

Options for Condo Owners Suffering from Drifting Secondhand Smoke

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If you own a condo¹ and a neighbor's secondhand smoke is entering your unit, you may be concerned about the implications for your health. Breathing secondhand smoke can be dangerous,² and when it enters your home, it becomes difficult to escape.

This fact sheet outlines six options for condo owners who want to avoid unwanted exposure to secondhand smoke at home. It focuses on options for those whose complex is not quite ready to restrict smoking on the property. If you are renting a condo, there are options available to your unit's owner, along with some steps you can take. If you rent an apartment, see TALC's other fact sheets on smokefree rental housing at www.phlpnet.org.

Option #1 Work out a solution with your neighbor

Before you take any other action, it is often best to try and reach an agreement with your smoking neighbor. The neighbor could agree to limit where s/he smokes, for example, or the times when s/he smokes. This type of agreement is not legally binding but may solve the problem.

While you could work out an agreement informally on your own, there are mediation and dispute resolution programs that can be helpful for disputes like this. Nolo (www.nolo.com) has free information on mediation that explains what it is and how it works (select "Search Entire Site" from the drop-down menu and search for the term "Mediation FAQ"). TALC has a listing of alternative dispute resolution services categorized by county, available at www.phlpnet.org.



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Option #2 Use the nuisance provision in the CC&Rs

Nearly all CC&Rs³ contain a provision saying that certain conditions or activities will be considered a "nuisance" and not permitted by the homeowners' association (HOA.) Some CC&Rs' nuisance provisions list specific examples, such as loud noise at certain hours or foul odors, while others merely make a general statement that any activity or thing affecting residents' health or welfare will not be permitted.

If secondhand smoke is drifting into your unit and your neighbor won't agree to work out an informal solution, you may ask the HOA to enforce the nuisance provision against the neighbor. You

The most effective way to eliminate secondhand smoke in your condo complex is to prohibit smoking on the premises. If you'd like to work with your homeowners' association (HOA) to limit smoking, please see TALC's fact sheet "How to Make a Condo Complex Smokefree," available at www.phlpnet.org.

should submit your request in writing and keep a copy for yourself. Because the drifting smoke may violate the nuisance provision of the CC&Rs, the condo board of directors ("board")⁴ has a duty to investigate the complaint and make a good faith determination of whether or not the secondhand smoke constitutes a nuisance.⁵ To be deemed a nuisance, the secondhand smoke must cause an unreasonable disturbance to your use of your property.



When making your request to the HOA, you must follow the procedures set out by your complex's governing documents.⁶ If the board members agree with you that the drifting secondhand smoke is substantial enough to constitute a nuisance, they must take appropriate action to stop the nuisance. A simple phone call or warning letter from the board may cure the problem.

It is important to note that the person making the complaint cannot dictate how to resolve the nuisance; the smoking neighbor, in conjunction with the HOA, will make that decision. The HOA doesn't have the power to order anyone to quit smoking altogether. But it might, for instance, be able to limit smoking to outdoors and away from the building or only indoors at certain times of day when the neighbors are not home; or it could require the unit be altered by sealing the air gaps or installing a HEPA filter.⁷

If your neighbor ignores the board's initial warning, it may require the smoking owner to appear at a board hearing and impose a fine or suspend privileges for each nuisance violation. If the fines do not solve the problem, the HOA can seek a court order to stop the owner from creating a nuisance.⁸

Option #3 Sue the HOA

The HOA may not agree that the amount of secondhand smoke in your apartment violates the nuisance provision and decline to get involved, or it may make only a token effort to enforce the nuisance provision. If you believe your HOA has failed to fulfill its duty to enforce any part of the CC&Rs, including the nuisance provision, you can take the HOA to court to compel it to do so.⁹ A condo owner in Massachusetts recently filed suit against her HOA after she formally requested that they act because drifting secondhand smoke was causing a "hazardous condition" in her unit, and the HOA did nothing to stop it.¹⁰ The HOA asked the court to dismiss the suit, but the court refused.¹¹

Option #4 Sue the neighbor

If going to the board doesn't solve the problem, another option is to bring a lawsuit against the neighbor who allows the secondhand smoke to drift into your unit. (Even if the smoker is a guest or tenant, the lawsuit must be brought against the condo owner, because, in a condo, owners are responsible for ensuring that guests and tenants follow all HOA rules and restrictions.) You should only consider a lawsuit against your neighbor after you have exhausted all other options.¹²

Filing a lawsuit should be your last resort. Lawsuits are time consuming, expensive, and contentious, and the outcome is always uncertain.¹⁸ In addition, some CC&Rs contain an "attorneys' fees provision." If a homeowner sues the HOA and loses—whether in superior court or small claims court—this provision would allow the HOA to charge that homeowner for the costs the HOA incurred defending itself against the lawsuit. Before suing you should consult an attorney to learn whether your CC&Rs contain such a provision.

If you decide to proceed with a lawsuit against your neighbor, you might base it on one or more of the following grounds, depending on your situation:

Violating the CC&Rs

All owners agree to abide by the restrictions contained in the CC&Rs when they purchase a condo. In essence, because CC&Rs include a clause that owners will not create a nuisance, your lawsuit would claim the neighbor broke this contract by permitting secondhand smoke to enter your unit.¹³

Nuisance

Some California cities have a law expressly stating that drifting secondhand smoke constitutes a nuisance.¹⁴ If there is no such law in your city, you must rely on state law, which does not identify secondhand smoke as a nuisance.¹⁵ To win in court under California law, you would have to show that the secondhand smoke drifting into your apartment amounts to a “substantial” and “unreasonable” interference with the use and enjoyment of your property.¹⁶

Other possible causes of action in a lawsuit against your neighbor include *trespass*, *negligence*, *harassment*, *battery*, or *intentional infliction of emotional distress*. Each of these legal claims is explained in the glossary of the TALC publication “Legal Options for Tenants Suffering from Secondhand Smoke,” available at www.phlpnet.org.¹⁷



If you decide to sue your neighbor, you'll need to decide whether to go to regular court or small claims court—a decision that depends on what you want to get out of your lawsuit and whether you can hire an attorney. There are pros and cons to using each court.

Small claims court

In small claims court, neither side is allowed to have attorneys, so you would represent yourself, which would save you money. Although small claims court can't directly order anyone to stop smoking inside the unit, it does have an option called a “conditional judgment,” which allows a losing defendant to choose between paying a fine or taking an action. For example, you could ask the judge to issue an order that says the smoker either has to pay you a certain amount of money or stop smoking in the unit. If the smoker chooses to pay the money, however, small claims court is unable to prevent him or her from continuing to smoke in the unit.

Small claims court does have the power to order the neighbor to reimburse you for any money you've spent or lost due to the smoking, known as *damages*—for instance, out-of-pocket expenses for items such as air filters or medical costs, or lost income if you missed work because the smoke made you sick. (In small claims court, the maximum amount of a claim is \$7,500.)

To learn more about bringing a suit in small claims court, a booklet from the California Department of Consumer Affairs is a great resource (www.dca.ca.gov/publications/small_claims), as well as the information at the California Courts website (www.courtinfo.ca.gov/selfhelp/smallclaims).

Superior Court

If you file your case in Superior Court, you may ask the court to issue an injunction—an order to stop doing something, in this case smoking—and you also can seek money damages if you wish. If you decide to go this route, you'll probably need to hire a lawyer, which can become expensive. TALC's California Legal & Dispute Resolution Services for Tenants & Smokers Injured by Tobacco (available at www.phlpnet.org) includes a listing of lawyer referral services in each county.

Option #5 Make a “reasonable accommodation” request

California and federal disability laws have a process for requesting a “reasonable accommodation” to ensure that people with disabilities have an equal opportunity to access and enjoy their homes.¹⁹ To qualify for protection under these laws, you must have a medical condition that meets the legal definition of a *disability*—a mental or physical condition that “limits” (under California law²⁰) or “substantially limits” (under federal law²¹) a major life activity such as breathing, walking, or performing manual tasks. Courts have generally recognized that individuals are disabled when they have severe asthma, allergies, chemical sensitivities, or other respiratory conditions that limit their ability to breathe.²² Whether you are legally considered disabled will depend on the particular facts of your situation.

Under federal and state disability laws, HOAs must modify their rules, practices, or services when

necessary to allow a person with a disability equal use and enjoyment of his or her premises.²³ The HOA also must permit a disabled person to make reasonable modifications to a unit—installing exhaust fans or air filters, for instance—if needed to fully use and enjoy the premises. Such modifications would be at the owner’s expense; the HOA is not obligated to pay for them.²⁴

Whether a modification to a policy or unit is “reasonable” depends on the specific facts of your situation. For a

resident with a disability affected by secondhand smoke, a reasonable accommodation might be requesting that the HOA amend the CC&Rs or Rules²⁵ to declare the common areas nonsmoking or to prohibit smoking in all units. (For more on how to accomplish this, see “How to Make a Condo Complex Smokefree,” a fact sheet from TALC available at www.phlpnet.org.)

A nonprofit organization known as a *fair housing council* may be able to help you make a reasonable accommodation request or may refer you to a local attorney for assistance. TALC’s fact sheet “How Disability Laws Can Help Tenants Suffering from Drifting Tobacco Smoke,” available at www.phlpnet.org, includes a list of fair housing councils in California.

To make a reasonable accommodation request, send a letter to the HOA explaining that you have a disability worsened by secondhand smoke and stating the specific accommodation you would like the HOA to make. You should also include a doctor’s note documenting the limitations caused by your disability and a written record of when you have experienced the drifting smoke. If you are renting a condo, you may send this letter to the owner of the condo or to the HOA.

If your request for a reasonable accommodation is rejected by the HOA (or by the unit’s owner, if you rent), you have one year to file a complaint with the California Department of Fair Employment and Housing or the U.S. Department of Housing and Urban Development. You have two years to file a lawsuit after the accommodation request has been denied.

Option #6 Work to pass a local law

If you are unable to alleviate the problem using any of these options, you may want to work with your city or county to help pass a local law (also called an *ordinance*) banning smoking in common areas or units of multi-unit housing, including condominiums. Belmont, California, passed the first ordinance of this kind in 2007, and many other cities have since followed its example with their own smokefree housing laws.²⁶ A city or county also can pass an ordinance declaring that unwanted secondhand smoke will be considered a nuisance, allowing individuals to act to abate the nuisance. Several cities in California have done just that.²⁷ If you are interested in pursuing this option, contact TALC to find out who in your area is working on this issue.

No matter which option you choose, it is important to consider your health. Breathing secondhand smoke that is drifting into your unit is not only annoying, it can cause serious health consequences. You can protect yourself and your family by taking action to prevent secondhand smoke from entering your home.

The Technical Assistance Legal Center is a project of Public Health Law & Policy (PHLP). PHLP is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

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- 1 A condominium or condo is housing that is subject to a Declaration of Covenants, Conditions, and Restrictions (CC&Rs) and managed by a homeowners' association (HOA). In addition to traditional condominium complexes, the use of the word "condo" in this document may also include co-ops, subdivisions, common interest developments, and planned unit developments.
- 2 Secondhand smoke is responsible for as many as 73,000 deaths among nonsmokers each year in the United States. See US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/secondhandsmoke.htm. Both the U.S. Surgeon General and the California Air Resources Board have concluded that there is no safe level of exposure to secondhand smoke. See US Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. 2007. Available at: www.surgeongeneral.gov/library/secondhandsmoke/factsheets/factsheet7.html; see also Resolution 06-01, Cal. Air Resources Bd. (2006) at 5. Available at: www.arb.ca.gov/regact/ets2006/etsfro.pdf. Secondhand smoke contains thousands of chemicals, at least 250 of which are known to be toxic or carcinogenic, including ammonia, formaldehyde, and sulfur dioxide. See National Toxicology Program, US Department of Health & Human Services. *11th Report on Carcinogens, Substance Profiles – Tobacco Related Exposures 1*. 2005, p. 1-2. Available at: <http://ntp.niehs.nih.gov/ntp/roc/eleventh/profiles/s176toba.pdf>.
- 3 "CC&Rs" stands for Declaration of Covenants, Conditions, and Restrictions and describes restrictions on the use of property in the complex—for example, the number or ages of people permitted to live in a unit. Because the CC&Rs are legally binding restrictions that automatically apply to the buyer, they must be disclosed at the time of sale and officially recorded, like a deed. Cal. Civ. Code § 1353(a) (West 2008).
- 4 The board consists of homeowners in the condo complex elected by the HOA to enforce or enact regulations controlling the use of property within the complex.
- 5 A good faith determination usually involves the board investigating the complaint, taking into account the circumstances surrounding the complaint, and making a reasonable determination without being in collusion with any of the parties. If the HOA investigates and decides not to discipline or refuses to sue the owner of the unit the smoke is coming from, the HOA must "reasonably believe its refusal to commence the action is good business judgment in the best interest of the corporation." *Beehan v. Lido Isle Community Assn.*, 70 Cal. App. 3d 858, 865 (1977).
- 6 Governing Documents apply to all of the owners in the condominium complex and may include the CC&Rs, Rules, Bylaws, Condominium Plan, or Articles of Incorporation.
- 7 Altering the unit is the least desirable approach because, although it may help reduce some of the drifting smoke, it rarely eliminates it entirely. If the amount of secondhand smoke is substantially reduced, even if some smoke is still drifting into your unit, the board may feel that the nuisance has been abated, and the HOA may be unwilling to force the neighbor to take additional measures beyond what was already done.
- 8 Although the HOA has the option to go to court to enforce the nuisance provision against an owner, it is relatively unlikely that they would exercise it. This is because initiating a lawsuit is very expensive for the entire HOA, and it would only benefit those owners who are experiencing the secondhand smoke in their units.
- 9 *Posey v. Leavitt*, 229 Cal. App. 3d 1236, 1246-47 (4th Dist. 1991). You may also be entitled to monetary damages. *Id.*
- 10 *Burrage v. Betty Gibson Associates, Inc., et al.*, No. SUCV2007-04578-E, (Suffolk, MA. 2007).
- 11 Memorandum and Order on the Defendant Gilchrist's and Defendants Trust's and Trustee's Motions To Dismiss, *Burrage v. Betty Gibson Associates, Inc., et al.*, No. SUCV2007-04578-E (Suffolk, MA. 2008).
- 12 In a lawsuit regarding drifting tobacco smoke in a condo, the result is especially unpredictable because there have been very few prior cases for you to rely upon.
- 13 If your condo's CC&Rs expressly state that secondhand smoke drifting into another unit automatically constitutes a nuisance, then you won't have to present evidence to prove that the secondhand smoke entering your unit is substantial enough to constitute a nuisance. For information about how to change your CC&Rs to add secondhand smoke to the nuisance provision, see the TALC publication "How to Make a Condo Complex Smokefree." Available at: www.phpl.net.org.
- 14 Those cities include Novato (Novato Municipal Code 7-3.11), Calabasas (Calabasas Municipal Code 8.12.070), Emeryville (Emeryville Municipal Code 5-29.14), Dublin (Dublin Municipal Code 5.56.160), Loma Linda (Loma Linda Municipal Code 8.10.035) and Belmont (Belmont Municipal Code 20.5-2).
- 15 California law more generally defines "nuisance" as "[a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of the property, so as to interfere with the comfortable enjoyment of life or property." Cal. Civ. Code § 3479. A California court held that a neighbor's secondhand smoke can constitute a nuisance if it is a "substantial and unreasonable" invasion "comparable to the reeking manure piles" left unattended by a dairy (the subject of another case). *Babbitt v. Superior Court*, WL 1068817, at *3 (Cal. App. 4th Dist. 2004). A recent California court case determined that even outdoor secondhand smoke can constitute a nuisance. *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540 (2009).
- 16 This is a fairly high threshold to meet and may even require that you present evidence showing what the state of scientific research is regarding amounts of SHS that are "unreasonable" and/or air sample data demonstrating how much secondhand smoke is in the air in your apartment, which is not always easy to obtain.
- 17 While it may be helpful to know a little about the legal claims you might make, you do not need to learn the names or specific details. If you take your case to trial court, your lawyer will evaluate which claims are best suited to your situation. If you choose to bring a case in small claims court—where lawyers are not allowed—you will not be expected to know the legal specifics of these claims.
- 18 Before filing a suit, you may need to participate in a process to resolve the dispute without going to court. Cal. Civ. Code § 1369.520.
- 19 See Fair Housing Act (FHA), 42 U.S.C. § 3601 et seq.; California Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12900 et seq. See also Unruh Civil Rights Act, Cal. Civil Code § 54.1(b)(1-2).
- 20 Cal. Gov't Code § 12926(k).
- 21 42 U.S.C. § 3602(h).
- 22 See *County of Fresno v. Fair Employment & Hous. Comm'n*, 226 Cal. App. 3d 1541, 1550 (1991) ("To most people tobacco smoke is merely irritating, distasteful or discomforting. Someone who suffers from a respiratory disorder and whose ability to breathe is severely limited by tobacco smoke is, nevertheless, physically handicapped within the meaning of the [Fair Employment and Housing] Act."). See also *Vickers v. Veterans Admin.*, 549 F. Supp. 85, 86-87 (W.D. Wash. 1982) where the court found the employee to be a "handicapped person" because the employee was unusually sensitive to tobacco smoke. Note: the legal definition of "handicapped" is equivalent to the legal definition of "disabled." See *Bragdon v. Abbot*, 524 U.S. 624, 631 (1998). Holdings in employment discrimination cases may be used as guidance in housing cases. *Pfaff v. U.S. Dep't of Hous. and Urban Dev.*, 88 F.3d 739, 745 n.1. (9th Cir. 1996).
- 23 California law provides residents with disabilities the same protections as federal law, though California's protections cover more people. See Fair Housing Act (42 U.S.C. § 3601 et seq.), Fair Employment and Housing Act (Cal. Gov't Code § 12900 et seq.) and the Unruh Civil Rights Act (Cal. Civ. Code § 51 et seq.).
- 24 42 U.S.C. § 3604(f)(3)(A).
- 25 Rules contain additional restrictions on the use of property and typically expand upon areas not fully defined in the CC&Rs—for example, whether private barbecue grills are permitted on balconies or what types of vehicles may park in the parking lot.
- 26 Belmont Municipal Code 20.5-3. The Center for Tobacco Policy and Organizing maintains a list of all cities with such ordinances, available at: www.center4tobaccopolicy.org/localpolicies-smokefreehousing.
- 27 See footnote 14 for a list of those cities.