BEHIND ALL THE SMOKE: ARE LAWS RESTRICTING THE RIGHT TO SMOKE IN CONDOMINIUMS, TOWNHOMES AND APARTMENTS REALLY NECESSARY?

By Nancy Le

Smoking bans are heating up across the nation. A reaction to concerns over second-hand smoke, the issue has become a topic in national news stories.[1] Once limited to only public spaces, state and local municipalities are now seeking to ban smoking in private condominiums and multi-residential townhomes and apartment complexes. Developers, building owners and owners' associations are attempting to ban smoking by use of covenants. A review of state condominium/common interest development and landlord-tenants laws show that these current regulations have long been used by nonsmoking residents to protect their right to live in a smoke-free environment. Therefore, is an additional layer of governmental control over smoking in private dwellings really necessary?

Three cities in California have pioneered the way for stretching smoking bans from the park down the street into people's homes. In May of this year, the Southern California city of Temecula passed ordinances banning smoking in public areas and required apartment buildings to make at least 25 percent of their units smoke-free. In October of this year, the Northern California city of Belmont approved a law which prohibits smoking in condominiums, townhomes, and apartments. Further down the California coast, in the city of Calabasas, where smoking in public places has been illegal for over a year, the city is also considering the approval of an ordinance that would restrict smoking in multi-unit residential complexes.

Common Interest Developments

A common interest development ("CID") is a descriptive term used to describe multi-unit residential housing where the owners share common areas and facilities within the development. CID's generally include, among many other forms of multi-unit housing, condominiums, town homes, and multi-story residential high-rises. Most typical state CID laws provide that each development be self-governed through an association of the homeowners living within the CID.[2]

A homeowner's association of a CID is run similarly to a corporation. Bylaws are created and governing documents called the declaration of the covenants, conditions and restrictions ("CC&Rs") are adopted, which outline the rules for the operation of the association. Membership within a homeowner's association occurs automatically when an individual purchases a home within the common interest development. In addition to the CC&Rs, it is not uncommon for most homeowner associations to adopt and enforce a set of association rules that outline among other things what activities are and are not

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[1] "A New Arena in the Fight Over Smoking: The Home", The New York Times (Nov. 5, 2007).

[2] See e.g. California Civil Code Section 1352 ("a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed").

permitted within the development. For example, association rules may dictate whether or not a unit owner can have a pet, post signs in windows, lease a unit, and even more, emit noxious odors. A ban on the emission of secondhand smoke is an additional restriction that may simply be incorporated into the association rules. Without additional governmental laws, the decision to allow smoking within any CID is left to the homeowner's association

Additionally it is not uncommon for CC&Rs to include a clause prohibiting activities which may amount to a "nuisance" to other homeowners or which may interfere with other homeowners' quiet enjoyment of their properties. If the CC&Rs do not include a "nuisance" clause, a plaintiff could probably turn to the state's private nuisance statute. For example, in California, a private nuisance is defined as one that is "injurious to health…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…."[3] In the state of Utah, secondhand smoke is a expressly classified as a nuisance if "any tobacco smoke…drifts into any residential unit a person rents, leases…more than once in each of two or more consecutive day periods."[4] The Utah nuisance statute further provides residents of condominiums and apartments with injunctive relief or damage if exposed to nuisance tobacco smoke.[5]

If the homeowner association rules or CC&Rs are silent on the issue of smoking, an aggrieved nonsmoking member of the association may still have several legal remedies against the smoking member who is causing him or her harm. In California, the association or an owner living within a CID may sue to enforce the terms of the CC&Rs (assuming they contain a "nuisance" clause). However, California law requires that the parties first attempt to resolve the dispute by an alternative dispute resolution process prior to filing a lawsuit.[6] If the dispute resolution process is not successful, common claims brought by an aggrieved nonsmoking association member include: breach of the CC&Rs, private nuisance, intentional infliction of emotional distress, trespass, and battery.

Aside from the state of Utah, most states perform a case by case analysis of nuisance claims brought as a result of involuntary exposure to secondhand smoke in private dwellings. A review of case law on these particular types of nuisance claims shows a trend requiring plaintiffs to demonstrate a high level of exposure and injury from the secondhand smoke in order to prevail. Claims of discomfort or "annoyance" caused by involuntary exposure to secondhand smoke do not seem to be sufficient to convince a court to award damages or enjoin the conduct of the smoker.

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[3] California Civil Code Section 3479.
[4] Utah Code Unnanotated §78-38-1(3).

[5] Id.

[6] California Civil Code Section 1369.520.

For example, in the case of Lipsman v McPherson,[7] the plaintiff, a nonsmoking tenant, sued the defendant for negligence and nuisance due to plaintiff's exposure to defendant's secondhand smoke that regularly seeped into plaintiff's apartment. The plaintiff alleged that secondhand smoke resulting from the defendant's three to six cigarettes a day caused plaintiff discomfort and "annoyance." The court entered judgment in favor of the defendant, finding that plaintiff's "annoyance" caused by the defendant's secondhand smoke was "not substantial and would not affect an ordinary person" and that "an injury to one who has specially sensitive characteristics does not constitute a nuisance."

However, in the Florida case of Merrill v. Bosser, [8] the plaintiff, a nonsmoking condominium owner, sued the defendant who lived one unit above the plaintiff. The defendant smoked about one pack of cigarettes a day, and also had a tenant who smoked. Despite the fact that the plaintiff's problems with the defendant's secondhand smoke stopped after the defendant's tenant was asked to move out, the plaintiff still brought a cause of action against the defendant for trespass, common law nuisance, and breach of the covenant of quiet enjoyment. The parties' condominium agreement had contained a covenant of quiet enjoyment. The plaintiff was awarded $1000 in damages for medical expenses, loss of use, and remedial expenses, and additional $275 for costs. In awarding the plaintiff damages, the court reasoned that the "unique facts" evidenced that the plaintiff was exposed to "excessive secondhand smoke" which amounted to a "disturbance of possession."

Apartments

In any state, a landlord or owner of multi-residential leasehold property has the authority to determine whether or not he or she wants to permit smoking on the leasehold premises. Landlords in general may prohibit any activity on the leasehold premises as long as the prohibition does not violate state or federal law. A restriction on smoking would be no different than a restriction on the number of pets, overnight guests, or parking spaces a tenant is entitled to have. These types of restrictions are generally outlined in the lease agreement between the landlord and tenant.

In the event a landlord does not want to expressly restrict smoking in the lease agreement, there are common law objections that non-smoking tenants may assert to protect their right to live in a healthy and smoke-free environment. In addition to the remedies already mentioned in this article, non-smoking tenants living within multi-unit residential leasehold properties have the common law protections pursuant to the implied covenants of habitability and quiet enjoyment.

Each state generally recognizes the implied covenant of habitability and quiet enjoyment that applies to every residential lease agreement. In California, the covenant of quiet enjoyment typically provides each tenant with the right to quiet enjoyment of his or her

[7] No. 191918 (Superior Court of Massachusetts, Middlesex 1991) reprinted in 12 Tobacco Products Liability Reporter 2.345 (1991)
[8] County Court of the 17th Judicial Circuit, Broward County, FL 2005.

residential apartment without a direct or indirect interference by the landlord.[9] Under the implied warranty of habitability, a landlord in a state such as California covenants that the premises shall remain in a habitable state for the duration of the lease.[10]

Under both covenants, a non-smoking tenant adversely affected by secondhand smoke could attempt to seek injunctive relief, or surrender the premises before the termination of the lease under the claim of constructive eviction. In the Oregon case of Fox Point Apt. v. Kippes,[11] the plaintiff sued the landlord for breach of the covenant of habitability and quiet enjoyment when the plaintiff began to suffer respiratory problems caused by secondhand tobacco smoked that was allowed to enter her apartment. The jury unanimously found a breach of the warranty of habitability and awarded the plaintiff a 50% reduction in rent and damages for plaintiff's medical expenses.

In the Ohio case of Dworkin v. Paley, the plaintiff, a nonsmoking tenant, prematurely terminated the lease agreement because the secondhand smoke emanating through the heating and cooling systems caused the plaintiff physical discomfort and annoyance. After terminating the lease, the plaintiff sued the landlord for breach of the covenant of quiet enjoyment. In reversing the dismissal in favor of the defendant, the appellate court held that there were "general issues of material fact concerning the amount of smoke or noxious odors being transmitted into appellant's rental unit."

Conclusion

There are not many reported decisions addressing claims related to secondhand smoke within private residential dwellings. However, both the reported and unreported decisions on this issue demonstrate that private disputes concerning the detrimental effects of secondhand smoke are being resolved through alternative dispute resolution or before an impartial tribunal. Without any governmental regulation on this issue, private property owners and associations maintain the authority to decide what legal activities, although potentially harmful to others, may be permitted on the premises. This begs the question: Is additional governmental regulation on smoking in private dwellings therefore really necessary?

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[9] Petroleum Collections Inc. v. Swords. 48 Cal. App. 3d 841 , 848 (1975).

[10] Knight et. al v. Hallstham-Mar et. al, 29 Cal.3d 46, 51 (1981).

[11] No. 92-6924 (Lackamas County Oregon District Court 1991).