Smoke-Free Environments Law Project

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SECONDHAND SMOKE IN APARTMENT BUILDINGS AND CONDOMINIUMS

Introduction:

As the public's understanding of the damaging health effects of secondhand smoke has grown, so too has concern grown regarding unwanted exposure to secondhand smoke in apartment buildings and condominiums. More and more people are voicing concerns that the tobacco smoke produced by neighbors is seeping into their own homes, often causing annoyance and discomfort and, sometimes, illness. These concerns are best resolved amicably, through discussion and reconciliation between neighbors and building managers. This is not always possible, however, and when that is the case, legal action may be warranted. Such actions have been brought across the United States, sometimes leading to out-of-court settlements, other times to verdicts in favor of one of the parties. This fact sheet describes the legal options available to the resident of an apartment or condominium that is exposed to secondhand smoke against their will.

First Steps: Document the Problem and, if Necessary, Seek Assistance from the Landlord or Condominium Management

One of the first actions that the resident affected by a neighbor's smoke should take is to document the problem by recording the nature of the problem and any health effects suffered as a result. The latter might include exacerbation of one's asthma, hay fever, heart disease, emphysema or other conditions worsened by exposure to secondhand smoke, including lesser problems such as sore throat or headache. Having on hand a letter from a physician that documents these problems can be very helpful.

Next, examine the rental lease or condominium agreement. Most residential contracts prohibit the inhabitants of such dwellings from engaging in activities that unreasonably interfere with the enjoyment of the premises by other tenants or owners. This contractual obligation applies to activities engaged in by a person in his or her own residence. Such prohibited activities typically involve producing offensive odors (such as by cooking) and creating loud noises (such as by playing loud music or having parties late at night). It is logical to assume that the prohibition against interference with a neighbor's enjoyment of the premises includes smoking, particularly

when the smoke seeps from the residence of one tenant or owner into that of another, causing discomfort or illness.

Ideally, the affected resident will inform their smoking neighbor about the problem, perhaps informing them of the actual and potential deleterious health effects of secondhand smoke exposure, such as bronchitis, ear infections (especially in young children), exacerbation of asthma, heart disease and even lung cancer. If the neighbor declines to voluntarily cease smoking on the premises, the affected resident can alert the condominium management or landlord that their neighbor is breaching their right to the quiet enjoyment of the premises and ask that such conduct be prohibited. Delivering a copy of the physician's letter and a highlighted copy of the relevant language in the lease or condominium agreement to the management or landlord is advisable.

It is important to emphasize with the condominium management or landlord that they have the authority to prohibit or restrict activities, including smoking, that take place in one dwelling and cause annoyance or health problems in another. While the management or landlord might initially assume that they cannot take such action, they are most likely mistaken in this assumption.

Different remedies can be pursued, either amicably with one's neighbor or, if necessary, through the intervention of the landlord or management. In lieu of total elimination of smoking by the neighbor, other options that might also be satisfactory include, for example:

- Permitting the neighbor to smoke only near an open window or in certain rooms
- Having the landlord or management add more fresh air intake into the ventilation system
- Changing, cleaning or installing better filters in the ventilation system
- Restricting the amount of air exhausted through the ventilation system from the residence of the party who smokes

When Such Efforts Aren't Enough…

If taking the steps described above fails to resolve the problem, it may be necessary to pursue legal action to protect one's entitlement to breathe clean air in their apartment or condominium. In that case, the affected party can advise the landlord or condominium management, and perhaps also the members of the condominium board, of possible legal liability for failing to take reasonable steps to alleviate the problem. It is important to provide written notification, which may be sent by an attorney.

Options for Legal Action and Some Sample Cases

There are a number of legal approaches that may be taken by the affected party. These include constitutional law, state and local building codes and common law.

Constitutional Law. At the most basic level, it should be noted that there is no constitutional or other legal right to smoke, even in one's own dwelling.

State and Local Building Codes. In some cases, a defect in the construction of the building - for example, a defective party wall - might be responsible for the seepage of smoke from one dwelling to another. If this is the case, state or local building codes may have been violated, and a legal action can seek to have the defective area properly reconstructed.

State Sanitary Codes. Non-smoking residents may also explore the use of state regulations, such as sanitary codes, as the basis for legal action. As explained in an analysis by Robert L. Kline, Esq., titled Smoke Knows No Boundaries: Legal Strategies for Environmental Tobacco Smoke Incursions into the Home Within Multi-Unit Residential Dwellings,http://www.tcsg.org/sfelp/kline.htm this strategy may offer the injured party the advantage of using an administrative system to seek correction of health violations. Taking this approach, the complaining party might take his or her case to a local board of health, which would then review the facts of the case and examine the scientific and medical data relating to the health effects of secondhand smoke. In most instances, courts defer to the decisions of such expert administrative bodies and will only overturn their decisions if they were made arbitrarily or capriciously.

Americans with Disabilities Act. Title III of the Americans with Disabilities Act protects disabled individuals who are eligible to receive service or participate in programs or activities provided by a public accommodation or commercial facility. Under the ADA, an individual is "disabled" if he or she has a physical or mental impairment that 1) substantially limits a major life activity, such as breathing, walking or working, 2) has a record of such an impairment, or 3) is regarded as having such an impairment. While Title III does not apply strictly to residential facilities, it does cover places of public accommodation within residential facilities if the use of such places is not limited exclusively to owners, residents and their guests. If a portion of a residential facility is open to the public, the protections and legal avenues provided by the ADA apply. Such locations include, for example, rental offices, pool areas or exercise facilities where memberships are sold to the general public and party rooms that may be rented to the public.

Common Law Theories. Significant precedent exists for pursuing remedies under the common law, including bringing legal action under the following theories:

- breach of the covenant of quiet enjoyment
- negligence
- nuisance
- breach of warranty of habitability
- battery
- intentional infliction of emotional distress
- trespass
- constructive eviction

The Laws of Michigan

The laws of Michigan are similar to those of most states. While no legal decisions have been rendered under Michigan's statutory or common (i.e., non-statutory) law concerning exposure to secondhand smoke in a condominium or apartment building, Michigan law generally provides that a landlord is not liable for injuries sustained by a tenant that are caused by a third person, including another tenant, unless the injury was sanctioned by the landlord. A landlord's duty to a tenant arises when the risk of harm is *foreseeable* and the risk is *unreasonable*. The court decisions have involved cases dealing with inured parties' exposure to unreasonable risks of harm resulting from foreseeable activities occurring within the common areas of a landlord's premises, including criminal activity (such as assaults) and physical injury from negligence (such as snow removal). *See Michigan Civil Jurisprudence*, "Landlord and Tenant" § 63, pp. 385-88 (citing cases).

Based on such legal theories, an individual living in an apartment or condominium, who is placed at risk by exposure to secondhand smoke produced by a neighbor, might have a legitimate legal complaint against the landlord or management. However, in order to impose a legal duty on the landlord or building management to protect the tenant or condominium owner against a neighbor's tobacco smoke, it is important that the individual start by informing the landlord or management about the problem. If the landlord or management then fails to address the problem effectively, this would expose them to potential liability. *Ibid.*

When a landlord fails to remedy the problem, and this results in the tenant having to vacate the premises, this is sometimes regarded as an eviction. This type of eviction is referred to as a *constructive eviction*, as distinguished from an actual eviction where the landlord orders the tenant to leave. Courts in Michigan have found that tenants have suffered constructive evictions when the landlords' acts demonstrated that the landlords intended to deprive their tenants of possession by knowingly failing, for example, to provide adequate heat or control rodent infestation. *Michigan Civil Jurisprudence*, "Landlord and Tenant" § 29, pp. 342-44 (citing cases). It is possible, therefore, that a landlord's failure to take action that substantially reduces or eliminates a tenant's exposure to secondhand smoke from a neighbor's apartment - if it results in the tenant's having to vacate the premises - could lead to a finding of constructive eviction.

Cases decided in Michigan on the theory of *nuisance Michigan Civil Jurisprudence,* "Nuisances" § 1, p. 53 et seq. (citing cases). While courts have determined that no one is entitled, in every circumstance, to air utterly uncontaminated by any odor whatsoever in their place of residence, they have found that, "when stenches contaminate the atmosphere to such an extent as to substantially impair comfort or enjoyment of adjacent premises, an actionable nuisance may exist." *Ibid.* § 14, p. 74-78 (citing cases).

In addition, Michigan cases applying the theory of trespass to vindicate the rights of injured persons might be used by individuals exposed to secondhand smoke in their apartments or condominiums. The law is clear that unauthorized intrusion on one's private premises by another person is a trespass which gives rise to potential legal liability. In short, "one is liable for trespass if he or she, without consent, intentionally causes a thing or substance to enter [the premises] in the possession of another." *Michigan Civil Jurisprudence*, "Trespass" § 3, p. 352 *et seq* . (citing cases; emphasis added).

Case Law from Various Jurisdictions

Employing the legal approaches noted above, residents of multiple-person dwellings and office buildings have in some cases prevailed. The following summarizes some of the legal cases that have been decided in various jurisdictions around the country.

Fox Point Apt. v. Kippes, No. 92-6924,(Lackamas County (OR) Dist. Ct. 1992). The landlord moved a known smoker into the apartment below a nonsmoking tenant who began to suffer nausea, swollen membranes and respiratory problems as the cigarette smoke entered her apartment. The tenant sued the landlord, alleging that the landlord had breached its statutory duty to keep the premises habitable and the covenant of peaceful enjoyment which the common law implied in every rental agreement. The jury unanimously found a breach of habitability, reduced the plaintiff's rent by 50 percent and awarded the tenant medical costs.

Donath v. Dadah, et al., No. 91-CV179 (Worcester Cty., MA, Housing Court Dept. 1991). A tenant sued her landlord for nuisance, breach of warranty of habitability, breach of the covenant

of quiet enjoyment, negligence, battery and intentional infliction of emotional distress due to exposure to secondhand tobacco smoke in her home emanating from the second floor apartment of the defendants. The plaintiff alleged that she had suffered asthma attacks, labored breathing, wheezing, prolonged coughing bouts, clogged sinuses and frequent vomiting due to the exposure to secondhand smoke in her home. The case was settled for an undisclosed sum of money. She moved out of the apartment shortly after filing the lawsuit.

Dworkin v. Paley, 638 N.E.2d 636,93 Ohio App. 3d 383, (Ohio App. 8 Dist. 1994). A nonsmoking tenant, Mr. Dworkin, entered into a one-year lease with the landlord, Ms. Paley, to reside in a two-family dwelling. The lease was later renewed for an additional one-year term. During the second year, Paley, a smoker, moved into the dwelling unit below Dworkin's. Two weeks later, Dworkin informed Paley in writing that her smoking was annoying him and causing physical discomfort. Dworkin noted that the smoke came through the common heating and cooling systems shared by the two units. Within one month, Dworkin vacated the premises. Eight months later, he filed a lawsuit to terminate the lease and recover his security deposit from Paley. The legal action, alleging that Paley had breached the covenant of quiet enjoyment and the statutory duties imposed on landlords (including doing "whatever is reasonably necessary to put and keep the premises in a fit and habitable condition") was dismissed on a motion for summary judgment. The court of appeals reversed the dismissal, concluding that exposure to secondhand tobacco smoke could constitute a breach of the covenant of quiet enjoyment. The appellate court remanded the case for further proceedings, finding that a review of the affidavits presented "the existence of general issues of material fact concerning the amount of smoke or noxious odors being transmitted into appellant's rental unit."

Pentony v. Conrad et al., NJ Super. Ct. (1994). The plaintiffs sought an injunction preventing their downstairs neighbors from smoking between 4:00 P.M. and 9:00 A.M. (when the Pentonys would be home from work) in their apartment because the secondhand smoke seeped throughout the Pentonys' apartment. After a two-hour hearing, the judge ordered the apartment complex directors to try to resolve the dispute out of court. The neighbors settled their dispute, but the terms of the settlement remain confidential. See "Neighbors Settle Smoking Dispute," The Record (Bergen County, NJ), March 2,1995,C12; "2 Smokers Are Sued by Neighbors in Apartment Above Them," New York Times, April 28,1994,B6; "US Couple Sue Downstairs Neighbors for Smoking, The Times, April 29,1994; Gold, J., "Judge Rejects Bid to Stop Neighbors Smoking," The Record (Bergen County, NJ) S06; Hanley, R., "Judge Turns Down Couple in Quest of Anti-Smoking Order Against Their Neighbors," New York Times, April 29,1994,B5; "Couple Whose Neighbors Smoke Sent to Co-op Board," Orlando Sentinel, April 30,1994,A18; "Judge: Neighbors' Smoking Dispute Must be Resolved by Board," The Legal Intelligencer, May 2,1994,8; "Complex Orders Repairs in Fight Over Smoking," The Record (Bergen Counting),May 13,1994,A27; "Truce Is Reached in a Co-op Clash Over Smoking," May 13,1994,B4; Boronson, W., "Love Thy Neighbor: Different Ways to Cope with the Nuisance Next Door," The Record (Bergen County, NJ),May 15,1994,R1; and "Upstairs, Up in Smoke," National Law Journal, May 23,1994,A23.

Snow v. Gilbert, Middlesex City. (MA) Superior Ct., Docket No. MICV94-07373 (1994). A woman suffering from multiple chemical sensitivity, pulmonary fibrosis and CREST, a form of scleroderma, won a temporary injunction against her landlord to prevent him from renting the units below hers to smokers, at least until she succeeded in finding another apartment elsewhere. The landlord was found to have violated an earlier agreement not to rent the units to smokers. The smoke emanating from the units rented to smokers consequently seeped into the plaintiff's apartment, causing a severe reaction.

Layon et al. v. Jolley, et al., Case No. NS004483, Superior Ct. of Calif., Los Angeles County (1996). The plaintiffs sought an injunction prohibiting harassment. According to the complaint, the plaintiffs' condominium sat above a garage where the defendants smoked marijuana, cigarettes and cigars. The exposure to secondhand smoke had forced the plaintiffs "to evacuate our own home for hours every time the defendant goes in his garage to smoke." The court issued a restraining order, specifying, "Defendant must stay away from his garage while smoking." See Russell, K., "Court Clears the Air," Press-Telegram, April 26,1996.

In re U.S. Department of Housing and Urban Development (HUD) and Kirk and Guilford Management Corp. and Park Towers Apartments, HUD Case No. 05-97-0010-8,504 Case No. 05-97-11-0005-370 (1998). Two complaints were filed in September 1996 by Nancy V. Kirk under Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act of 1968 against Guilford Management Corp. and Park Tower Apartments. Ms. Kirk claimed that she had a respiratory condition that was aggravated by exposure to her neighbors' secondhand tobacco smoke, which seeped into her apartment at Park Tower, a HUD-subsidized high-rise for the elderly and the disabled. The parties entered into a conciliation agreement, which was approved by HUD. The agreement provided that Park Tower would go smoke-free, beginning with new tenants only, who moved in on or after March 15,1998. Smokers could move in, but only if they agreed to comply with the no-smoking policy. Violators of the no-smoking policy would be subject to written warnings and eventually to eviction. Since the transition to a smoke-free building would take many years, Park Tower agreed to inquire of several tenants currently residing in an area of the building having fewer smokers as to their willingness to be relocated elsewhere in the building, thus making available an apartment for Kirk to move to a less smoke-filled area.

50-58 Gainsborough St. Realty Trust v. Haile, et al., 13.4 TPLR 2.302,No. 98-02279,Boston Housing Court (1998). A nonsmoker who lived with her husband in an apartment directly above a smoky bar was sued by her landlord for failure to pay rent. The tenant had withheld the rent, alleging that the smoke seeping into her apartment deprived her of the quiet enjoyment of that apartment. A Housing Court judge ruled that the amount of smoke from the bar below had made the apartment "unfit for smokers and nonsmokers alike." The judge found that "the evidence does demonstrate to the Court the tenants' right to quiet enjoyment was interfered with because of the second-hand smoke that was emanating from the nightclub below." The judge awarded the tenants $4,350. See Estes, A., "Tenant Wins Suit over Smoky Home," Boston Herald, June 10,1998,1,4; and "Judge: Landlord Must Stop Secondhand Smoke," The Recorder (Greenfield, MA), June 11,1998,9.

Weil, Gotshal & Manges LLP v. Longstreet Associates, L.P., et al., 13.4 TPLR 3.188,Supreme Court of the State of New York (1998). A large law firm in a New York City office building filed suit against the landlord and a tenant located one floor below its offices. The law firm alleged that the secondhand smoke emanating from the floor below had caused some of the firm's partners, associates and employees "illness, discomfort, irritation and endangerment to their health and safety" and prevented some of their personnel from being able to use or occupy their offices. The firm alleged that the landlord breached its contract and constructively evicted the plaintiff and further alleged that both defendants permitted a nuisance, engaged in trespass and were negligent. The law firm later dropped the suit because the owner and the tenant agreed to remedy the smoke problem voluntarily. See Gregorian, D., "Law Firm Smokin' Mad at Neighbors," New York Post, June 23,1998 22; and Arena, S., "Lawsuit Raises Stink Over Cigar Smoking," Daily News (New York), June 23,1998,17. See "Law Firms Drops Smoking Lawsuit," Crain's New York Business, September 14,1998,1.

Lipsman v. McPherson, 19 M.L.W. 1605 No. 90-1918, (Middlesex, MA, Superior Court 1991). A nonsmoking tenant sued a smoking tenant of an apartment in the same building, alleging nuisance and negligence because the smoke from the defendant's apartment regularly seeped into the plaintiff's apartment, causing him annoyance, discomfort and increasing his risk of physical harm due to exposure to secondhand tobacco smoke and of fire. The defendant filed a motion to dismiss. The court dismissed the claims for negligence and risk of fire, but allowed the claim of private nuisance to be heard. The defendant won at trial before a judge without a jury. The court ruled that the "annoyance" of smoke from three to six cigarettes per day was "not substantial and would not affect an ordinary person." It also held that the "plaintiff may be particularly sensitive to smoke, but an injury to one who has specially sensitive characteristics does not constitute a nuisance." Shortly after this decision, the Defendant moved out.

Platt v. Stella Landi, et al., No. BC 152452,Calif. Super. Ct., Los Angeles County, (1996). A nonsmoking owner of a condominium unit sued his downstairs neighbor and the condo association because of the cigarette smoke that drifted through his open windows from the unit below. The plaintiff sought to prohibit his neighbors from smoking anywhere in the development or from smoking in their condominium, except with the windows closed and under certain conditions. He also wanted the landlords to refrain from renting the neighboring condominiums to smokers. The trial court dismissed the case and the plaintiff appealed. He later sold his unit and vacated the building. The court of appeal ruled that since both the plaintiff and the downstairs neighbor had moved from the building, the case was moot. In addition, the court did not overturn the trial court's ruling awarding attorneys' fees to the defendants. See Liss, R., "Non-Smoker Sues Neighbors," Los Angeles Daily Journal, June 28,1996; and Simon, S., "Smoke and Ire: Man's Suit Over Neighbors' Cigarettes Could Open New Front in War on Tobacco," Los Angeles Times, July 5,1996,B2.

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