to rent spaces where smokers had lived, and sales prices on units and buildings where smoking was or had been allowed were lower than real estate where smoking had been banned or disallowed.<sup>115</sup> But that was not where the financial benefits ended: studies also showed that, not only did 7 out of 10 tenants prefer to live in a smoke-free environment,<sup>116</sup> but by 2011, 43% of tenants were reporting a willingness to pay more to live in a building with a smoke-free policy.<sup>117</sup>

Given that rental properties are a means of income (investment or business), it is of little surprise that once landlords were made aware of the cost-savings associated with policy adoption that the availability of smoke-free housing increased. By 2011, 45% of landlords reported owning a 100% smoke-free rental building,<sup>118</sup> up from 36% in 2007.<sup>119</sup> It truly appeared the tides were changing in Maine, and the market was helping to drive that change.

### *B. MaineHousing's Qualified Allocation Plan's Smoke-Free Policy Requirement*

Acknowledging the health and financial benefits of smoke-free policy adoption, government housing agencies began to take steps to promote and address smoke-free housing by the mid-2000s, providing additional support and incentives for smoke-free policy adoption by private landlords and developers, as well as public housing authorities.<sup>120</sup> In 2008, the State's housing agency, Maine State Housing Authority ("MaineHousing"), began providing a one-point incentive as part of their annual qualified allocation plan for administering the federal Low-Income Housing Tax Credit ("LIHTC")<sup>121</sup> program.<sup>122</sup> The incentive was highly successful, with all but one applicant between 2008 and 2012 choosing to adopt a smoke-free policy.<sup>123</sup> In response, the 2013 plan included a threshold requirement, requiring those applying for and receiving the LIHTC through MaineHousing to develop 100% smoke-free affordable rental buildings.<sup>124</sup> With this shift from an

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2008 and 2009, found that landlords that implemented complete smoke-free policies for their buildings could achieve "significant savings.")

115. SFH Video, *supra* note 32. See also, Antoinette Martin, *On Tobacco Road, It's a Tougher Sell*, N.Y. TIMES, Feb. 8, 2004, <http://www.nytimes.com/2004/02/08/realestate/on-tobacco-road-it-s-a-tougher-sell.html>; Editorial, *Smoke-Free Housing*, BANGOR DAILY NEWS, Aug. 30, 2005, at A8.

116. See CRITICAL INSIGHTS, *supra* note 78, at 24.

117. See *id.*

118. *Id.* at 32.

119. See SFH ROBOCALL, *supra* note 108.

120. See 99-346 C.M.R. ch. 16, § 7(A)(7) (LEXIS 2012). See also SMOKE-FREE HOUS. COAL. OF ME., *supra* note 108 (stating that for the past five years MaineHousing has provided a one-point incentive to developers who adopt a smoke-free policy when applying for Low-Income Housing Tax Credits); U.S. DEP'T OF HOUSING & URBAN DEV., *supra* note 36; MaineHousing & Smoke-Free Hous. Coal. of Me., *supra* note 36.

121. For more information on qualified allocation plans for Low-Income Tax Credits, see *Qualified Allocation Plans*, NAT'L HOUS. LAW PROJECT, <http://nhlp.org/node/515> (last visited Sept. 30, 2013).

122. See Press Release, Smoke-Free Hous. Coal. of Me., MaineHousing Requires Secondhand Smoke Protection for Low-Income Tenants (Nov. 1, 2012), available at <http://www.slideshare.net/breathesasy/press-release-qap-2012>.

123. *Id.*

124. 99-346 C.M.R. ch. 16, § 5(Q), amended by order 2012-275 (effective Sept. 27, 2012) (establishing a threshold requirement that, "[an] Applicant must establish and implement a policy

incentive to a threshold requirement for funding, Maine became the first state in the nation to require LIHTC recipient properties to be smoke-free.<sup>125</sup>

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While financial incentives and voluntary policies have led to an increase in smoke-free housing stock, more than half of Maine's tenant population lacks access to smoke-free housing.<sup>126</sup> In addition, voluntary policies and incentives lack an enforcement mechanism, leading to the question of what remedy is available to tenants who are left involuntarily exposed to secondhand smoke in their homes. Thus, while an encouraging step in the right direction, if the goal is to protect renters, regardless of their socioeconomic status, age, or location, from secondhand smoke, broader policy change is necessary.

#### IV. ENFORCEMENT ISSUES AND BARRIERS TENANTS EXPOSED TO SECONDHAND SMOKE MAY FACE IN SEEKING CIVIL REMEDIES

The financial benefits and incentives for adopting smoke-free policies will ultimately lead to smoke-free policies showing up in more and more lease agreements. While such a shift in the market represents a positive response to health concerns related to smoke exposure and tenants' desire to live in smoke-free homes, it is important to highlight that both adoption and enforcement remain voluntary.

For example, when a landlord adopts a smoke-free policy, he or she is free to advertise the building as smoke-free.<sup>127</sup> Considering the majority of tenants want to live in a smoke-free environment,<sup>128</sup> there is a strong incentive for landlords and property managers to market their buildings in such a way. But what happens when a tenant moves into a building that he or she believes is smoke-free, only to find that other tenants are not abiding by the rules and the landlord is not enforcing the policy? At what point does voluntary policy adoption and enforcement fail to protect the health and safety of tenants in multi-unit housing?

##### *A. Enforcement of Voluntary Policies*

Landlords are ultimately responsible for ensuring smoke-free policies are

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prohibiting smoking in all units and common areas of the Project. The Applicant must develop and maintain a written occupancy policy that prohibits smoking in the units and the common areas of the Project, include a non-smoking clause in the lease for every household and make educational materials on tobacco treatment programs, including the phone number for the statewide Maine Tobacco HelpLine, available to all residents of the Project through the resident service coordinator. The Application must include a commitment to comply with the requirements of this Section and the proposed policy and lease provision or addendum implementing the policy, and the detailed service plan required . . . shall include making the tobacco treatment program educational materials available to residents.”).

125. *Maine Housing Units to Go Smoke-Free*, BOS. GLOBE, Nov. 3, 2012, <http://www.boston.com/news/local/maine/2012/11/03/mainehousing-units-smoke-free/sr3gDSGmZzJ9HlrQQ8oIK/story.html>.

126. See *supra* text accompanying note 17.

127. *Frequently Asked Questions About Smoke-Free Apartment Policies*, MI SMOKE-FREE APARTMENT, <http://www.tcsg.org/sfelp/FAQonSFApts9-4-06.pdf> (last visited Sept. 8, 2013).

128. See *supra* text accompanying note 109.

enforced and followed. Through the use of a lease agreement that states the smoke-free policy in detail, a landlord has the ability to enforce the policy through a number of measures, including retaining portions of the security deposit for the purpose of remediating damage caused by smoking indoors, or in more egregious cases, moving to evict the offending tenant for violations of the lease.<sup>129</sup>

Standards and regulations adopted by State agencies are weak and provide little to no support for tenants who are involuntarily exposed to secondhand smoke. For example, Maine Housing Quality Standards require properties receiving financial support from the State's housing agency to provide "conspicuous" signage for the purpose of notifying tenants and guests of the presence of a smoke-free policy,<sup>130</sup> but do not expressly require any further action on behalf of a landlord to ensure the policy is enforced or followed.

Where policy adoption is voluntary, landlords are free to incorporate clauses in the lease that preclude liability for a breach of the lease contract. If, for example, a tenant moves into a building with a written smoke-free policy, and later comes to find that other tenants or their guests are smoking in the building, the liability of the landlord is dependent on several factors, especially those express terms found within the lease agreement.<sup>131</sup> While a landlord may not incorporate provisions that absolve them from negligence,<sup>132</sup> the lease may be drafted to waive certain provisions and liabilities.<sup>133</sup> In such an event, the only recourse available to the tenant would be to terminate the lease and move out.<sup>134</sup> Depending on one's socioeconomic or health status, this can present an extreme hardship for a tenant.

129. See *Tips for Enforcement*, SMOKE-FREE FOR ME, <http://www.smokefreeforme.org/landlord.php?page=Tips+for+Enforcement> (last visited Sept. 9, 2013).

130. ME. STATE HOUS. AUTH., MAINE HOUSING QUALITY STANDARDS AND PROCEDURES MANUAL, Part 1, § B, div. 2, ¶ 17, at 6 (2013), available at <http://www.mainehousing.org/docs/default-source/development/quality-standards-procedures-manual.pdf?sfvrsn=7> (requiring building designated as smoke-free to provide notice to tenants and guests by way of signage).

131. "A landlord is generally not liable for a dangerous condition that comes into being after the lessee takes exclusive possession and control of the premises." *Stewart v. Aldrich*, 2002 ME 16, ¶ 10, 788 A.2d 603 (citing *Hankard v. Beal*, 543 A.2d 1376, 1378 (Me. 1988); *Nichols v. Marsden*, 483 A.2d 341, 343 (Me. 1984)). However, a landlord is liable for "defective or dangerous conditions on his property under the exclusive control of his tenants" if the landlord:

(a) fails to disclose the existence of a latent defect which he knows or should have known existed but which is not known to the tenant[s] nor discoverable by [them] in the exercise of reasonable care; (b) gratuitously undertakes to make repairs and does so negligently; or (c) expressly agrees to maintain the premises in good repair.

*Id.* (emphasis added) (quoting *Nichols*, 483 A.2d at 343).

132. 14 M.R.S.A. § 6030(2)(A) (2003 & Supp. 2012).

133. *Id.* § 6021(5) (providing that a tenant may agree to certain conditions that would otherwise violate the landlord's duty under the implied warranty of habitability in exchange for "fair consideration").

134. The methods and grounds for termination depend on the status of the tenancy (i.e., whether it is a tenancy at will or a leasehold). See, e.g., *id.* § 6002 (providing that a tenancy at will can be terminated by the landlord or tenant provided that the party gives the other at least 30-days' notice, unless either party waives the notice or certain grounds within subsection 2 of the statute are met); *id.* § 6001(1-B)(B) (Supp. 2012) (providing that leases without termination or notice language require the tenant to provide the landlord with seven-days written notice of intention to terminate the lease where the landlord has "substantially breached" a provision of the lease agreement).

*B. Unanticipated Barriers in Maine's Secondhand Smoke Disclosure Law*

In 2011, the Maine Legislature made it even more difficult for tenants to obtain civil recourse against landlords who fail to enforce existing smoke-free policies. P.L. 2011, ch. 199 was passed as a smoking policy disclosure law requiring landlords to notify tenants in writing of the landlord's policy on smoking.<sup>135</sup> The legislation, as initially proposed by Rep. Dr. Linda Sanborn (D-Gorham), created a civil violation enforceable by the District or Superior Court with an assessed fine of no more than \$250 for failure to notify tenants of the presence of, or policies barring, smoking on the premises.<sup>136</sup>

However, the legislation enacted by the 125<sup>th</sup> Maine State Legislature, and codified in 14 M.R.S.A. § 6030-E, is substantially different than that proposed: rather than establishing a penalty for landlords that fail to follow the disclosure requirement, the law bars tenants from filing a private cause of action against the landlord should he or she fail to disclose the smoking policy to the tenant.<sup>137</sup> Going even further, the law bars a tenant from bringing a private cause of action against a landlord if the basis for the cause of action is a violation of the smoking policy by another tenant.<sup>138</sup> As for an enforcement provision, there is none.<sup>139</sup>

While the proposed legislation was arguably meant to increase awareness of the legality and availability of smoke-free housing across the state, the law may have done more harm than good to tenants. The language expressly states that “this subsection restricts private causes of action based on violations of this section or smoking policies provided to tenants . . . .”<sup>140</sup> Thus, while there has been no litigation to test the application of this provision, it could be argued that the restrictive language eliminates any recourse a tenant may have against a landlord in the event that he or she is involuntarily exposed to secondhand smoke. In other words, even if a tenant moves into the building with the understanding that it is smoke-free, only to find that another tenant is smoking, the nonsmoking tenant is precluded from bringing a private cause of action against the landlord to enforce the policy or recover damages from the landlord for failing to stop the tenant from smoking.<sup>141</sup> This will place many tenants in the difficult situation of having to directly battle other tenants, disputing (and possibly litigating) whether the tenant has a right to stop another tenant from smoking in light of the smoking policy.<sup>142</sup> It takes the landlord entirely out of the equation (at least in a legal sense), and pits tenant against tenant without a mediating property owner.<sup>143</sup> In short, section

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135. P.L. 2011, ch. 199 (codified at 14 M.R.S.A. § 6030-E (Supp. 2012)).

136. L.D. 1067, § 4 (125th Legis. 2011).

137. 14 M.R.S.A. § 6030-E(4)(A).

138. *Id.* § 6030-E(4)(B).

139. *See generally id.* § 6030-E.

140. *Id.* § 6030-E(4).

141. *See id.* § 6030-E(4)(B) (providing that “[a] tenant . . . may not use a violation of the smoking policy by another tenant as the basis for a private cause of action against a landlord . . .”).

142. For legal theories that may be used by nonsmoking tenants against smoking tenants who involuntarily subject them to secondhand smoke, *see generally* SCHOENMARKLIN, *infra* note 162, and Part V of this Comment.

143. *See* Ezra, *supra* note 23, at 155 (noting that disputes over secondhand smoke exposure in multi-unit housing can be “quite emotional, with smokers and nonsmokers feeling like their own homes have become a constant source of displeasure and aggravation.”).

6030-E(4) effectively gives the landlord immunity—an immunity that can disincentivize enforcement of voluntary policies.

V. EXPLORING POTENTIAL REMEDIES FOR MAINE TENANTS INVOLUNTARILY EXPOSED TO SECONDHAND SMOKE

If, as advocates of the initial legislation underlying 14 M.R.S.A. § 6030-E argue, the ultimate goal of the disclosure law was to increase awareness and availability of smoke-free housing,<sup>144</sup> the resulting law may have overstepped its bounds and created unintended barriers for vulnerable tenants living in buildings where they are involuntarily exposed to secondhand smoke. Thus, it is worth asking whether: a) there is any authority to suggest that the restrictive language of section 6030-E(4) can be overcome by existing statutory or common law principles meant to protect tenants; and b) whether the law should be amended or interpreted narrowly as to eliminate potentially detrimental barriers to justice for vulnerable tenants. At the time of this writing, Maine is the only state that has expressly limited a tenant's private right of action against a landlord should the landlord fail to enforce an existing smoke-free policy. The smoke-free housing provisions enacted in other jurisdictions—which include legal requirements that tenants abide by the landlord's smoke-free policy<sup>145</sup> and clarification of a landlord's right to adopt a smoke-free policy<sup>146</sup>—do not prevent a tenant from seeking civil recourse against the landlord for violation of the policy by another tenant. Most notable is Utah's nuisance law, which expressly includes tobacco smoke as a nuisance and provides tenants with a private cause of action against landlords who claim to have adopted a smoke-free policy but fail to enforce it.<sup>147</sup> If the goal is to protect tenants' health and their ability to live in a smoke-free home, the Utah law represents model legislation that Maine policymakers should strongly consider. However, in the meantime, tenants and tenants' rights advocates must examine, navigate, and interpret existing laws to determine avenues available to prevent or remediate incursion and damage from secondhand smoke. This section addresses the legal theories and potential options available to tenants that find themselves in multi-unit housing where they are involuntarily exposed.

*A. Narrowly Interpreting 14 M.R.S.A. § 6030-E(4)(B)*

While section 6030-E expressly requires landlords to disclose to current and potential tenants the status of smoking on the rented premises, sub-section (4)(B) expressly limits a tenant's ability to bring a private cause of action against a landlord for another tenant's violation of the smoking policy. Thus, tenants may

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144. See *Smoking Disclosure Law*, SMOKE-FREE FOR ME, <http://www.smokefreeforme.org/landlord.php?page=Smoking+Disclosure+Law> (last visited Sept. 13, 2013) (suggesting that the law educates landlords and tenants about the benefits of smoke-free housing and increases prospective tenants' awareness of smoke-free policies).

145. See, e.g., UTAH CODE ANN. § 57-22-5(1)(h) (West 2013) (stating that tenants are obligated to follow a landlord's restriction on smoking in the rental unit).

146. See, e.g., CAL. CIV. CODE ANN. § 1947.5 (West 2013) (codifying a landlord's legal right to adopt and enforce a smoke-free policy).

147. See UTAH CODE ANN. §§ 78B-6-1101, 78B-6-1106.

find themselves with few options unless the legislation is amended to eliminate this restriction on a tenant's private right of action against a landlord. However, it should be noted that section 6030-E(4) only bars, on its face, a private cause of action by a tenant against a landlord for either failing to disclose the smoking policy, or for another tenant's violation of the smoking policy.<sup>148</sup> This may prove an important distinction for those tenants seeking recourse. For example, if a tenant moves into a building and the landlord fails to disclose the smoking policy, the tenant may not bring a private cause of action against the landlord "on the *sole basis* that the landlord . . . failed to provide [a] smoking policy disclosure",<sup>149</sup> however, if the landlord fails to establish a policy one way or another, and the tenant is adversely affected by another tenant's smoke, he or she is arguably not precluded by section 6030-E(4)(B) from bringing a private cause of action because that provision expressly states that "[a] tenant . . . *may not use a violation of a smoking policy by another tenant* as the basis for a private cause of action against a landlord . . .".<sup>150</sup> Thus, it appears that landlords who establish smoke-free policies—yet fail to enforce them—are immune from suit under the law, while landlords who fail to establish a policy remain open to suit—for example, under the theories of breach of the implied warranty of habitability or quiet enjoyment, negligence, nuisance, or trespass—by a nonsmoking tenant who is adversely affected by another tenant's smoking behavior.

Such a reading of the statute has its pros and cons. The pros are fairly obvious: tenants involuntarily exposed to secondhand smoke in buildings without a policy on smoking may have recourse if their health and safety are unduly affected, and the landlord does nothing to remedy the problem. It may also encourage more landlords to adopt smoke-free policies and increase access to smoke-free homes. The con, however, is that tenants living in buildings where they are led to believe (by way of the written disclosure) that smoking is not allowed, but are nonetheless exposed to secondhand smoke, may have no recourse when their landlord fails to enforce the policy. This could lead to residual effects contrary to public policy. For example, it may incentivize more landlords to adopt smoke-free policies that they have no intention of enforcing, solely to avoid liability. Such results are likely to unfairly impact vulnerable populations, specifically those that actively seek smoke-free homes due to health conditions that are directly impacted or exacerbated by secondhand smoke exposure.

Given that the statute has never been tested by the courts, it remains to be seen how section 6030-E(4) will be used defensively by landlords. That said, due to the apparent lack of logic and fairness that is likely to result from an application of this provision, the legislature would be well advised to reconsider whether section 6030-E(4) should remain in effect.

### *B. Common Law and Statutory Avenues for Relief*

Even prior to the enactment of section 6030-E, Maine's case law associated with secondhand smoke exposure was, and remains, weak; as for multi-unit

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148. 14 M.R.S.A. § 6030-E(4) (Supp. 2012).

149. *Id.* § 6030-E(4)(A) (emphasis added).

150. *Id.* § 6030-E(4)(B) (emphasis added).

housing, it is practically non-existent.<sup>151</sup> Despite an absence of local guidance, there are models in the case law and statutory provisions of other states to support the development of civil remedies for Maine tenants facing involuntary exposure to tobacco smoke in multi-unit housing. Other jurisdictions have acknowledged a tenant's ability to use common law remedies to force a change in his or her living circumstances when secondhand smoke from a neighbor makes a living situation intolerable and the nonsmoking tenant is unwilling or unable to easily move him or herself out. This section will discuss theories adopted by other jurisdictions in conjunction with Maine's own statutory and common law provisions, suggesting how tenants could potentially use existing concepts of landlord-tenant, tort, and contract law to enforce smoke-free policies and obtain remedies for damages resulting from involuntary exposure to secondhand smoke.

### *1. Implied Warranty and Covenant of Habitability*

Under the implied warranty and covenant of habitability, codified in statute under 14 M.R.S.A. § 6021, a landlord is implicitly obligated to maintain a unit fit for human habitation—that is, make sure it is safe to live in.<sup>152</sup> A building in which tenants are exposed to secondhand smoke arguably “endangers or materially impairs the health or safety of the tenants,”<sup>153</sup> especially given the known health hazards presented by tobacco smoke.<sup>154</sup> Remedies may include injunctive relief<sup>155</sup> or damages<sup>156</sup> when the tenant is able to show that the landlord has actual or constructive notice, yet has unreasonably failed to take “prompt, effective steps” to remedy the violation, and the violation was not caused by the tenant or one of their guests.<sup>157</sup>

The concern with raising any claim based on a violation of the smoking policy by another tenant is that the landlord is likely to argue, *inter alia*, that he or she is immune from such a suit under section 6030-E(4)(B). If the court does not narrowly interpret this section, such a defense would likely prevail if the tenant can find no other basis for his or her claim for breach of the implied warranty.<sup>158</sup>

However, for the sake of argument, it is worth highlighting that the implied warranty of habitability establishes that the landlord has—whether expressly or not—promised to keep the apartment “fit for human habitation”;<sup>159</sup> thus, it is unclear whether the immunity provision of section 6030-E(4)(B) would trump the

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151. *But see* *America v. Sunspray Condominium Ass'n*, 2013 ME 19, 61 A.3d 1249 (discussed *infra* Part V.B.5.b of this Comment).

152. 14 M.R.S.A. § 6021(2).

153. *Id.* §§ 6021(3)(A), 6026(1).

154. *See supra* text accompanying note 2.

155. 14 M.R.S.A. § 6021(4)(A).

156. *Id.* § 6021(4)(B).

157. *Id.* § 6021(3).

158. However, it is important to note that, should the legislature choose to amend this provision to no longer bar a private cause of action against the landlord for violation of the policy by another tenant, the implied warranty of habitability presents a logical avenue for tenants seeking to collect damages or reduce their exposure to secondhand smoke through injunctive relief. *See Ezra, supra* note 23, at 161.

159. 14 M.R.S.A. § 6021(2).

implicit warranty afforded by statute.<sup>160</sup> For example, an argument could be made that a violation of the warranty of habitability occurs where the landlord has failed to insulate the tenant from exposure by not taking remedial actions to prevent seepage from one unit to another.<sup>161</sup> A tenant may waive the implied warranty of habitability only in very limited circumstances;<sup>162</sup> thus, if a court deemed involuntary secondhand smoke exposure to constitute a material danger that “impair[ed] the health and safety” of the tenant, the tenant may argue that but-for the landlord’s failure to take “prompt, effective steps” to remedy the seepage of secondhand smoke, the tenant’s health would not have been compromised.<sup>163</sup> Rather than argue that the tenant’s smoking behavior establishes the cause of action, it could be argued that the landlord fails to maintain an environment that is “fit for human habitation”<sup>164</sup> by neglecting or refusing to enforce the policy. Under this interpretation, a landlord notified of the seepage of smoke from another unit who fails to take reasonable steps to mitigate the damage could be held liable for the resulting personal and property damages to the nonsmoking tenant under a theory that he or she breached the implied warranty of habitability.<sup>165</sup>

In addition, it should also be noted that, even if the court were to find that section 6030-E(4) immunized the landlord from direct suit on the basis of violations of the smoking policy, section 6030-E(4) does not bar a tenant from raising the implied warranty of habitability defensively when the landlord initiates litigation or an eviction against him or her. Such a defense was successfully used

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160. While outside the scope of this Comment, whether the two statutes are in conflict is a question worth exploring. It is this author’s position that any attempt to assert conflict would be weak given that, at the time of this writing, there is no case law to suggest the presence of secondhand smoke can substantiate a claim for breach of the warranty of habitability. Canons of statutory construction would require the court to first determine whether there is a “real” conflict between the statutes, *see* *Sunshine Dev., Inc. v. FDIC*, 33 F.3d 106, 113 (1st Cir. 1994), and unless they are found to be “absolutely conflicting, [the statutes] are to be construed so as to make them operate harmoniously,” *Cram v. Cnty. of Cumberland*, 148 Me. 515, 517, 96 A.2d 839, 841 (1953) (quoting *Collins v. Chase*, 71 Me. 434, 436 (1880)).

161. At the time of this writing, Maine has no case law on point to support a violation of the implied warranty of habitability when smoke incursion occurs. However, other jurisdictions have addressed this issue. *See* SUSAN SCHOENMARKLIN, TOBACCO CONTROL LEGAL CONSORTIUM, INFILTRATION OF SECONDHAND SMOKE INTO CONDOMINIUMS, APARTMENTS AND OTHER MULTI-UNIT DWELLINGS: 2009 4-5 (2009) (referencing *Fox Point Apt. v. Kipples*, No. 92-6924 (Or. Dist. Ct. Lackamas Cty. 1992) (finding a breach of the warranty of habitability by a landlord who allowed a smoking tenant to move in below another tenant sensitive to secondhand smoke. The jury awarded the tenant damages to cover medical expenses and reduced the plaintiff’s rent by 50%), and *Poyck v. Bryant*, 820 N.Y.S.2d. 774, 776-77, 779-80 (N.Y. Civ. Ct. 2006) (holding that a tenant exposed to secondhand smoke exposure from another unit could bring a cause of action against the landlord for violating the warranty of habitability on the theory that the landlord had “failed to offer any evidence that he took any action to eliminate or alleviate the hazardous condition”).

162. *See* 14 M.R.S.A. § 6021(5) (explaining that waiver may be granted in exchange for reductions in rent, but all other agreements to waive the implied warranty of habitability will be held void).

163. *Id.* § 6021(3)(A), (D).

164. *Id.* § 6021(2).

165. *But see* *Belyea v. Shiretown Motor Inn, LP*, 2010 ME 75, ¶ 13, 2 A.3d 276 (stating that a landlord’s “mere ability to control an activity of its tenant does not give rise to a legal duty” (quoting *Hughes v. Beta Upsilon Bldg. Ass’n*, 619 A.2d 525, 527 (Me. 1993)).

in the Boston Housing Court in 1998.<sup>166</sup> In the case of *50-58 Gainsborough St. Realty Trust v. Haile*,<sup>167</sup> the tenants, the Hailes, had failed to pay rent for several months, leading the landlord to initiate eviction proceedings.<sup>168</sup> As a defense to the eviction, the Hailes alleged that secondhand smoke from a downstairs bar had been seeping into their unit through the fireplace and electrical outlets, making it “as smoky as a nightclub.”<sup>169</sup> The court ruled that smoke from the downstairs bar caused the unit to become “unfit for smokers and nonsmokers alike,” and as a result constituted a breach of the covenant of quiet enjoyment and the implied warranty of habitability.<sup>170</sup> Thus, where Maine’s and Massachusetts’s implied warranty statutes contain similar requirements,<sup>171</sup> it is arguable that if Maine tenants are unable to find a remedy by means of direct action, they may be able to withhold rent and, upon threat of eviction, invoke the defense of breach of warranty of habitability to avoid paying rent until the landlord takes remedial measures to correct the infiltration of smoke.<sup>172</sup>

## 2. Private Nuisance and Negligence

Nuisance is the use of one’s own property to cause injury to the right, interest, or property of another.<sup>173</sup> Negligence is defined as a breach of a duty owed that causes damages to another party.<sup>174</sup> Under Maine law, the torts of negligence and nuisance are “practically inseparable.”<sup>175</sup>

Nuisance and negligence, both separately and in combination, may present possible relief for tenants involuntarily exposed to secondhand smoke in their homes. While secondhand smoke has yet to be expressly defined as a nuisance under Maine law, the Maine Supreme Judicial Court, sitting as the Law Court, has recognized “that some trades, occupations or acts are regarded as . . . inherently noxious, or offensive . . . .”<sup>176</sup> Furthermore, something otherwise lawful—such as

166. See SCHOENMARKLIN, *supra* note 161, at 5 (referencing *50-58 Gainsborough St. Realty Trust v. Haile*, No. 98-02279 (Bos. Housing Ct. 1998)).

167. No. 98-02279 (Bos. Housing Ct. 1998).

168. Ezra, *supra* note 23, at 161 (citing *Massachusetts Tenants Get Some Damages for Secondhand Smoke*, 12-4 MEALEY’S LITIG. REP. TOBACCO, June 18, 1998, at 19).

169. *Id.* at 161-62 (citing Andrea Estes, *Tenant Wins Suit over Smoky Home; No Butts: Landlord Must Clear Air in Hub Apartment*, BOS. HERALD, June 10, 1998, at 1).

170. SCHOENMARKLIN, *supra* note 161, at 5 (citing *50-58 Gainsborough*, No. 98-02279).

171. Compare 14 M.R.S.A. § 6021 with MASS. GEN. LAWS ANN. ch. 239, § 8A (West 2013).

172. Tenants should be careful to follow the statutory requirements of 14 M.R.S.A. § 6021, which requires notice to the landlord before rent is withheld, or else tenants may forfeit their right to file a complaint with the District or Superior Courts. See 14 M.R.S.A. § 6021(3)(E).

173. JACK H. SIMMONS, DONALD N. ZILLMAN & DAVID D. GREGORY, MAINE TORT LAW § 14.02, at 14-3 (2001 ed.) [hereinafter MAINE TORT LAW].

174. See *Gray v. TD Bank, N.A.*, 2012 ME 83, ¶ 16, 45 A.3d 735 (“A claim of negligence requires proof of a duty owed, breach of that duty, and an injury proximately caused by the breach.” (citing *McIlroy v. Gibson’s Apple Orchard*, 2012 ME 59, ¶ 8, 43 A.3d 948)).

175. *Foley v. H.F. Farnham Co.*, 135 Me. 29, 30, 188 A. 708, 710 (1936).

176. *Barnes v. Hathorn*, 54 Me. 124, 127 (1866). The dissent also noted that some activities can be a “nuisance *per se*.” *Id.* at 130 (Dickerson, J., dissenting). See also *City of So. Portland v. Pine State By-Products, Inc.*, 306 A.2d 1, 2 (Me. 1973) (permanently enjoining a meat waste plant from allowing “offensive odors injurious or dangerous to the health, comfort or property of individuals or of the public to escape from the defendant’s plant to such a degree that they are detectable . . . by a person of normal

smoking—may become a nuisance through a landlord’s negligence in failing to mitigate the impact smoke from one tenant has on the other tenants in the building; a tenant may also be held liable for negligence and nuisance as a result of their own smoking within a building.<sup>177</sup> Where a nuisance is deemed a violation of the landlord’s absolute duty to a tenant, negligence is presupposed.<sup>178</sup> Thus, arguably, where there is a smoking tenant in a non-smoking building, a landlord has a duty to eliminate the nuisance.<sup>179</sup> If a tenant were to show cognizable harm as a result of the landlord’s and/or smoking tenant’s negligence, not merely (but possibly in addition to) failure to follow or enforce the policy, a claim could be successfully brought and relief sought.<sup>180</sup>

In 2013, the Law Court addressed whether or not secondhand smoke exposure supported a claim of negligence. In *America v. Sunspray Condominium Ass’n*, the Court, analyzing a complaint by a condominium owner against his condominium association citing, *inter alia*, negligence for failure to enforce a smoking ban in the condominium building, held that the tort of negligence requires a “cognizable” personal injury or property damage to be alleged in the complaint.<sup>181</sup> The Court concluded that such an element of the claim was also required to sustain a cause of action for breach of contract.<sup>182</sup> In support of his negligence claim, the plaintiff argued that he had sustained actual injury because “cigarette smoke is universally understood to be a toxic and carcinogenic substance,” and he “[could not] enter or leave his unit without passing the exhaust of a unit in which tobacco [was] being smoked in violation of the Smoking Ban.”<sup>183</sup> However, the Court disagreed; due to the plaintiff’s inability to demonstrate actual damage, such as “particularized physical injury or illness,”<sup>184</sup> the Law Court held that the lower court<sup>185</sup> had properly dismissed the plaintiff’s negligence claim.<sup>186</sup>

While its discussion of the issue of negligence for failing to enforce a smoke-free policy was limited due to the finding that the plaintiff had not sustained actual

or average sensitivity to odors.”); *Ace Tire Co., Inc. v. Mun. Officers of Waterville*, 302 A.2d 90, 97 (Me. 1973) (“Private property rights are not absolute but are held subject to the implied condition that they shall not be used for any purpose that injures or impairs the public interest.” (citations omitted)).

177. See *Foley*, 135 Me. at 30, 188 A. at 710 (“A thing may be lawful in itself, and yet become a nuisance through negligence in the maintenance or use of it.” (citation omitted)).

178. See *id.* at 31, 188 A. at 710 (“A nuisance, in many if not in most, instances, especially with respect to buildings or premises, presupposes negligence.” (citation omitted)).

179. While in theory negligence can be used to hold both the landlord and the smoker liable for smoke incursion, no jurisdiction has found a landlord negligent for allowing secondhand smoke to seep into a fellow tenant’s apartment. See *SCHOENMARKLIN*, *supra* note 161, at 7. See also *Schuman v. Greenbelt Homes, Inc.*, 69 A.3d 512, 520-22 (Md. Ct. Spec. App. 2013) (holding that tobacco smoke is not a “nuisance per se”); *DeNardo v. Corneloup*, 163 P.3d 956, 961 (Alaska 2007) (holding that a tenant does not have a duty “to refrain from smoking absent either a provision in the rental agreement or a statute or municipal ordinance prohibiting smoking or declaring smoke a nuisance in a multi-party residence”).

180. See *America v. Sunspray Condominium Ass’n*, 2013 ME 19, ¶ 9, 61 A.3d 1249.

181. *Id.* ¶ 24.

182. *Id.* ¶ 23.

183. *Id.* ¶ 18 (internal quotation marks omitted).

184. *Id.*

185. The case was tried in the Business and Consumer Court. See *America v. Yamartino*, BCD-CV-11-41 (Bus. & Consumer Ct., Mar. 16, 2012, *Horton, J.*).

186. *Id.* ¶ 24.

damages, *Sunspray Condominium Ass'n* represents the first case before the Maine Law Court addressing secondhand smoke exposure in multi-unit housing, and provides—even if only minimally—some guidance as to the procedural requirements for establishing a claim of negligence when one is involuntarily exposed to secondhand smoke in his or her home. One thing that *Sunspray Condominium Ass'n* does make clear is that, in order to succeed in a claim that a failure to enforce a smoke-free policy constitutes negligence on the part of the landlord (or in this case, condominium association), a plaintiff must demonstrate actual, cognizable injury.<sup>187</sup> It is not enough, under Maine law, to claim that, because secondhand smoke is a known carcinogen that it is disruptive or annoying, injury has occurred; a showing of actual harm is necessary.<sup>188</sup>

Beyond the requirement that tenants demonstrate actual damages, other barriers exist. Again, due to the bar on private causes of action under section 6030-E(4)(B), tenants may be excluded from bringing suit against their landlord under either a negligence or nuisance theory if the complaint arises from another tenant's violation of the smoking policy. Given it would be difficult to cite anything other than the violation of the smoking policy by the other tenant as the nuisance that gave rise to the landlord's negligence, most claims will fail in light of the immunity provision. However, while outside the scope of this Comment, it should be noted that there is nothing to preclude a cause of action against a tenant who violates a smoke-free policy.<sup>189</sup> In other jurisdictions, nuisance claims have been successfully brought against both landlords and tenants.<sup>190</sup> The problem, though, is that a suit against the smoking tenant is unlikely to provide satisfactory relief for the nonsmoking tenant where the financial resources of the smoking tenant stand to be low, and the cost to the nonsmoking tenant of seeking either damages or injunctive relief are greater than the cost of leaving the building altogether. The only substantial source of coverage for tenant liability would be renter's insurance; however, Maine law does not require renters to purchase such a policy.<sup>191</sup> Thus, at most, the nonsmoking tenant can hope that the threat of suit will motivate the smoking tenant to cease their policy-violating behavior. Still, this may be an optimistic assumption of the impact of filing suit, especially where the landlord fails to take any action to support the position of the nonsmoking tenant.

#### *a. Tobacco Smoke as a Nuisance—An Example from Utah*

While most questions of whether secondhand smoke exposure constitutes a nuisance are dealt with on a case-by-case basis,<sup>192</sup> there is at least one state

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187. *See id.*

188. *See id.* (citing *In re Hannaford Bros., Co.*, 2010 ME 93, ¶¶ 8-9, 4 A.3d 492).

189. The statute at issue only precludes a suit by the tenants against the landlord, or a person acting on behalf of the landlord, and does not limit a tenant's rights to bring a private cause of action against another tenant. *See* 14 M.R.S.A. § 6030-E(4) (Supp. 2012).

190. *See* SCHOENMARKLIN, *supra* note 161, at 6.

191. *See* *Maine Rental Insurance*, RENTERSINSURANCE.NET, <http://www.rentersinsurance.net/maine.html> (last visited Sept. 27, 2013).

192. *See* SCHOENMARKLIN, *supra* note 161, at 6-7. Even within the same state, courts have struggled to define “how much smoke” constitutes a nuisance for the purpose of satisfying the common law and statutory meaning of the word. *Id.*

legislature that has adopted the view that secondhand smoke incursion should be deemed a nuisance to those living in multi-unit buildings.

Under Utah law, secondhand smoke is expressly included in the statutory definition of “nuisance.”<sup>193</sup> Where secondhand smoke drifts into any residential unit from another unit (or adjacent business) more than once a week for at least two weeks,<sup>194</sup> and interferes with the “comfortable enjoyment of life or property,”<sup>195</sup> the tenant may bring suit against both the offending neighbor and the landlord when the smoker is another tenant and there was a smoke-free policy in place.<sup>196</sup> The statute extends this private right of action to anyone “whose property is injuriously affected, or whose *personal enjoyment is lessened by the nuisance*,” suggesting that proof of *actual* damages under the Utah statute is not required in order for one to seek relief in the form of an injunction or monetary damages.<sup>197</sup>

The Utah statute also bars anyone from bringing a cause of action under the nuisance theory if they had first been notified in writing that smoking *was allowed* (though not requiring disclosure of a policy outright).<sup>198</sup> Unlike Maine’s section 6030-E, which, on its face, appears to have used a disclosure statute as a vehicle to restrict a tenant’s private right of action, the Utah statute, rather, uses nuisance law as a vehicle to incentivize landlords to disclose when they have chosen not to adopt a smoke-free policy.<sup>199</sup> In addition, where section 6030-E(4) bars private causes of action against a landlord for another tenant’s violation of the smoking policy, the Utah statute allows private causes of action against a landlord who discloses a smoke-free policy and fails to enforce it (or fails to disclose the policy at all). So, while Maine’s statute arguably creates an immunity that protects the hands-off landlord who takes advantage of the fact that tenants want to live in smoke-free housing, the Utah statute is structured in a way that requires the landlord to ensure that the policy he or she advertises to tenants is followed.

By establishing a concrete tort action for tenants involuntarily exposed to secondhand smoke, the Utah statute stands as a noteworthy example of how states can adopt laws that serve to protect tenant health, while also respecting a landlord’s choice to allow smoking in his or her building. In this way, the Utah statute could serve as a model for future Maine legislation should the legislature determine that protecting residents living in multi-unit housing from secondhand smoke is a priority for the State. Adoption of a similar measure would involve the legislature’s elimination of 14 M.R.S.A. § 6030-E(4),—or an amendment revising

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193. UTAH CODE ANN. § 78B-6-1101(3) (West 2013) (stating, with some exceptions, that a “nuisance . . . includes tobacco smoke that drifts into any residential unit a person rents, leases, or owns, from another residential or commercial unit . . .”).

194. *Id.*

195. *Id.* § 78B-6-1101(1).

196. *Id.* § 78B-6-1106(2).

197. *Id.* § 78B-6-1101(6) (emphasis added).

198. *Id.* § 78B-6-1106(1).

199. *See id.* § 78B-6-1105 (outlining the legislative intent behind incorporating secondhand smoke in the definition of “nuisance”). The Utah legislature reported finding that “persons who desire to not be exposed to drifting environmental tobacco smoke should be able to determine in advance of entering into a rental, lease, or purchase agreement whether the subject unit may be exposed to environmental tobacco smoke” and that “construction practices” are not effective in eliminating secondhand smoke seepage. *Id.*

the language to preclude private rights of action against those landlords who disclose that smoking is allowed on the property<sup>200</sup>—as well as express legislation identifying secondhand smoke as a public health nuisance.<sup>201</sup> Such changes would be consistent with efforts to prevent involuntary exposure to secondhand smoke and protect tenants' rights, all while preserving a landlord's choice to allow or not allow smoking on his or her property.

### 3. Trespass

Trespass is an “improper physical interference with one’s person or property that causes injury to health or property.”<sup>202</sup> Under Maine law, a tenant may bring a cause of action in trespass against another tenant as long as the other tenant is in possession of the unit at the time of the alleged trespass.<sup>203</sup> The landlord can be found to be trespassing on his own property, but he or she may not maintain trespass against a tenant or a tenant’s guest for damage to the property.<sup>204</sup> One may be held liable for common law trespass regardless of whether he or she caused harm to any legally protected interest of another if he or she intentionally entered the property or caused someone or something to do so.<sup>205</sup>

It is not clear whether secondhand smoke incursion can ever constitute an actionable trespass.<sup>206</sup> While, courts in other jurisdiction have begun to address whether a substance can trespass,<sup>207</sup> they have not examined secondhand smoke specifically. In Alabama, for example, the state court has found that dust and gas may constitute trespass, and in New Hampshire, the federal court has questioned whether spreading fumes falls within the necessary meaning of wrongful entry of property.<sup>208</sup>

In Maine, however, it appears the courts—as least the federal courts—are less

200. Specifically, Maine could adopt the same exception as Utah, which states that there is no cause of action for nuisance against the landlord or offending tenant where:

[T]he rental, lease, restrictive covenant, or purchase agreement for the unit states in writing that: (a) smoking is allowed in other units, either residential or commercial, and that tobacco smoke from those units may drift into the unit that is subject to the agreement; and (b) by signing the agreement the renter, lessee, or buyer acknowledges he has been informed that tobacco smoke may drift into the unit he is renting, leasing, or purchasing, and he waives any right to a cause of action for a nuisance . . . .  
*Id.* § 78B-6-1106(1).

201. Currently, the statutory definition of “nuisance” and related liabilities can be found at 17 M.R.S.A. §§ 2701-2859 (2006 & Supp. 2012); the definition does not expressly include secondhand smoke. However, efforts to statutorily define secondhand smoke as a nuisance, as well as create an action for trespass, have been made, though never enacted. *See* L.D. 1429, § 3 (124th Legis. 2009) (proposing the adoption of a new section to Title 22, § 1545-A, which would have stated that “[e]xposing another person nonconsensually to secondhand smoke in areas where smoking is prohibited is a nuisance and a trespass and may be enforced as a nuisance or as a trespass.” This provision, however, was stricken by Comm. Amend. A, No. S-177 prior to enactment. *See* P.L. 2009, ch. 300.

202. SCHOENMARKLIN, *supra* note 161, at 6 (citing 75 AM. JUR. 2D *Trespass* § 25 (1991)).

203. *See* MAINE TORT LAW, *supra* note 173, § 5.03, at 5-7.

204. *Id.* § 5.03, at 5-6—5-7.

205. *Darney v. Dragon Prods. Co.*, 771 F. Supp. 2d 91, 105 (D. Me. 2011) *amended in part by* 2:08-CV-47-GZS, 2011 WL 2007300 (D. Me. May 23, 2011).

206. SCHOENMARKLIN, *supra* note 161, at 6.

207. *Id.*

208. *Id.*

likely to find trespass for nonphysical intrusions upon land. In *Darney v. Dragon Prods. Co.*, the U.S. District Court for the District of Maine held that, under Maine Law, “intrusions of dust and vibrations—just like other ‘invisible’ irritants such as smoke, gas and noise—are not actionable as a trespass but only as a private nuisance.”<sup>209</sup> Thus, under current precedent, it appears that an action in trespass—either against the landlord or the smoking tenant—that resulted from involuntary exposure to secondhand smoke would fail under *Darney*’s holding that “smoke” does not constitute a trespass.<sup>210</sup>

#### 4. Breach of Contract

As previously mentioned, under Maine law, negligence and breach of contract claims contain similar elements, including a showing of actual damages by the party seeking relief.<sup>211</sup> Specifically, in order to recover under a breach of contract claim, one must establish that there was a breach of a material contract term and that such a breach caused injury or damage.<sup>212</sup> Thus, a claim could be made that an action for breach of contract arises when a tenant suffers actual damages as a result of a landlord’s failure to dutifully enforce a smoke-free policy incorporated in the lease agreement or house rules.

Ignoring the immunity imposed by section 6030-E(4) for a moment, it is possible that if a tenant were to show actual injury or damage (which would not be cumbersome for a tenant who suffers from a condition that is exacerbated by secondhand smoke or owns chattel that is damaged by tar residue),<sup>213</sup> the tenant might succeed in a claim for breach of contract where the landlord fails to uphold his or her duty to enforce the smoke-free policy. As for a remedy, the tenant could seek damages in the form of back rent or specific performance requiring the landlord to enforce the policy.<sup>214</sup>

However, in addition to landlord immunity found within section 6030-E(4), tenants may face additional barriers in attempting to recover under a theory of breach of contract. For example, as discussed by the Law Court in *Sunspray Condominium Ass’n*, a disagreement about *how* a policy should be enforced does not necessarily constitute a violation of the law.<sup>215</sup> Thus, it is possible that a court would refuse to find a breach, or other actionable violation, if the landlord failed to

209. *Darney*, 771 F. Supp. 2d. at 106 (emphasis added).

210. *But see supra* note 201 (discussing failed legislation, proposed in 2009, that would have made “[e]xposing another person nonconsensually to secondhand smoke in areas where smoking is prohibited . . . a trespass.”)

211. *See In re Hannaford Bro., Co.*, 2010 ME 93, ¶ 8, 4 A.3d 492 (stating that “actual injury or damage is an element of both negligence and breach of contract claims”).

212. *Tate & Lyle Ingredients Americas, Inc. v. Transp. Distrib., LLC*, 746 F. Supp. 2d 189, 196 (D. Me. 2010).

213. However, it should be noted that “no claim for anticipated damages arises on breach of covenant for rent of real estate in the absence of a provision in the lease to that effect.” *Cooper v. Casco Mercantile Trust Co.*, 134 Me. 372, 383, 186 A. 885, 890 (1936). Thus, mere concern of the impact of smoke exposure and infiltration without cognizable injury may not constitute a breach.

214. *See* ME. ATT’Y GEN., MAINE CONSUMER LAW GUIDE § 2.9 (last revised Jan. 18, 2013); *see, e.g.*, 14 M.R.S.A. 6021(4) (2003 & Supp. 2012) (listing remedies the court may provide where the plaintiff establishes a breach of the warranty of fitness for human habitation has occurred).

215. *See America v. Sunspray Condominium Ass’n*, 2013 ME 19, ¶¶ 16, 22, 61 A.3d 1249.

enforce the policy in a way that sufficiently protected the tenant if the landlord took *some* action to “enforce” the policy. This raises the question of whether merely asking a tenant to stop, or slipping a letter under his or her door after each complaint, would legally constitute enforcement of the smoking policy. If that is the case, it further limits a tenant’s ability to protect him or herself from secondhand smoke exposure and obtain a remedy after incursion has occurred (but enforcement of the policy has not). In addition, it removes an incentive for landlord to actively ensure the smoke-free policy is being followed and tenant health and safety is preserved.

### 5. Disability Related Claims under Federal and State Law

Given that common law recourse is stifled by certain barriers in Maine’s statutory framework, this Comment will now turn to a brief examination of federal and state disability laws and the potential avenue these laws provide for tenants suffering from involuntary secondhand smoke exposure in multi-unit housing.

#### a. The Fair Housing Act and the Americans with Disabilities Act

Tenants involuntarily exposed to secondhand smoke in multi-unit rental housing may be able to obtain relief under the federal Fair Housing Act (“FHA”).<sup>216</sup> The FHA prohibits discrimination in housing against persons with disabilities<sup>217</sup> or “handicaps.”<sup>218</sup> In determining what constitutes a disability under the FHA, courts look to the Americans with Disabilities Act (“ADA”)<sup>219</sup> and evaluate cases in relation to common law precedent.<sup>220</sup> Disabilities may include “severe breathing problems that are exacerbated by secondhand smoke,”<sup>221</sup> which

216. 42 U.S.C. §§ 3601-3619 (2006). *See also* SCHOENMARKLIN, *supra* note 161, at 8 (stating that “[a] tenant . . . who is sensitive to tobacco smoke can use the Federal Fair Housing Act . . . to seek relief from secondhand smoke infiltration.”).

217. Memorandum from Carole W. Wilson, Assoc. Gen. Counsel for Equal Opportunity & Admin. Law, U.S. Dep’t of Hous. & Urban Dev., to Frank Keating, Gen. Counsel, U.S. Dep’t of Hous. & Urban Dev. (Mar. 5, 1992), available at <http://www.hud.gov/offices/adm/hudclips/lops/GME-0009LOPS.pdf> (concluding that persons suffering from secondhand smoke-related illnesses and disorders could qualify as disabled under the Fair Housing Act).

218. Under the Fair Housing Act, a “handicap” is defined as:

- (1) a physical or mental impairment which substantially limits one or more of [a] person’s major life activities,
- (2) a record of having such an impairment, or
- (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance . . . .

42 U.S.C. § 3602 (2006). *See also* Astralis Condominium Ass’n v. Sec’y, U.S. Dept. of Hous. & Urban Dev., 620 F.3d 62, 67 (1st Cir. 2010) (stating that “[t]o establish a prima facie case of failure to accommodate under the FHA[], a claimant must show that he is handicapped within the purview of 42 U.S.C. § 3602(h) and that the party charged knew or should reasonably have known of his handicap. Next the claimant must show that he requested a particular accommodation that is both reasonable and necessary to allow him an equal opportunity to use and enjoy the housing in question. Finally, the claimant must show that the party charged refused to make the requested accommodation.” (citations omitted)).

219. 42 U.S.C. §§ 12101-12213 (2006).

220. *See* SCHOENMARKLIN, *supra* note 161, at 9 & 15 n.96.

221. *Id.* at 8.

arguably could include persons suffering from asthma and chronic obstructive pulmonary disease (“COPD”).<sup>222</sup>

Tenants who qualify as disabled under the FHA may be entitled to “reasonable accommodation” in places deemed “public accommodations.”<sup>223</sup> Under the FHA and ADA, common areas—such as stairwells, ground floor hallways, and elevators—of multi-unit buildings are considered areas of “public accommodation,” and must remain accessible to persons with disabilities.<sup>224</sup> Additionally, persons with disabilities may be entitled to “reasonable accommodation” where they are exposed to secondhand smoke in their units.<sup>225</sup> Thus, if a tenant can prove that he or she has a disability under the FHA and ADA, and that exposure to secondhand smoke exacerbates his or her condition, it has been successfully argued that the landlord must make reasonable accommodation for that person.<sup>226</sup> Reasonable accommodations may include enforcing a smoke-free policy, making repairs to the building to minimize seepage, or even transferring the tenant to another unit where he or she will no longer be involuntarily exposed to secondhand smoke.<sup>227</sup>

One benefit of filing an FHA complaint, as opposed to litigating under one of the common law theories addressed above, is that it does not require the tenant to hire an attorney.<sup>228</sup> Additionally, the complaint does not need to be filed on a

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222. See *Fair Housing and ADA Protections*, SMOKEFREE HOUSING VT, [http://www.smokefreehousingvt.org/landlords\\_fair\\_ADA.html](http://www.smokefreehousingvt.org/landlords_fair_ADA.html) (last visited Oct. 4, 2013). While outside the scope of this Comment, it is worth mentioning that the ADA Amendments Act of 2008 (“ADAAA”) significantly expanded the scope of ADA protections by broadly defining disabilities to include those conditions that can be mitigated or are episodic in nature, as long as they substantially limited a major life activity when the action was active or absent mitigation. See generally ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3(a)(4) 122 Stat. 3553, 3555-56 (2008) (codified at 42 U.S.C., §§ 12101-12103, 12111-12114, 12201 12205a, and 29 U.S.C. § 705).

223. See SCHOENMARKLIN, *supra* note 161, at 15 n.99; Ezra, *supra* note 23, at 165.

224. See *Americans with Disabilities Act ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities* § III-1.2000, ADA.GOV, <http://www.ada.gov/taman3.html> (last visited Oct. 4, 2013). These areas are seen as areas of “public accommodation” where use of the areas is not limited exclusively to owners, residents, and their guests. *Id.*

225. See 42 U.S.C. § 3604(f)(3)(B) (2006) (FHA statute stating that “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling”).

226. See, e.g., *In re U.S. Dep’t Hous. Urban Dev. & Kirk and Guilford Mgmt. Corp. & Park Towers Apartments*, HUD Case No. 05-97-0010-8, 504 Case No. 05-97-11-0005-370 (1998) (settled case in which a tenant with a respiratory condition aggravated by secondhand smoke in a HUD subsidized apartment filed complaints against the management agency, and as part of the settlement, management agreed to implement a smoke-free policy by grandfathering in current residents and including an indoor smoking ban as a provision of all new leases); *United States v. Seattle Hous. Auth.*, Case No. C01-1133L (W.D. Wash. 2002) (requiring the Seattle Housing Authority to revise its policy to allow “reasonable accommodation” under the FHA and holding that the tenant’s requested relocation would be a “reasonable accommodation”).

227. See SCHOENMARKLIN, *supra* note 161, at 9.

228. Memorandum, Susan Schoenmarklin, Smoke-Free Env’ts Law Project, Analysis of the Voluntary and Legal Options of Condominium Owners Confronted with Secondhand Smoke from Another Condominium Unit 12 (Feb. 2006), available at <http://www.wvsmokefreehousing.com/myfiles/landlords/legaloptionsmultiunit.pdf> [hereinafter Schoenmarklin Memo].

specific form, and complaints can be made via telephone, mail, or email.<sup>229</sup> For example, imagine for a moment a tenant with asthma living in a building where she is involuntarily exposed to secondhand smoke. The smoke incursion results in an exacerbation of her condition that makes it impossible for the tenant to breathe in her home, and she wants to seek a reasonable accommodation. The asthma-suffering tenant can, without assistance of counsel, file a complaint with the Department of Housing and Urban Development's ("HUD") Office of Fair Housing and Equal Opportunity within one year of exposure; HUD must respond within 100 days to this complaint.<sup>230</sup> If HUD determines that Maine Human Rights Commission has the same Fair Housing powers as HUD, then it will refer the case to the state body (potentially resulting in swifter resolve).<sup>231</sup> In addition, if the tenant were to live in a multi-unit building that receives federal funding, he or she can also file a complaint within one year with the federal agency providing the subsidy.<sup>232</sup>

The downside of filing complaints under the FHA is that few individuals will qualify as disabled under the FHA standard because a person must either prove that the landlord "regarded" them as having a disability exacerbated by secondhand smoke,<sup>233</sup> there exists a record of a disabling impairment,<sup>234</sup> or that he or she has a severe, long-term sensitivity to tobacco smoke that substantially limits one or more major life activities.<sup>235</sup> In other words, what may be classified as "mild" reactions to tobacco smoke exposure would not qualify a person for protection under the Act.<sup>236</sup> Thus, one who merely finds secondhand smoke seepage to be an annoyance is unlikely to obtain protection under the FHA.<sup>237</sup>

Returning to our example of the asthma-suffering tenant, there remains a high standard for demonstrating a disability exists; there is no guarantee that filing a complaint will result in relief. Therefore, the tenant would need to document and

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229. See *HUD's Title VIII Fair Housing Complaint Process*, U.S. DEP'T OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/complaint-process](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/complaint-process) (last visited Oct. 4, 2013) (explaining the FHA complaint process).

230. See SMOKE-FREE ENV'TS LAW PROJECT, THE FEDERAL FAIR HOUSING ACT AND THE PROTECTION OF PERSONS WHO ARE DISABLED BY SECONDHAND SMOKE IN MOST PRIVATE AND PUBLIC HOUSING 5 (Feb. 2002), <http://smchealth.org/sites/default/files/docs/Fair%20Housing%20Act-%20secondhand%20smoke%20and%20people%20with%20disabilities.pdf> [hereinafter *SMOKE-FREE ENV'TS FHA Document*].

231. See *Fair Housing—It's Your Right*, U.S. DEP'T OF HOUS. & URBAN DEV., [portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/FHLaws/yourrights](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/yourrights) (last visited Oct. 4, 2013) (stating that "[i]f HUD has determined that your State or local agency has the same fair housing powers as HUD, HUD will refer your complaint to that agency for investigation and notify you of the referral. That agency must begin work on your complaint within 30 days or HUD may take it back.").

232. See *id.*

233. See 42 U.S.C. § 12102(2)(C) (2006).

234. See *id.* § 12102(2)(B).

235. See *id.* § 12102(2)(A). The courts have further restricted the meaning of "disabled." See, e.g., *Trafton v. Sunbury Primary Care, P.A.*, 689 F. Supp. 2d 180, 189 (D. Me. 2010) ("A record or history of an impairment is not sufficient to show disability; the record must be of an impairment [that] substantially limited a major life activity." (quoting *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1169 (1st Cir. 2002))).

236. Schoenmarklin Memo, *supra* note 228, at 13.

237. See SCHOENMARKLIN, *supra* note 161, at 9.

amass evidence that secondhand smoke has had a severe and long-term impact on his or her regular, daily activities; such evidence may include doctors' notes containing details on how the tenant was, and continues to be, affected.<sup>238</sup> Such a task can prove burdensome, especially for individuals in immediate need of a reasonable accommodation, or those with limited resources.

*b. The Maine Human Rights Act*

In addition to filing a complaint under the FHA, a Maine resident affected by secondhand smoke could file a complaint with the Maine Human Rights Commission<sup>239</sup> citing violations of the Maine Human Rights Act.<sup>240</sup> The Maine Human Rights Act ("MHRA") prohibits discrimination in housing on account of physical disability.<sup>241</sup> Much like the FHA, discrimination includes the refusal "to make reasonable accommodations in rules, policies, practices or services when those accommodations are necessary to give a person with [a] . . . disability equal opportunity to use and enjoy the housing."<sup>242</sup>

The MHRA defines "disability" more broadly than the FHA and ADA; thus, MHRA may prove a less cumbersome avenue for relief than its federal counterparts. For example, the MHRA does not require individuals suffering from conditions such as "cancer; . . . [COPD]; . . . [or] heart disease; . . ." to prove "severity" of their condition.<sup>243</sup>

The most notable difference, however, is that the MHRA's definition of disability includes anyone who is "*likely to develop*" a condition that constitutes a disability under the statute.<sup>244</sup> Thus, it is arguable that a person who otherwise does not qualify as having a disability under ADA, but as a result of exposure to secondhand smoke in his or her unit is likely to develop a condition such as COPD or heart disease, may find protection under the MHRA. These tenants could request reasonable accommodation under 5 M.R.S.A. § 4582-A, asking that they either be relocated to a unit where smoke incursion is not an issue or that the landlord prohibit other tenants from smoking inside the building.

Given the significant health risks associated with secondhand smoke exposures,<sup>245</sup> if 1) the courts determined that the MHRA should be interpreted to allow for such a broad definition of the disability standard, and 2) the plaintiff tenant could prove the likelihood that exposure would result in a disease or condition that substantiated a disability, requests for accommodations under the statute could prove significant in buildings where smoking is allowed or policies go unenforced.

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238. See SMOKE-FREE ENV'TS *FHA Document*, *supra* note 231, at 5.

239. For information on filing a complaint with the Maine Human Rights Commission, see Me. Human Rights Comm'n, *File a Complaint*, MAINE.GOV, [http://www.maine.gov/mhrc/file\\_a\\_complaint/index.htm](http://www.maine.gov/mhrc/file_a_complaint/index.htm) (last visited Oct. 4, 2013).

240. 5 M.R.S.A. §§ 4551-4634 (2013).

241. *Id.* § 4582-A(1).

242. *Id.* § 4582-A(2).

243. *Id.* § 4553-A(1)(B).

244. *Id.* § 4553-A(1)(D) (emphasis added).

245. See *generally* TOBACCO SMOKE CAUSES DISEASE, *supra* note 2 (discussing the broad range of health risks and disabilities exacerbated by exposure to secondhand tobacco smoke).

## VI. CONCLUSION

In Maine, smoke-free living is the norm, not the exception. However, despite the presence of state laws protecting people in a variety of venues from the harmful effects of secondhand smoke, and the fact that the majority of Maine tenants want to live in a smoke-free environment, there are few legal protections for people living in multi-unit housing who may be involuntarily exposed in their homes.

It is good public policy to enact and enforce laws that protect people in their homes from harmful substances, but due to the state of existing Maine law, there are few legal remedies available to tenants who may be involuntarily exposed to secondhand smoke; several barriers exist that can be effectively eliminated through minor legislative changes. At the very least, the Maine legislature should consider amending 14 M.R.S.A. § 6030-E to remove any bar on private causes of action by tenants against landlords who fail to enforce smoke-free policies.<sup>246</sup> The legislature should also consider following Utah's lead and incorporating secondhand smoke within the statutory definition of "nuisance." Furthermore, to better safeguard tenant health and safety, and further promote smoke-free living, the legislature should strongly consider amending Maine's Public Place Smoking Law to include an express prohibition on smoking in multi-unit rental housing. While the latter suggestion is far more restrictive on the landlord sovereignty, it may be the only effective means of providing tenants throughout the state with equal access to smoke-free multi-unit housing. Regardless of the means, if our goal is truly to make Maine the "healthiest state in the nation,"<sup>247</sup> lawmakers must take additional and immediate steps to address secondhand smoke exposure in the place people spend the majority of their time: the home.

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246. This could be done simply by striking the language contained within 14 M.R.S.A. § 6030-E(4) from the statute.

247. SFH Video, *supra* note 32.