A Law Synopsis by the Tobacco Control Legal Consortium
December 2006

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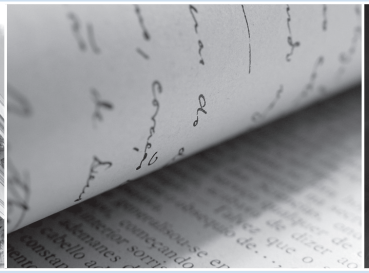

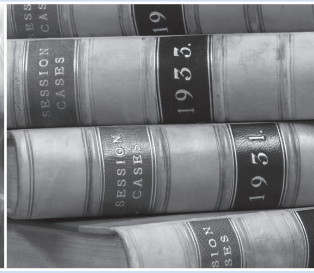

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Suggested citation:
Susan Schoenmarklin, Tobacco Control Legal Consortium, *Legal Options for Condominium Owners Exposed to Secondhand Smoke* (2006).

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This publication was made possible by the financial support of the American Cancer Society and the Robert Wood Johnson Foundation.

Legal Options for Condominium Owners Exposed to Secondhand Smoke

Susan Schoenmarklin

Introduction

As scientific warnings about the hazards of secondhand smoke grow stronger, condominium owners, along with other residents of multi-unit housing, are becoming increasingly concerned about drifting smoke from adjacent units. These concerns are justified. U.S. Surgeon General Richard Carmona recently warned in a comprehensive scientific report that breathing even a little secondhand smoke can be harmful.[1] Secondhand smoke contains more than 4,000 chemicals and more than 50 carcinogens.[2]

Secondhand smoke is especially hazardous for those who suffer from cardiovascular diseases, asthma or other lung conditions. Secondhand smoke can increase the risk of heart disease in nonsmokers by as much as 60 percent.[3] Children are particularly vulnerable. Children exposed to secondhand smoke in the home are twice as likely to develop and suffer persistently from asthma.[4] Secondhand smoke also causes acute lower- and upper-level respiratory tract conditions, acute middle ear conditions,[5] and elevated levels of Sudden Infant Death Syndrome,[6] in addition to myriad long-term adverse health effects.

Many people living in multi-unit dwellings are exposed involuntarily to secondhand smoke. The California Division of Occupational Safety and Health reported that "tobacco smoke travels from its point of generation in a building to all other areas of the building [moving] . . . through light fixtures, through ceiling crawl spaces, and into and out of doorways."[7] Exposure also occurs in common patios, decks, balconies, exhaust systems, hallways, underground parking garages, and recreational facilities. Even in buildings with good ventilation, exposure to secondhand smoke has been shown to occur.[8]

This synopsis discusses legal options available to a condominium owner exposed to drifting secondhand smoke from a neighboring condominium unit. Section I describes preliminary steps an owner should take in preparation for any legal action. Section II discusses legal options available under the Federal Fair Housing Act, the Americans with Disabilities Act, and state disability laws. Section III briefly reviews the use of arbitration or mediation. Section IV examines legal theories that could be used in a lawsuit against the neighbor or the condominium association. The synopsis concludes with observations about the implementation of smoke-free policies for condominium complexes.

Key Points

- Condominium owners who are exposed to secondhand smoke should adequately prepare before taking any legal action and consider alternatives to a lawsuit such as voluntary agreements, arbitration or mediation.
- Condominium owners who can show that secondhand smoke exposure limits a major life activity can utilize the Fair Housing Act, the Americans with Disabilities Act, and applicable state anti-discrimination laws to eliminate or reduce their exposure.
- It is more difficult to sue the condominium association for a neighboring owner's smoking than to sue the offending owner due to the superior resources of the condominium association and the additional proof required.
- Condominium owners have successfully sued a neighbor for secondhand smoke exposure using the common law theories of trespass, nuisance, covenant of quiet enjoyment, warranty of habitability, and harassment.
- It is lawful for a condominium board or association to adopt smoking restrictions after the creation of the condominium, and courts are likely to apply such restrictions to condominium owners who purchased prior to the change.

Section I – Preliminary Steps in Addressing Secondhand Smoke in Condominiums

Before considering legal action, aggrieved condominium owners should become informed. They need to be prepared to discuss the dangers of secondhand smoke and to make available relevant written materials on the subject. (Resources cited in this synopsis might be a good start.) Aggrieved owners should also do their best to document what the problem is, where the secondhand smoke originates, and how it affects them. A letter from the owner's treating physician (or pediatrician if children are involved) may be persuasive. No one, however, should wait for the onset of a health problem before taking action.

Aggrieved owners should also familiarize themselves with the policies governing their condominium complex. Condominium owners agree to abide by a set of covenants, conditions and restrictions ("CCRs") that define the rights and obligations of owners, including use of common areas, maintenance responsibilities, restrictions on the use of individual units and more. In addition, condominium boards can adopt rules that provide detailed guidance on issues not fully described in the CCRs, such as rules for using recreational facilities.

Most CCRs contain a "nuisance clause" that prohibits owners or their guests from engaging in any activity that interferes with another owner's peace and well-being. The nuisance clause is typically invoked by residents objecting to late-night parties, offensive odors, loud music or other activities generally accepted by the public as significant annoyances, and can arguably apply to drifting secondhand smoke. The condominium rules may also be relevant.[9] The use of a nuisance clause in the event of secondhand smoke seepage is discussed in detail in Section IV of this synopsis.

Owners should check to see if there are any local or state laws governing smoking in their condominium. Colorado, Delaware, Hawaii, Maine, New Jersey, New York, North Dakota, and Rhode Island communities prohibit smoking in the common areas of condominiums.[10] In Utah, condominium owners are specifically granted the authority to prohibit smoking in units and common areas, including outdoor areas.[11] Utah also defines by statute what is required for secondhand smoke from a residential unit to be classified as a "nuisance," and creates a cause of action against the owner of the unit.[12] The local health department would likely have more information, or owners could access online databases.[13]

Aggrieved condominium owners can use this information as they work with their neighbors, the condominium association or the condominium board to try non-legal means of resolving the problem. A discussion of such voluntary strategies is beyond the scope of this synopsis. Readers may wish to review the condominium section of the Smoke-Free Environments Law Project website to learn more about voluntary strategies.[14] The remainder of this synopsis addresses legal alternatives.

Section II – Disability Claims Under Federal and State Laws

Obtaining Relief under the Federal Fair Housing Act

Condominium owners suffering *severe* health effects from secondhand smoke may be able to obtain relief under the federal Fair Housing Act ("FHA"). The FHA prohibits discrimination in housing against persons with disabilities, including persons living in condominium complexes with more than four units.[15] Filing an FHA complaint is an attractive choice because it does not require the expense of hiring an attorney.

Unfortunately, under current FHA standards only a limited number of nonsmokers exposed to secondhand smoke qualify as "disabled." To qualify as disabled, the affected person must prove a severe and long-term hypersensitivity to cigarette smoke that substantially limits one or more major life activities.[16] This is a fairly high standard, which may require proving difficulty breathing or ailments such as a cardiovascular disorder that are caused or exacerbated by exposure to secondhand smoke. Consequently, despite the dangers of secondhand smoke, a condominium owner who has only "mild" reactions to the secondhand smoke such as itchy eyes or a sore throat probably would not qualify for protection under the FHA.[17]

A condominium owner with a hypersensitivity to secondhand smoke should first try to reach a "reasonable accommodation" with the condominium board before pursuing an FHA complaint.[18] Under FHA rules, if a condominium owner is able to prove a qualifying disability, the condominium board still

has the opportunity to demonstrate that it "reasonably accommodated" the owner's need for protection from secondhand smoke exposure.[19] What constitutes a reasonable accommodation in a condominium complex would be decided on a case-by-case basis.[20]

An extensive search did not identify any published cases of a complaint by a condominium owner brought under the FHA,[21] so it is difficult to determine what would be considered a "reasonable accommodation" in a condominium complex. However, in a case involving a rental housing complex subsidized by the U.S. Department of Housing and Urban Development ("HUD"), a "reasonable accommodation" included an agreement to make an existing building smoke-free for future tenants.[22] Owners may want to seek a similar remedy without grandfathering current tenants.[23]

If the condominium owner decides to move forward with a complaint, he or she should contact the HUD Office of Fair Housing and Equal Opportunity. A complaint must be filed *within one year* of the owner's exposure to secondhand smoke. There are several ways to file a complaint, including calling HUD toll-free at 1-800-669-9777, filling out a HUD form, or submitting a personal letter which includes the full legal name of the condominium association. The owner can download a HUD form from the HUD website or can complete an online HUD form.[24]

The complaint should include a description of the owner's smoke sensitivity, the problems occurring as a result of a neighbor's secondhand smoke and the board's response. The complaint could be filed against the condominium association, the offending smoker, or both. The Smoke-Free Environments websites at www.tcsg.org/sfelp/home.htm and www.mismokefreeapartment.org provide more information.

Obtaining Relief under the Americans with Disabilities Act

If condominium owners qualify as "disabled" under the FHA, they would be entitled to "reasonable accommodation" in the public areas of the condominium complex under the Americans with Disabilities Act ("ADA").[25] Title III of the ADA protects disabled condominium owners in public accommodations.[26] If part of the condominium complex is open to the general public and not just owners, tenants, and guests, then smoking could be restricted or prohibited in those portions of the complex serving the public. This could include, for example, pool or exercise areas if memberships are sold to the general public or party rooms are available for rental by the public.

What constitutes a "reasonable accommodation" in the public places of a condominium complex is decided on a case-by-case basis in a similar manner to complaints against private units in the complex. In prior cases, courts have decided that a ban on smoking in a public place could constitute a "reasonable accommodation" under the ADA.[27]

To take action under the ADA, the affected condominium owner could file a complaint with the Department of Justice ("DOJ") or bring a private lawsuit in U.S. District Court. If a complaint is filed, the case may be referred to a mediation program sponsored by the DOJ.

To file a complaint with the DOJ, the owner should write a letter containing the following information: his or her name, address, and telephone number, the legal name of the condominium association, and a description of the discrimination and relevant dates. The letter should be signed and mailed to the Disability Rights section of the Civil Rights Division of DOJ.[28] To obtain information about the ADA or obtain free ADA materials, a toll-free number is available at 1-800-514-0301. The website ada.gov/t3compfm.htm provides more information.

Obtaining Relief under State Housing Discrimination Laws

A person who suffers physical effects from second-hand smoke seepage may also want to examine state laws prohibiting discrimination in housing against the disabled. Each state has its own constitution and laws protecting the disabled. These laws in general offer the same level of protection afforded under the ADA.

A Massachusetts court decision recently applied a similar standard as the ADA. The court required more severe symptoms than personal discomfort for a person to qualify as disabled by secondhand smoke. The court ruled that a residential tenant who experienced itchy eyes and tiredness from exposure to secondhand smoke did not qualify for protection as a disabled person.[29] In the related context of employment, a Michigan court in 1995 held that a mental hospital did not have to prohibit smoking on its campus to satisfy its duty to accommodate an employee whose asthma was exacerbated by secondhand smoke in the workplace.[30] Nor was the employer required to move the employee to another position.[31]

While the Michigan court's unsympathetic decision may have resulted in part from a lack of awareness of the relationship between secondhand smoke and asthma at the time the case was decided, it is important to note that very little case law exists in this area. However, the only way to know whether state civil rights laws provide relief is to try to obtain it.

The chances of a favorable decision under such state laws, as well as under the FHA and ADA, increase as society gains a greater understanding of the hazards of secondhand smoke and of the burden it imposes on vulnerable individuals. The June 2006 publication of the U.S. Surgeon General's Report on the hazards of secondhand smoke[32] could represent a turning point in these cases.

Section III – Arbitration and Mediation

Arbitration or mediation can be used to address secondhand smoke exposure complaints. In arbitration, a neutral third party decides the dispute through a binding "ruling," while under mediation a neutral third party tries to settle the dispute through compromise. The mediator has no power to impose a decision on the participating parties.

Although arbitration and mediation are typically voluntary approaches, condominium owners are sometimes required to use them. California, Florida, Hawaii, Michigan, and Wisconsin have provisions for arbitration or mediation as a means of settling a dispute among condominium owners.[33] Other state statutes give the condominium association the option of making mediation or arbitration part of the condominium policy.[34] Consequently, it is important to check condominium documents to see if some type of alternative dispute procedure is required before filing a lawsuit. Also, in addition to those states that require arbitration or mediation, many courts offer litigants an arbitration or mediation program shortly after a lawsuit is initiated.

Section IV – Secondhand Smoke Seepage Lawsuits

The Parties to the Lawsuit

If the condominium owner decides to initiate a lawsuit, the next issue to consider is whether to sue the offending condominium owner, the condominium association,

or both. Current trends suggest that the offending condominium owner be named as the defendant. A search of case law on secondhand smoke disputes shows that thus far no plaintiff has prevailed against an association.[35] Additionally, the aggrieved owner should note that CCRs often require the litigating owner to pay the legal fees of the association if he or she loses. On the other hand, some lawsuits against the smoking condominium neighbor have been successful.

When condominium associations have prevailed in these cases, their considerable financial resources may have played a role. Their success may also be a result of the additional burden of holding a condominium association liable for the actions of another owner. Under common law principles, the condominium association can only be held liable for the actions of the offending condominium owner if the association owes some kind of "duty" to the aggrieved condominium owner. Different courts apply different tests in determining whether a duty is owed, but one factor is whether the actions of the offending condominium owner were "foreseeable."[36]

Thus, a condominium owner cannot hold a condominium association liable for the actions of another owner or tenant without a showing that the condominium association has in some manner "sanctioned" the behavior that gave rise to the lawsuit.

Consequently, it is essential that a condominium owner with a secondhand smoke complaint inform condominium management of the problem. Once notified, if management fails to adequately address the problem, owners can argue that the secondhand smoke exposure was foreseeable. It is important, of course, to check case law in the individual condominium owner's state to determine what exactly is required to make a case against the condominium association.

The most straightforward lawsuit, however, is against the smoking condominium neighbor. The plaintiff can make a number of legal arguments, including trespass, nuisance, breach of the covenant of quiet enjoyment, harassment, negligence, battery, and intentional infliction of emotional distress, among others. Although several other theories may be advanced in a lawsuit, this section is limited to those legal theories that have been successful in court.

Possible Legal Theories to Use Against Smoking Condominium Owners

Trespass

A claim of trespass is considered to be an improper physical interference with one's person or property that causes injury to health or property.[37] Aggrieved condominium owners could argue that the secondhand smoke from the defendant condominium owner improperly interferes with the plaintiff's property and health. There is no legal consensus on whether a *substance* can trespass, and if so, what substances qualify. For example, Alabama courts have found that dust and gas can give rise to trespass, but light and noise cannot.[38] A federal court in New Hampshire questioned whether the spreading of fumes, noise and light falls within the ordinary meaning of wrongful entry of property under the traditional definition of trespass.[39] State statutes also must be taken into account. For example, Michigan law states "one is liable for trespass if he or she, without consent, intentionally causes a thing or substance to enter land in the possession of another."[40]

Nuisance

A claim of nuisance could also be applied to the issue of secondhand smoke infiltration. In Utah, nuisance is defined by statute and includes secondhand smoke that drifts into a condominium "more than once in each of two or more consecutive seven-day periods."[41] In all other states, the issue of whether secondhand smoke constitutes a nuisance is decided under common law, which classifies nuisance as anything that *substantially interferes* with the enjoyment of life or property. A substantial interference is measured by the "definite offensiveness, inconvenience or annoyance to the person in the community."[42]

Decisions reached by a number of courts suggest that nuisance claims based on secondhand smoke infiltration would be actionable. A California court stated that "[i]ntrusions by smoke and noxious odors are traditionally appropriate subjects of nuisance actions."[43] A Nebraska court in ruling on a nuisance claim regarding a hog raising operation said that the "right to have air floating over one's premises free from noxious and unnatural impurities" is an "absolute" right.[44] An Iowa court upheld a jury award of damages for nausea, inconvenience, and discomfort from odors produced from a sewage plant.[45]

The condominium owner may also be able to rely on the condominium CCRs, which typically contain a standard "nuisance clause." This nuisance clause prohibits condominium owners from interfering with another owner's peace and well-being and could apply to secondhand smoke. The case law on nuisance claims would appear to support including secondhand smoke within the types of things prohibited under the "nuisance clause."[46]

Covenant of Quiet Enjoyment

It may be possible to invoke landlord-tenant law to argue that the offending condominium owner has breached the "covenant of quiet enjoyment" with respect to the plaintiff. The covenant of quiet enjoyment protects a tenant from serious intrusions that impair the character or value of the tenant's premises.[47] Condominium owners typically sign an agreement that includes a covenant of quiet enjoyment. This covenant enables a plaintiff to assert that a defendant's secondhand smoke constituted a serious intrusion that impaired the value of his or her condominium unit.

While the covenant of quiet enjoyment is derived from landlord-tenant law and has been applied successfully in that context,[48] it has also been applied for the benefit of the condominium owner.[49] A Michigan court has said that "although the relationship in the instant case is not exactly one of lessor-lessee or landlord-tenant, the analogy is close enough that the legal principles should apply."[50] A Florida court held a defendant condominium owner liable for breaching the covenant

of quiet enjoyment with his neighbor due to his smoking.[51]

Warranty of Habitability

A related claim of breach of warranty of habitability could be asserted. The law requires that all landlords warrant that their residential rental properties are fit for habitation.[52] Although traditionally applied in the context of a landlord-tenant relationship, condominium owners should consult case law in their states to see if the warranty of habitability could be applied for their benefit. Condominium owners can argue that the presence of secondhand smoke renders their residence unfit for habitation and constitutes a breach of the warranty. An Oregon court held a landlord breached the warranty of habitability by allowing secondhand smoke to migrate among units in his rental residential property.[53] An Ohio court reached a similar conclusion even though the landlord made numerous efforts to insulate the nonsmoker's unit from seeping smoke.[54]

Harassment

Finally, owners could claim that secondhand smoke in their unit constitutes "harassment." Harassment consists of words, gestures or actions that annoy or alarm another person.[55] Recently, a California court found that the defendant condominium owner's conduct constituted "harassment" because the owner's secondhand smoke was a substantial annoyance to the plaintiff.[56]

Examples of Lawsuits Against Condominium Owners

Harwood Capital Corp. v. Carey (Boston Housing Court) [57]

A recent exciting development was a jury verdict in 2005 against two tenants renting a condominium unit who smoked throughout the day in their unit. In *Harwood Capital Corp. v. Carey*, the owner of a condominium in Boston sought to evict the tenants after receiving complaints from owners of adjoining units about the strong smell of smoke emanating from the unit. The tenants worked out of their unit and together smoked 40 to 60 cigarettes a day. The jury decided that the tenants had breached the lease under a standard lease provision prohibiting tenants from creating a nuisance. This provision prohibited tenants from engaging in an activity that substantially interfered in the rights of other tenants.

Merrill v. Bosser (Broward County Court, Florida) [58]

Also in 2005, a Florida judge in *Merrill v. Bosser* awarded damages to a non-smoking condominium owner against a smoker who lived one floor above her. The non-smoking condominium owner did not have a problem with secondhand smoke seepage until the defendant rented his unit to a tenant who smoked heavily. After the plaintiff made numerous complaints and threatened a lawsuit, the condominium manager removed the tenant on a "technicality" for failure to register with the association.

The plaintiff's problem with smoke ended when the tenant moved, but the plaintiff sued the condominium owner for her exposure during the time the tenant lived in the condominium unit. The court awarded the plaintiff $1,000 in damages and $275 in costs, holding that the plaintiff was subjected to an excessive amount of smoke. The court held that the defendant's actions amounted to trespass upon the plaintiff,[59] breached

the covenant of quiet enjoyment,[60] and constituted a nuisance.[61]

The court noted that a trespass need not be inflicted directly on property, but may be committed by "discharging a foreign polluting matter" beyond the boundary of defendant's property.[62] In Florida, the focus of the tort of trespass is "disturbance of possession."[63] The *Merrill* court held that secondhand smoke that is "customarily part of everyday life" is not a disturbance of possession and therefore not actionable in trespass.[64] However, in the case before the court, the smoke was so excessive as to constitute a "disturbance of possession."[65]

The condominium agreement in *Merrill* contained a covenant of quiet enjoyment, which the court analyzed using landlord-tenant law. According to the court, "similar to landlord-tenant situations, the covenant of quiet enjoyment is breached when a party obstructs, interferes with, or takes away from another party in a substantial degree the beneficial use of the property."[66] The covenant was breached in *Merrill*, according to the court, because secondhand smoke set off the smoke detector in one instance and in several cases forced the plaintiff's family to leave their condominium and sleep in a different location.

Finally, the secondhand smoke in *Merrill* was also classified as a "nuisance." The court noted that Florida courts have upheld a claim of nuisance based on odors created by another party, and likened the secondhand smoke to an odor. The court cautioned however that the facts of the case amounted to an "interference with property on numerous occasions that goes beyond mere inconvenience or customary conduct."[67] The plaintiff and her family had recurring illnesses due to the smoke and on several occasions were forced out of their condominium.

Layon v. Jolley (Los Angeles County Superior Court)[68]

Non-smoking condominium owners were able to prevail in a case in California under the theory of harassment. In 1996, condominium owners successfully enjoined a smoker from smoking in a shared garage under the owners' condominium. The plaintiffs alleged that the defendant was harassing them by smoking marijuana, cigarettes, and cigars in the garage, forcing them to leave their condominium "for hours at a time."[69] A Superior Court in Los Angeles issued a restraining order that required the defendant to refrain from smoking in the garage.

Zangrando v. Kuder (Ohio County Court)[70]

Along with the recent victories for non-smoking condominium owners are losses. In 2004 a jury in Ohio decided against a non-smoking condominium owner who was exposed to smoke from the condominium owner next door. Several times a day, the defendant smoked on a front porch shared with the plaintiff's condominium unit. The plaintiff repeatedly asked the defendant to move about 30 feet to smoke, but the defendant refused. After the condominium association refused to take action, the plaintiff filed a lawsuit seeking damages and an order barring the defendant from smoking on the porch. Luckily for the plaintiff, the defendant moved to another residence after the lawsuit was filed, so secondhand smoke was no longer a problem by the time of the jury verdict.

Section V – Changing Condominium Complexes to Smoke-Free

There is no doubt that smoking within a condominium complex, even in individual units, may be prohibited at the time the condominium is created. Nor is there any question that the condominium association may take action against smoking upon a finding that secondhand smoke infiltration violates the CCRs' nuisance clause. Such a finding would allow the condominium association to prohibit smoking to the extent needed to abate the nuisance fully – up to and including prohibiting smoking in individual units. Apart from these instances, if a condominium implements a smoke-free policy, smokers who purchased their condominium unit before the change might challenge the policy.

Owners who smoke are likely to argue that the smoking prohibition does not apply to them, but instead only applies to those who purchased units after the new policy went into effect. Although associations do not have unlimited authority to regulate condominium owners, particularly when owners did not have notice of the restriction at the time they purchased a unit,[71] a recent case from Colorado found that the amended bylaws were enforceable against smoking condominium owners.[72]

Courts probably will continue to agree with condominiums that go smoke-free. The majority of courts apply the standard of "reasonableness."[73] The condominium association must demonstrate that it

acted reasonably in enacting the amendment or bylaw at issue. A reasonable amendment will be binding on all units, including those owners who bought before the amendment or bylaw was passed.[74] For example, a California court ruled that an amendment to prohibit pets applied retroactively to a condominium owner who had acquired a dog.[75]

There are some very persuasive arguments that going smoke-free is reasonable. Secondhand smoke is carcinogenic and has been linked to myriad adverse health outcomes, both acute and chronic. The American Society of Heating, Refrigerating, and Air-Conditioning Engineers, the international body that sets the standard for indoor air quality typically adopted into state local building codes, has found that ventilation technology is insufficient to protect building occupants from secondhand smoke.[76] Additionally, unattended cigarettes are a leading cause of residential fires.[77] The elimination of smoking would reduce the chances of fire as well as potentially reduce related insurance premiums for the condominium.

Section VI – Conclusion

At this time there is no easy legal solution for the problem of secondhand smoke seepage in condominiums. Only recently, spurred by heightened awareness of the hazards of secondhand smoke, have affected persons attempted to address the problem legally. Although current cases are not always in favor of nonsmokers, the trend is on their side, as society gains a better understanding of secondhand smoke and the hazards it poses in the home.

In a 2004 decision that allowed a nonsmoker living in a condominium to move forward with a personal injury claim of negligence against a neighboring cigar smoker, a California court recognized that the law is evolving.[78] The court stated:

> [T]he dangers of secondhand smoke are not imaginary, and the risks to health of excessive exposure are being increasingly recognized in court. . . . Whether or not recovery has previously been allowed in tort for secondhand smoke injuries is not dispositive. The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society. . . .[79]

Multi-unit dwellings, including condominiums, are among the fastest growing segments of the housing market today. As the number of individuals and families living in multi-unit dwellings rises and more people become aware of the irrefutable evidence on the hazards of secondhand smoke, local and state governments will be increasingly pressured to enact laws that protect owners from secondhand smoke. In the meantime, those individuals who act today to protect their living space from secondhand smoke, whether by voluntary agreements or lawsuits, are pioneers who deserve public sympathy and support.

About the Author

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

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6 U.S. Dep't of Health & Human Servs., *Women and Smoking: A Report of the Surgeon General* 307 (2001).

7 John Howard, Chief, Cal. Div. of Occupational Safety & Health, Testimony before the Labor and Employment Committee, California Assembly (Oct. 20, 1994).

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

9 It is unlikely that a nuisance clause would be found in the condominium bylaws. The bylaws govern the election of the board, terms of office, and other procedural matters for the board. Some bylaws may be changed by vote of the board, and some require a vote of the association membership.

10 *See* Colo. Rev. Stat. §25-14-204 (2006); Del. Code Ann. Tit. 16 §2903 (2006); N.J. Stat. Ann. §26:3D-58 (2006); N.D. Cent. Code §23-12-09 (2006); R.I. Gen. Laws §23-20.10-3 (2006); Am. Lung Ass'n, *State Legislated Actions on Tobacco Issues: 2005* (17th ed. 2005).

11 Utah Code Ann. §57-8-16(7) (2006).

12 Utah law defines secondhand smoke in a condominium as a nuisance when it drifts into another unit "more than once in each of two or more consecutive seven-day periods[,]" and "is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Utah Code Ann. § 78-38-1(1), (3) (2006).

13 *See, e.g.,* Americans for Nonsmokers' Rights Foundation, *Municipalities with Local 100% Smokefree Laws* (2006); *see also* Am. Lung Ass'n, *supra* note 10.

14 Smoke-Free Environments Law Project, *Environmental Tobacco Smoke in Condominiums*, http://www.tcsg. org/sfelp/condos.htm (last visited Aug. 2, 2006).

15 Secondhand smoke-related illness can be considered a Multiple Chemical Sensitivity Disorder ("MCS") or Environmental Illness ("EI"), and consequently could qualify as a disability under the Fair Housing Act. Memorandum from Carole Wilson, Assoc. Gen. Counsel for Equal Opportunity and Admin. Law, to Frank Keating, Gen. Counsel, MCS Disorder and Environmental Illness as Handicaps, No. GME-0009, (March 5, 1992), *available at* www.hudclips.org (follow search to search legal opinions, enter document number "GME-0009", and follow to document) (last visited Aug. 30, 2006).

16 Cliff Douglas, Smoke-Free Environments Law Project, *The Federal Fair Housing Act and the Protection of Persons Who are Disabled by Secondhand Smoke in Most Private and Public Housing* 3 (2002).

17 Wilson, *supra* note 15.

18 Telephone Interview with Jeff Brown, FHA Investigator (Dec. 6, 2005).

19 *See* Wilson, *supra* note 15 (discussing reasonable accommodation for MCS and EI).

20 Douglas, *supra* note 16, at 5.

21 Search conducted in June 2006.

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

23 *See* discussion *infra* Section V (outlining the legal ramifications for implementing a smoke-free policy without a waiting period).

24 U.S. Dep't of Hous. & Urban Dev., Housing Discrimination Complaints, www.hud.gov/complaints/housediscrim. cfm (last visited Aug. 24, 2006).

25 The FHA regulations incorporate the ADA definition of disability. *Compare* 42 U.S.C. § 3602(h) (2005) *with*

42 U.S.C. § 12102 (2005). Therefore, a person who qualifies as disabled under the FHA would automatically be considered disabled under the ADA.

26 *See* 28 C.F.R. § 36.102(a)(1) (2005) (discussing protections in public accommodations).

27 For example, in 1995 the Second Circuit said in a lawsuit against McDonald's that under appropriate circumstances, a "reasonable accommodation" could include a ban on smoking in a public place. *Staron v. McDonald's Corp.*, 51 F.3d 353, 357-58 (2d Cir. 1995).

28 The mailing address is: U.S. Department of Justice, 950 Pennsylvania Avenue NW, Civil Rights Division, Disability Rights – NYAV, Washington, D.C. 20530. The U.S. Department of Justice's Civil Rights Division Directory, http://www.usdoj.gov./crt/drssec.htm (last visited Oct. 17, 2006).

29 *Donnelley v. Cohasset Hous. Auth.*, No. 0100933, 2003 WL 21246199, at *10-11 (Mass. Super. Ct. Mar. 31, 2003).

30 *Hall v. Hackley Hosp.*, 532 N.W.2d 893, 897-98 (Mich. Ct. App. 1995).

31 The court ruled that the asthmatic employee did not meet her burden of showing that prohibiting smoking at a mental institution was a "reasonable accommodation" of her sensitivity to smoke. The court also held that the state disability law did not extend to new job placement; consequently the institution had no duty to place the employee in another job in the hospital. *Id.*

32 U.S. Dep't of Health & Human Services, *supra* note 1.

33 Cal. Civ. Code § 1369.520 (2004 & Supp. 2006); Fla. Stat. Ann. § 718.1255(4)(a) (West 2006); Haw. Rev. Stat. §§ 514B-161, 514B-162 (2005); Mich. Comp. Laws § 559.154(8) (2006); Wis. Stat. § 703.365(6)(c) (2001 & Supp. 2005).

34 *See* Ofni Condominium Law, www.e-condolaw.com/tables.php (last visited August 25, 2006). This is an on-line database of condominium laws, which can be accessed for a small fee.

35 Search conducted in June 2006.

36 *See, e.g., Siddons v. Cook*, 887 A.2d 689, 692-93 (N.J. Super. Ct. App. Div. 2005).

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

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

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

40 24 Mich. Civ. Jur. *Trespass* § 2 (2006), *available at* MIJUR TRESPASS § 2 (Westlaw). "A trespass may be committed by the continued presence on land of a structure, chattel, or other thing which a person has placed on the land with the consent of the possessor of the land, if the person fails to remove it after the consent has been effectively terminated. Indeed, the continued presence of the person alone, admitted originally with consent, may constitute a trespass where he or she remains after termination of the consent. This continued presence of a thing or person may constitute what is frequently referred to as a continuing trespass." *Id.* at § 3.

41 Utah Code Ann. § 78-38-1(3) (2006).

42 W. Prosser, Law of Torts § 87, at 620 (5th ed. 1984).

43 *Babbitt v. Superior Court of Riverside*, No. E033448, 2004 Cal. App. LEXIS 4679, at *9 (Cal. Ct. App. May 13, 2004).

44 *Flansburgh v. Coffey*, 370 N.W.2d 127, 131 (Neb. 1985).

45 *Duncanson v. City of Fort Dodge*, 11 N.W.2d 583, 585 (1943).

46 It should be noted that condominium boards and associations who wish to avoid controversy over the extent of catch-all nuisance clauses are advised to adopt a clear policy prohibiting smoking or identifying drifting secondhand smoke as a nuisance. The policy is best effectuated by recording an amendment to the CCRs.

47 52A C.J.S. *Landlord & Tenant* § 737 (May 2006).

48 *See 50-58 Gainsborough St. Realty Trust v. Haile,* No. 98-02279 (Boston Housing Ct. June 8, 1998), 13.4 Tobacco Prod. Litig. Rep. 2.302, 2.304 (awarding rent abatement for residential tenant located above smoky bar and finding that the amount of smoke drifting up from the bar made the apartment "unfit for smokers and nonsmokers alike"); *see also Dworkin v. Paley*, 638 N.E.2d 636, 638-39 (Ohio Ct. App. 1994) (reversing a lower court decision in order to give a tenant the opportunity to prove at trial that the amount of secondhand smoke infiltration was sufficient to constitute a breach of quiet enjoyment).

49 *See e.g.*, *Martinez v. Woodmar IV Condo. Homeowners Ass'n*, 941 P.2d 218, 220-21 (Ariz. 1997); *Frances*

T. v. Village Green Owners Ass'n, 723 P.2d 573, 576-77 (Cal. 1986).

50 *Cowan v. Lakeview Vill. Condo. Ass'n*, No. 250251 & 251645, 2005 Mich. App. LEXIS 223, at *49 (Mich. Ct. App. Feb. 1, 2005).

51 Final Judgment in Favor of Plaintiff with Findings of Fact and Conclusions of Law, *Merrill v. Bosser*, No. 05-4239 COCE 53, at 6 (Fla. 17th Cir. Ct. June 29, 2005) [hereinafter "Final Judgment"], *available* at http://ash.org/merrillcase.pdf

52 52 C.J.S. *Landlord & Tenant* § 687 (May 2006).

53 *Fox Point Apt. v. Kipples*, No. 92-6924 (Or. Dist. Ct. Lackamas County 1992).

54 *Heck v. Whitehurst Co.*, No. L-03-1134, 2004 WL 1857131, at *6 (Ohio Ct. App. Aug. 20, 2004).

55 Black's Law Dictionary 733 (7th ed. 1999).

56 *Layon v. Jolley*, No. NS004483 (Cal. Super. Ct. Los Angeles County 1996).

57 *Harwood Capital Corp. v. Carey,* No. 05-SP-00187 (Boston Housing Ct. June 8, 2005).

58 Final Judgment, *supra* note 51

59 *Id.* at 3.

60 *Id.* at 6.

61 *Id.* at 5.

62 *Id.*

63 *Id.* at 3.

64 *Id.*

65 *Id.* at 6.

66 *Id.*

67 *Id.* at 5. Some nuisance claims regarding secondhand smoke have failed. In a 1991 Massachusetts case, a court ruled that the "annoyance" of smoke from three to six cigarettes a day was not a nuisance. *See Lipsman v. McPherson*, 19 M.L.W. 1605 No. 90-1918, 6.2 Tobacco Prod. Litig. Rep. 2.345 (Mass. Middlesex Super. Ct. 1991).

68 *Layon v. Jolley*, No. NS004483 (Cal. Super. Ct. Los Angeles County 1996).

69 *Id.*

70 *See Zangrando v. Kuder*, No. 22448, 2006 WL 826081, at *6 (Ohio Ct. App. Mar. 31, 2006) (affirming jury verdict).

71 *See, e.g., Ridgely Condo. Ass'n v. Smyrnioudis*, 681 A.2d 494, 500 (Md. 1996) (stating that amendment of bylaws affected the existing owners' property interests).

72 Ann Schrader, *Couple's Smoking at Home Snuffed*, Denver Post (Nov. 15, 2006), *available at* http://www.denverpost.com/news/ci_4667551 (last visited Nov. 22, 2006).

73 Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 Pepp. L. Rev. 1, 11 (1995). Courts in some states, such as New York, presume the validity of a condominium amendment or bylaw in the absence of fraud or bad faith. *Id.* at 15.

74 The District of Columbia Court of Appeals and the Florida Supreme Court both reached this conclusion after surveying cases nationally. *See Burgess v. Pelkey*, 738 A.2d 783, 788 (D.C. 1999); *Woodside Vill. Condo. Ass'n v. Jahren*, 806 So.2d 452, 461 (Fla. 2002).

75 *Villa de Las Palmas Homeowners Ass'n v. Terifaj*, 90 P.3d 1223, 1229 (Cal. 2004).

76 *See* Am. Nat'l Standards Inst., Am. Soc'y of Heating, Refrigerating, & Air Conditioning Eng'rs, Inc., *supra* note 8.

76 John R. Hall, Jr. et al., U.S. Fire Admin. & Nat'l Fire Prot. Assoc., *Behavioral Mitigation of Smoking Fires Through Strategies Based on Statistical Analysis* 1 (2006).

77 *Babbitt*, 2004 Cal. App. LEXIS 4679, at *6-7.

78 *Id.* at *5-7 (citations and internal quotations omitted) (*quoting Soldano v. O'Daniels*, 190 Cal. Rptr. 310, 317 (Cal. Ct. App. 1983)).

About the Tobacco Control Legal Consortium

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

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