



LEGAL SERVICES  
of North Dakota

# LEGAL SERVICES OF NORTH DAKOTA

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A United Way Agency

 LSC

March 15, 2013

Goldmark Property Management  
1701 Gold Drive S, Ste 200  
PO Box 3024  
Fargo, ND 58103



West Fargo, ND 58078

RE: Mandatory Tenant Liability Insurance Provision

To Whom It May Concern:

I am writing to you on behalf of my client, [REDACTED] regarding a letter she received informing her of Goldmark's new mandatory tenant liability insurance provision. [REDACTED] currently resides in a property owned and managed by Goldmark. My conversations with [REDACTED] reveal the following information:

### FACTS

[REDACTED] resides at [REDACTED] West Fargo, North Dakota 58078. [REDACTED] signed a lease agreement with Goldmark which is due to expire on March 31, 2013. [REDACTED] is also a participant in the housing choice voucher program, a rental assistance program, locally administered by Fargo Housing and Redevelopment Authority (FHRA). Goldmark entered into a Housing Assistance Payment (HAP) contract with FHRA. Per the HAP contract, [REDACTED] contract rent for the unit is in the amount of \$600 per month, of which [REDACTED] is responsible to pay \$269 and FHRA pays \$331.

On January 18, 2013, [REDACTED] received a letter from [REDACTED] [REDACTED]. The letter states "Goldmark now requires each leaseholder to obtain renter's insurance with a minimum of \$100,000 liability coverage to protect you against liability claims and any damage to the premises caused by you, your guests and/or you animals (if applicable). An updated copy of your insurance policy certificate must be provided on or before 4/1/13."

A paper titled "Renters Insurance Information" accompanied the letter. The paper states "[p]roof of insurance must be provided prior to the Lease Agreement start date, and must be current with respect to the applicable policy period. The insurance must also list the property they reside at as a named insured (details below)." In addition, the paper states "[p]lease remember, Residents are not to be considered co-insured with Management/Owner on any of the Management/Owners insurance policies and residents will not be covered by such insurance."

After receiving and reviewing the above documents, [REDACTED] contacted Legal Services of North Dakota (LSND) for assistance. LSND accepted [REDACTED] application for assistance. LSND has researched whether Goldmark may lawfully require [REDACTED] to purchase liability insurance separate and in addition to her monthly rent. My analysis of the issue is as follows:

## LAW & ARGUMENT

**Goldmark's attempt to require [REDACTED] [REDACTED] to purchase and obtain liability insurance in addition to her rent is unlawful and unenforceable under federal and state laws.** Pursuant to the HAP contract, Goldmark must comply with federal laws and regulations of the Section 8 voucher program, namely the Housing Act found in the United States Code and codified in the Code of Federal Regulations. Similarly, Goldmark must comply with state laws interpreting insurance coverage agreements between landlords and tenants.

### **I. Section 8 Federal Law Provisions**

A property owner may enter into a HAP contract with a public housing authority (PHA). The HAP contract allows a PHA to provide rent assistance for a family under the voucher program. In addition to the HAP contract, an owner enters into a lease with the family receiving rent assistance. The HAP contract requires the lease to comply with Title 42, Section 8 of the United States Code and Title 24, Part 982 of the Code of Federal Regulations, all the provisions of the tenancy addendum, and state and local law. *See* form HUD-52641, HAP Contract, Part B(1), (2).

#### A. Rent Control

Federal laws include rent control provisions for programs providing rental assistance to low-income tenants. Under the Section 8 program, the rent to owner may at no time exceed the reasonable rent for the contract unit as most recently determined by the PHA in accordance with HUD requirements. To determine whether Goldmark may require [REDACTED] to purchase liability insurance in addition to rent, the meaning of rent must be considered.

##### 1. Meaning of Rent

The ordinary meaning of rent is defined as consideration given for the use and occupation of the premises. *See Mayoral v. Jeffco Am. Baptist Residencies, Inc.*, 726 F.2d 1361, 1364 (10th Cir. 1984); *see* The National Housing Law Project, HUD Housing Programs: Tenants' Rights § 6.2 (4th ed. 2012). Rent may include services for maintenance, utilities, and equipment supplied by the owner or PHA. *See generally Rossetto v. Barross*, 110 Cal. Rptr. 2d 255, 259 (2001); *see* The National Housing Law Project § 6.2. The ordinary meaning of rent is quite broad. Federal

housing law provisions are often more stringent than common law and state law housing provisions. Thus, the meaning of rent within the Section 8 voucher program must be considered.

*a. Meaning of Rent within the Section 8 Voucher Program*

Under the Section 8 program, rent is the full amount charged for the unit including any utilities the owner provides under the lease. The Department of Housing and Urban Development (HUD) has issued regulations clarifying that a landlord can collect only a security deposit, a tenant's portion of the rent, and charges for extraordinary damage to the unit caused by the tenant. *See* 24 C.F.R. § 982.452(b)(5). Overall, federal statutes and HUD regulations do not expressly explain whether liability insurance is included as rent. Thus, it is necessary to analogize to other parts of federal law and judicial authority on similar issues. To determine the meaning of rent within the Section 8 voucher program it is best to analogize to federal law prohibitions of extra charges in addition to rent and judicial interpretations of the meaning of rent.

*b. Extra Charges Prohibited by Federal Law*

HUD provides that rent is definitively separate from other charges. Other charges are those that are not consideration given for the use and occupation of the premises. Rather, the charge is levied for a reason independent of the rent. *See* The National Housing Law Project § 6.2. Some examples of extra charges that may be prohibited, depending on the circumstances, include excessive late fees, damage and repair charges, fines, legal fees and costs, service/support animal charges and deposits, application fees, meal charges, under-the-table payments, and *fees for non-essential items that a tenant has no option to reject*. *See* The National Housing Law Project §§ 6.2.2.1 - 6.2.4 [emphasis added]. A mandatory charge for a service or use of the housing unit must be included in the rent and cannot be charged in addition to rent. An owner must include in the rent any charges for non-essential items if the tenant has no option to accept or reject the service or equipment.

In this case, Goldmark is attempting to require ██████████ to pay for liability insurance for liability and damage claims occurring on the premises. Liability insurance is a non-essential item because it is generally discretionary or optional to carry liability or property insurance. It is not essential like food and shelter. In its letter, Goldmark stated its liability insurance provision is mandatory and required in order to enter into a lease agreement. Goldmark has indicated there is no option to reject its liability insurance provision. Thus, federal law and regulations prohibit Goldmark from requiring tenants who receive Section 8 voucher assistance to purchase liability insurance in addition to rent. **Therefore, federal laws and regulations prohibit Goldmark from requiring ██████████ to purchase liability insurance in addition to rent.**

*c. Judicial Interpretations of the Meaning of Rent*

As previously explained, federal law and regulations do not discuss expressly the charge of liability insurance in lieu of rent. However, the issue of whether liability insurance is included in the amount of rent has been discussed by many courts, including the North Dakota Supreme Court, in their decisions. The issue has been frequently discussed in landlord/tenant insurance subrogation cases.

## i. Landlord/Tenant Insurance Subrogation

Courts have discussed whether insurance premiums are payable as part of the rent in the context of landlord/tenant insurance subrogation cases. The overarching issue in insurance subrogation cases is whether a tenant is an implied co-insured on a landlord's insurance policy. The great majority of courts that have considered the issue have adopted the *Sutton* rule.

### A. The *Sutton* Rule Rationale

According to the *Sutton* rule, absent an express agreement to the contrary, a tenant is an implied co-insured under the landlord's insurance. See *Tate v. Trailco Scrap, Inc.*, 745 F. Supp. 458 (M.D. Tenn. 1989); *Hoff v. Krebs*, 2009 ND 48; 763 N.W.2d 520 (2009); *Community Credit Union v. Homelvig*, 487 N.W.2d 602 (1992); *Agra-By-Products v. Agway*, 347 N.W.2d 142 (1984); *Sutton v. Jondahl*, 532 P.2d 478 (Okla. Ct. App. 1975).

The courts' rationale of the *Sutton* rule is important to determine whether Goldmark may require ■■■■■ to purchase liability insurance in addition to rent. In the *Sutton* case, the court reasoned that both a landlord and tenant have an insurable interest in rented premises. The landlord owns the property and the tenant has a possessory interest in it. The court reasoned that since both parties have an insurable interest in the property, *as a matter of sound business practice, the landlord/owner must consider the amount of the insurance premium in establishing the rent rate on a rental unit. Thus, the court found the insurance premium is chargeable against the rent as an overhead or operating expense. Therefore, the tenant actually pays the insurance premium as part of the monthly rent.* See *Homelvig*, 487 N.W.2d at 604 (quoting *Sutton*, 532 P.2d at 482).

The majority of courts have adopted the *Sutton* court's reasoning. For example, a Nevada court stated "[c]ourts [ ] consider it to be an undue hardship to require a tenant to insure against his own negligence when he is paying through his rent, for the fire insurance which covers the premises . . . ." See *Homelvig*, 487 N.W.2d at 604 (quoting *Safeco Insurance Co. v. Capri*, 705 P.2d 659, 482 (Nev. 1985)).

On the same note, a Tennessee court emphasized that the tenant ultimately bears the cost of the landlord's insurance premiums. The court stated "[d]espite the fact that the lessor may actually send the premium check to the insurance company, the lessee ultimately pays for insurance through his rent checks, because the lessor takes his own costs into account when setting rent. If the lessee is ultimately the source of the insurance payment, simple equity would suggest that he be able to benefit from that payment unless he has clearly bargained away that benefit." See *Homelvig*, 487 N.W.2d at 604 (quoting *Tate v. Trailco Scrap, Inc.*, 745 F. Supp. 458, 473 (M.D. Tenn. 1989)). The court added, "[a] different rule would promote multiple insurance policies on the same building by the various parties involved. This, in turn, is likely to create overlapping coverage which inevitably means more premiums paid than necessary. This economic inefficiency then results in higher costs being passed down throughout the economy." *Tate*, 745 F. Supp. at 473; see also *Homelvig*, 487 N.W.2d at 605.

The majority courts' reasoning of the *Sutton* rule clarifies that tenants pay for insurance premiums as part of their rent. Thus, under the Section 8 program, the payment of insurance

premiums is included in the rent. Federally subsidized landlords may not separately charge tenants for items already included in the rent. Accordingly, mandatory insurance provisions requiring tenants, who participate in the Section 8 voucher program and similar federal programs, to purchase liability insurance in addition to rent are prohibited by federal law.

Moreover, it is important to note that the HAP contract controls over terms of the lease between a landlord and tenant. Specifically, the HAP contract prohibits landlords from requiring tenants to pay charges in addition to rent. Thus, the HAP contract will void any requirement in a lease requiring tenants to purchase liability insurance in addition to rent. **Therefore, Goldmark's attempt to require [REDACTED] [REDACTED] to pay for liability insurance in addition to her monthly rent is unlawful and unenforceable under federal law.**

## 2. Amount of Rent

Under the Section 8 voucher program, tenant rent cannot exceed the statutory maximum levels. Tenants may not pay more than thirty (30%) to forty percent (40%) of their income for rent. Extra charges, when levied to cover services already covered in the rent, may cause tenants to pay more than the amount permitted by statute.

FHRA has determined, based on [REDACTED] income, she may pay \$269 in rent per month. Requiring [REDACTED] to purchase liability insurance in addition to the rent will most likely cause [REDACTED] to pay more rent than the statutory maximum. **Therefore, Goldmark is prohibited by federal law from requiring [REDACTED] [REDACTED] to purchase liability insurance in addition to rent.**

## III. CONCLUSION

Federal law and regulations impliedly prohibit Goldmark from requiring [REDACTED] and other tenants who receive rent assistance to purchase and pay for liability insurance in addition to rent where liability insurance is a discretionary and non-essential item. In addition, courts have interpreted whether liability insurance is included in the payment of rent pursuant to landlord/tenant insurance subrogation cases. The majority of courts have found that tenants bear the cost of insurance through the payment of rent. Accordingly, liability insurance may be interpreted to be included within the meaning of rent under the Section 8 voucher program. **Therefore, Goldmark's attempt to require [REDACTED] to pay for liability insurance in addition to her monthly rent is in violation of federal and possibly state law. In conclusion, Goldmark may not require [REDACTED] to purchase liability insurance** and I have advised her not to do so.

Notably, it is unlawful for landlords to retaliate against tenants by refusing to rent to a prospective tenant or evicting a current tenant who receives rent assistance for failure to purchase liability insurance. **Accordingly, Goldmark may not refuse to renew [REDACTED] [REDACTED] lease agreement because Goldmark wants to contravene federal law by requiring [REDACTED] to procure liability insurance.**

I request you immediately rescind your policy requiring tenants, specifically [REDACTED] to purchase liability insurance in addition to rent and inform me of your decision by March 25, 2013. You are hereby on notice of Goldmark's violation of federal law and LSND is prepared to litigate this matter if Goldmark fails to cease and desist its unlawful conduct.

If you have questions regarding this letter, consult with at private attorney as LSND represents [REDACTED]

Sincerely,



Breezy Schmidt  
Attorney at Law

cc: [REDACTED]; FHRA; and Joel Manske, HUD Fargo Field Office Director