

Apartments and Condominiums: Why all the fuss about secondhand smoke?

Why is there such concern about **secondhand smoke (SHS)** in apartments, condominiums and other multi-unit residences?

Here's what landlords should know:

1. Complaints are Increasing

Secondhand smoke (SHS) seepage complaints continue to increase because tenants are more informed about SHS and its dangers.

"Breathing even a little secondhand smoke can be deadly."

- U.S. Department of Health and Human Services, *the Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006)

2. Tobacco Smoke Travels

"Tobacco smoke travels from its point of generation in a building to all other areas of the building. **It has been shown to move through light fixtures, through ceiling crawl spaces, and into and out of doorways.** Building occupants are at risk for irritant, allergic, acute and chronic cardiopulmonary and carcinogenic adverse health effects."

- John Howard, M.D., Chief of the CA Division of OSHA

3. Eliminating Health Risk

"At present, the only means of effectively eliminating health risk associated with indoor exposure is to ban smoking activity."

- American Society of Heating, Refrigerating & Air Conditioning Engineers (ASHRAE), June 2005

4. What Can Landlords and Condo Boards Legally Do

Apartment and Condominium owners and Condominium Boards are **permitted by federal and state law to adopt total smoke-free policies.**

5. There is No Right to Smoke

"The right to smoke or not to smoke is **not a right that is protected under the Civil Rights Act** of 1964 because smokers are not a protected class under federal law."

- HUD Legal Counsel Letter, July, 2003

6. Landlords may be vulnerable to lawsuits from nonsmokers

Tenants negatively impacted by secondhand smoke actually have the right to seek legal action against landlords who do not adequately protect them from second hand smoke.

Most cases are settled, but in those cases that have reached a court decision, tenants have been most successful using the common law remedies breach of warranty of habitability and breach of covenant of quiet enjoyment.

In all states, even if landlords are not at fault for a problem, they are responsible for ensuring that residential rental properties are fit for human occupancy.

Warranty of Habitability

- Landlords are responsible for ensuring rental housing is fit for human occupancy.
- Under current caselaw, the greater the SHS exposure, the stronger the argument that the exposure is a breach of the warranty of habitability.

Nuisance Suits

- In every state, SHS is a nuisance if it *substantially interferes* with the enjoyment of life or property.

10. Examples of Successful Suits Against Landlords

Merrill v. Bosser, Broward County (Broward County, FL 2005)

Court found breach of trespass (“discharging a foreign polluting matter”), breach of nuisance (“frequent, harmful SHS interfered with use and enjoyment of home”), and breach of covenant of quiet enjoyment (“obstructed, interfered, and took away the beneficial use of the plaintiff’s property”).

Gainsborough State Realty Trust v. Haile (Boston Housing Court 1998)

Court held that a landlord breached the covenants of habitability and quiet enjoyment to a renter whose apartment was located over a bar.

11. The possibilities of future lawsuits

“The dangers of secondhand smoke are not imaginary, and the risks to health of excessive exposure are being increasingly recognized in court... The inherent capacity of the common law for growth and change is its most significant feature. It is constantly expanding in keeping with progress of society”

- Cited in a 2004 case in CA allowing a condo owner to proceed with a claim against a neighboring smoker

This fact sheet adapted from “Infiltration of Secondhand Smoke into Condominiums, Apartments and Other Multi-Unit Dwellings: A Law Synopsis by the Tobacco Control Legal Consortium” by Susan Schoenmarklin, April 2004, and *Waiting to Exhale? The Future of Tobacco Litigation*, Smokefree Environmental Law Project, October 27, 2006.