

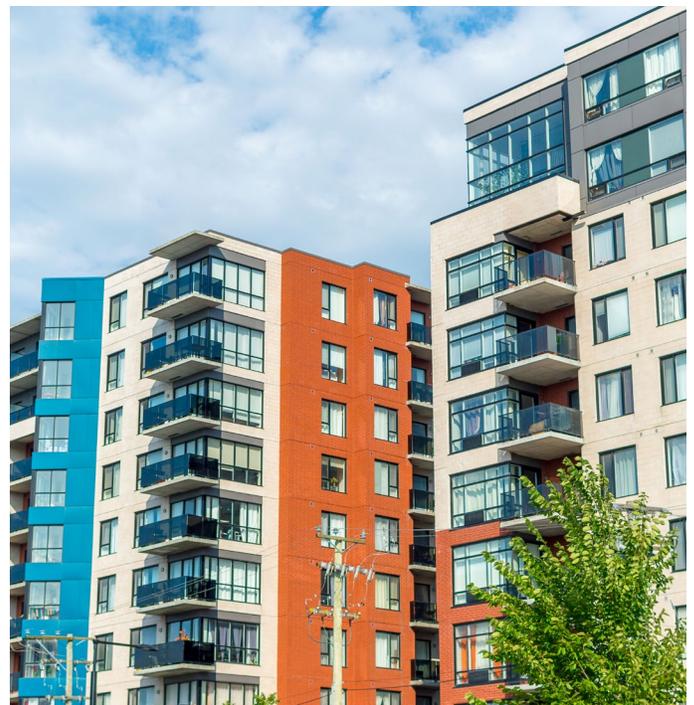


# SMOKE-FREE HOUSING AND RENT ABATEMENT



The U.S. Surgeon General has concluded that there is no risk-free exposure to secondhand smoke. A substantial number of individuals living in multi-unit rental housing continue to be involuntarily exposed to secondhand smoke, which poses a significant health hazard.

Minnesota law generally embraces the idea that no one should be allowed or forced to live in unhealthy or unsafe housing. Therefore, to ensure that rental property is fit for human habitation, Minnesota law requires every lease agreement to include certain terms guaranteeing that the leased property is habitable. These terms are known as covenants of habitability or, collectively, the “warranty of habitability.” For that reason, when a property owner rents out property, the owner promises the tenant that (1) the property is fit for human habitation; (2) the owner will keep the property in reasonable repair during the lease; and (3) the property will be



maintained in compliance with health and safety laws. Because these promises are mandated by law, the property owner and the tenant cannot waive or modify them. Minnesota is not the only state with laws guaranteeing the habitability of rental property, and courts across the U.S. have recognized that, in some instances, these laws can be used to protect tenants from involuntary continuous exposure to secondhand smoke.<sup>1</sup>



Tenants exposed to secondhand smoke in their rental units can rely on the warranty of habitability and ask the property owner to take steps to eliminate the exposure. If the property owner then fails to take appropriate steps within a reasonable time, the law provides the tenant with a wide range of remedies, including withholding rent payments until the property owner addresses the tenant's concerns. This is referred to as a rent escrow action.<sup>2</sup>

In some instances, exposure to secondhand smoke may be so continuous that it violates the warranty of habitability, which may then entitle the tenant to file a rent escrow action in court. A rent escrow action permits a tenant to pay rent to the court, instead of paying it to the property owner. The purpose of a rent escrow action is to compel the property owner to take appropriate steps (adopting a smoke-free policy, for example) to ensure that the rental property is fit for habitation.

The first step in taking a rent escrow action is to notify the property owner in writing, specifying the conditions that violate the warranty of habitability. In case of exposure to secondhand smoke, for example, tenants would have to provide details of how secondhand smoke is infiltrating their rental property. The written notice must be delivered personally or mailed to the person or place where the tenants normally pay rent.<sup>3</sup>

If the landlord does not take steps to address a tenant's exposure to secondhand smoke within 14 days, the tenant may deposit the rent with the court administrator rather than paying rent to the landlord. Minnesota courts have developed a simplified rent escrow form that a tenant can complete when depositing rent.

Fourteen days after the tenant deposits the rent money with the court administrator or after the tenant notifies the property owner in writing as noted above, the court conducts a hearing to determine whether the warranty of habitability has been violated.

If the court finds that the property owner has violated the warranty of habitability, it can provide several remedies, including retroactive rent abatement or the abatement of future rent until the property owner addresses the issue causing the violation— e.g., exposure to secondhand smoke. Rent abatement means a reduction in the amount of rent the tenant is required to pay. In other words, the court may reduce the tenant's rent by calculating the difference between the fair rental value of the property without the exposure to secondhand smoke and the fair rental value of the property with secondhand smoke exposure during any period when the tenant rented the property. The Minnesota judiciary has a detailed document describing the process of a rent escrow action and forms that can be used in that action. The instructions can be accessed [here](#).

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## Endnotes

- 1 See e.g., *555-565 Assocs., LLC v. Kearsley*, 18 N.Y.S.3d 578 (Table), 2015 WL 4401562, 2015 N.Y. Slip Op. 51093(U) ("There is legal authority to support the claim that the presence of secondhand smoke can be the basis for a breach of warranty of habitability and /or constructive eviction."); *Poyck v. Bryant*, 13 Misc. 3d 699, 820 N.Y.S.2d 774 (N.Y. City Civ. Ct. 2006) ("As such, it is axiomatic that secondhand smoke can be grounds for a constructive eviction."); *Heck v. Whitehurst Co.*, 2004 WL 1857131, Ohio App. 6 Dist., Aug. 20, 2004 (awarding rent abatement upon finding that cigarette smoke was infiltrating tenant's apartment and that landlord had not made the repairs necessary to keep the apartment in a fit and habitable condition); *Upper E. Lease Assocs., LLC v. Cannon*, 30 Misc. 3d 1213(A), 924 N.Y.S.2d 312 (Dist. Ct. 2011), aff'd, 37 Misc. 3d 136(A), 961 N.Y.S.2d 362 (App. Term 2012) (finding that secondhand smoke qualifies as a condition that invokes the protections of warranty of habitability); *Reinhard v Connaught Tower Corp.*, No. 602503/08, 2011 WL 6119800 (Sup. Ct. Nov. 30, 2011).
- 2 MINN. STAT. § 504B.385.
- 3 In *Dean v. Paul*, the Minnesota Court of Appeals ruled that giving notice to the owner via email was acceptable in a rent escrow action where the lease agreement states that notices could be sent and received via email. No. A122120, Minn. Ct. App., July 8 2013 2013 WL 3368595, at \*4.