



SECONDHAND SMOKE IN CONDOMINIUMS

Legal Options for Owners



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Introduction

Residents of any multi-unit housing, including condominiums, can be exposed involuntarily to secondhand commercial tobacco smoke.¹ Secondhand smoke is a health hazard and can greatly impact the quality of life of non-smokers. According to the U.S. Surgeon General, there is “no risk-free level of exposure to secondhand smoke.”² The California Air Resources Board has classified secondhand smoke as a “toxic air contaminant” similar to diesel exhaust and benzene³ and the Environmental Protection Agency classifies secondhand smoke as a Group A carcinogen, for which there is no safe level of human exposure.⁴ Secondhand tobacco smoke is especially hazardous for those who suffer from cardiovascular diseases, asthma, or other lung conditions.

Moreover, the Centers for Disease Control and Prevention considers the risk of heart attacks from exposure to secondhand smoke substantial enough to warn those at increased risk for coronary heart disease to avoid all indoor environments that permit smoking.⁵ Children are particularly vulnerable. In fact, children exposed to secondhand smoke in the home are twice as likely to develop, and suffer persistently from, asthma.⁶ Secondhand smoke also causes

acute lower- and upper-level respiratory tract conditions and acute middle ear conditions, in addition to myriad long-term adverse health effects.⁷ In addition, condominium owners may be concerned about involuntary exposure aerosols from electronic cigarettes or cannabis smoke, the health effects of which have been less studied.⁸

Smoke of all kinds can drift from its point of origin within a building to other units through light fixtures and ceiling crawl spaces, into and out of doorways, and through a building's ventilation and exhaust systems. Exposure can also occur in common patios, decks, balconies, hallways, underground parking garages, and recreational facilities. According to the American Society of Heating, Refrigeration and Air-Conditioning Engineers (ASHRAE) — the body that sets the standard for indoor air quality — “the only means of avoiding health effects and eliminating indoor [smoke] exposure is to ban all smoking activity inside and near buildings.”⁹ This is because remedial treatments such as sealing gaps, weather-proofing doors and windows, and adjusting ventilation are insufficient to protect building occupants from secondhand smoke.¹⁰

This policy brief describes legal options available to condominium owners exposed to drifting secondhand smoke. [Section I](#) describes preliminary steps an owner can take in preparation for any legal action. [Section II](#) discusses legal options available under the Federal Fair Housing Act and state anti-discrimination laws. [Section III](#) examines legal theories that could be used in a lawsuit against a neighbor or a condominium association. The policy brief concludes with observations about the implementation of smoke-free policies for condominium complexes.

Key Points

- Owners who qualify as disabled and can show that secondhand smoke exposure limits a major life activity can use the Fair Housing 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, and harassment.
- It is lawful for a condominium board or association to adopt smoking restrictions after the creation of the condominium, and courts have upheld no smoking restrictions when challenged by condominium owners who purchased their property prior to the change.



Section I: Preliminary Steps

Before considering legal action, condominium owners adversely affected by secondhand smoke need to document the issue and gather information about secondhand smoke, their condominium policies, and relevant state and local policies. Aggrieved owners should do their best to compile evidence about 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.¹¹ No one, however, should wait for the onset of a health problem before taking action.

Aggrieved owners should also be prepared to discuss the dangers of secondhand smoke, to make available relevant written materials on the subject, and to familiarize themselves with the policies governing smoking in their condominium complex. Condominium owners agree to abide by a set of covenants, conditions, and restrictions (CC&Rs) 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 CC&Rs, such as rules for using recreational facilities.

In addition, owners should check to see if there are any relevant state or local laws related to smoking in condominiums. For example, if the source of drifting smoke is from a common area or public space of a condominium, Colorado, Delaware, Hawaii, Maine, New Jersey, New York, North Dakota, and Rhode Island have state laws that prohibit smoking in common areas of condominium buildings.¹² If the source of the smoke is another condominium unit, California has 80 municipalities with local policies that fully or partially prohibit smoking in private condominium units.¹³ Local health departments can also be a potential resource for information about no-smoking policies.

Moreover, state law and CC&Rs may determine how aggrieved condominium owners can pursue a secondhand smoke-related dispute. For example, California, Florida, Hawaii, Michigan, and Wisconsin have state law provisions for arbitration or mediation as a means of settling a dispute among condominium owners.¹⁴ 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. Other state statutes give condominium associations the option of making mediation or arbitration a part of their condominium policies.¹⁵ Consequently, it is important to check condominium documents to see if alternative dispute resolution is required before filing a lawsuit.

The first step in any dispute, of course, is to try to resolve the issue without legal action. Condominium owners can use this information as they work with their neighbors to try non-legal means of resolving the problem.¹⁶ Owners who are unable to resolve their dispute with fellow condominium owners have recourse to their condominium boards and condominium associations. More formal legal alternatives are described below.

Section II: Disability Claims Under Federal and State Laws

Condominium owners may be able to use the federal Fair Housing Act to seek relief from secondhand smoke infiltration.¹⁷ The Act prohibits discrimination in housing against, among others, persons with disabilities. The Act also applies to most condominiums.¹⁸ In addition to the Fair Housing Act, states have their own anti-discrimination statutes, which may provide additional protections to those experiencing health difficulties as a result of secondhand smoke seepage.¹⁹

Under the Fair Housing Act, the affected person must prove an adverse health reaction that substantially limits one or more major life activities.²⁰ Simply showing an adverse health

reaction to secondhand tobacco smoke is insufficient proof of a “disability” under the Act. To be “substantial,” the impairment must be severe and long-term.²¹ A substantial impairment could include difficulty breathing or other ailments, such as a cardiovascular disorder, respiratory illness, asthma, allergies, Multiple Chemical Sensitivity, or environmental illness caused or exacerbated by exposure to secondhand smoke.²² State housing discrimination laws also only apply to people qualifying as disabled. For example, when interpreting California’s Fair Employment and Housing Act, the California Court of Appeals stated: “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 Act.”²³

A person who merely finds secondhand smoke annoying would probably not obtain protection under the Fair Housing Act. The 2003 Massachusetts case *Donnelley v. Cohasset Housing Authority* is instructive.²⁴ Under a Massachusetts civil rights law modeled after the federal Americans with Disabilities Act, the superior court ruled that a plaintiff who claimed fatigue and itchy eyes when exposed to secondhand smoke did not qualify for protection from secondhand smoke as a disabled person.²⁵ While not controlling outside of Massachusetts, this ruling exemplifies the high standard plaintiffs need to meet to show their sensitivity to secondhand smoke substantially limits a major life activity.²⁶

A condominium owner who qualifies as disabled under the Fair Housing Act should first try to reach a “reasonable accommodation” with the condominium board before pursuing a complaint.²⁷ Under Fair Housing Act rules, if a condominium owner is able to prove a qualifying disability, the condominium board has the opportunity to demonstrate that it “reasonably accommodated” the owner’s need for protection from secondhand smoke exposure.²⁸ What constitutes a reasonable accommodation in a condominium complex is decided on a case-by-case basis.²⁹

Whether or not a condominium association has a no smoking policy when a dispute arises is an important factor when analyzing the reasonableness of a requested accommodation. In the 2019 case *Davis v. Echo Valley Condominium Association*, the United States Court of Appeals for the Sixth Circuit analyzed whether a condominium owner’s request that the condominium association prohibit smoking for the entire condominium complex was a “reasonable accommodation” under the Fair Housing Act.³⁰ The owner suffered from asthma that was exacerbated by tobacco smoke. In response to the owner’s concerns about smoke entering her unit, the condominium association held a vote to amend its CC&Rs to ban smoking in all units, but the vote failed to pass, and it took no further steps to prohibit smoking in individual units.³¹ The court interpreted the phrase “reasonable accommodation” to an existing condominium association policy under the Fair Housing Act to mean a moderate adjustment to a challenged

policy.³² The court found that although the plaintiff was adversely impacted by secondhand smoke from another condominium unit, she purchased her condominium knowing that the condominium association policy permitted smoking. The court dismissed the case, ruling that the plaintiff's proposal that the condominium association prohibit smoking for all residents "amounted to a 'fundamental alteration' of the Association's smoking policy."³³ The court further reasoned that such a change could intrude on the rights of other owners who "may well have bought their condos because of the Association's policy permitting smoking."³⁴

Condominium owners deciding to move forward with complaint under the Fair Housing Act do not need to be represented by an attorney. They can directly contact the Department of Housing and Urban Development (HUD) Office of Fair Housing and Equal Opportunity. A complaint must be filed within one year of the last date of the alleged discrimination.³⁵ A complaint can be filed in several ways, 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.³⁶ The owner can download a HUD form from the HUD website or can complete an online HUD form.³⁷ 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 can be filed against the condominium association, the offending smoker, or both.

Condominium owners deciding to move forward with a complaint under state housing discrimination law should consult the agency in their state responsible for enforcing their state's anti-discrimination laws.³⁸

Section III: Secondhand Smoke Seepage Lawsuits

A condominium owner in a dispute over secondhand smoke infiltration can also consider court action or the threat of court action. Depending on the jurisdiction, a suit could be brought in small claims court or a special housing court, as an alternative to state court. Most cases are settled, with only a handful reported nationally in which a decision was reached on the merits. Condominium owners have successfully brought claims for secondhand smoke seepage using various common law remedies, including breach of the covenant of quiet enjoyment, trespass, and nuisance.

Parties to the Lawsuit

If condominium owners decide to initiate a lawsuit, they must decide whether to sue the offending condominium owner, tenants occupying a condominium unit, the condominium association, or a combination of these potential defendants. Aggrieved owners should bear in mind that condominium association with considerable financial resources will have an

advantage in litigation. Also, courts have been sympathetic to condominium associations when they take steps to address secondhand smoke seepage, such as making changes to building ventilation — even though these measures are ineffective.³⁹ In addition, owners should carefully review their CC&Rs to determine whether they would be required to pay the association's legal fees if the lawsuit is unsuccessful.

There also are legal hurdles when seeking to hold 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 an offending condominium owner if the association owes some kind of "duty" to the aggrieved condominium owner, such as a duty to enforce an association's CC&Rs.⁴⁰ Different courts apply different tests to determine whether a duty is owed, but one factor is whether the actions of the offending condominium owner were "foreseeable."⁴¹ 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, condominium owners with a secondhand smoke complaint need to 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, for owners to check state case law to determine what exactly is required to make a case against the condominium association.

Possible Legal Theories

Covenant of Quiet Enjoyment

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 the condominium unit. In 2005, a Florida court in *Merrill v. Bosser* found that an owner of a condominium unit who rented his unit to a heavy smoker violated the condominium's covenant of quiet enjoyment.⁴² According to the court, "[s]imilar 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."⁴³ The covenant was breached, according to the court, because the amount of tobacco smoke entering the plaintiff's unit was "excessive," set off the smoke detector in one instance, and in several cases forced the plaintiff's family to leave the condominium and sleep in a different location.⁴⁴

In the absence of a specific agreement, it may be possible to invoke landlord-tenant law to argue that the offending condominium owner has breached a common law covenant of quiet

enjoyment. The covenant of quiet enjoyment protects a tenant from serious intrusions that impair the character or value of the tenant's premises, including excessive tobacco smoke.⁴⁵ If the smoke impacting the owner is emanating from an area of the condominium complex under the control of the condominium association, such a claim may also be available to the aggrieved condominium owner against the condominium association. In various other contexts (e.g., building repairs, exterior lighting, parking lot snow and ice removal), courts have applied the principles of landlord tenant law to disputes involving the duty of care owed to residents by condominium associations.⁴⁶

Warranty of Habitability

Condominium owners can also assert a related claim: breach of the implied warranty of habitability that a dwelling be fit for its intended use.⁴⁷ 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 can 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.⁴⁸ An Ohio court reached a similar conclusion when a landlord's minimal and ineffective efforts failed to prevent smoke from entering into a nonsmoker's unit.⁴⁹

Trespass

In general, the tort of trespass requires "possession of the property by the plaintiff when the alleged trespass was committed, an unauthorized entry by the defendant, and damage to the plaintiff from the trespass."⁵⁰ States vary in their statutory definitions of "trespass," and no legal consensus exists among states on whether a substance can trespass.⁵¹ For example, courts have interpreted trespass under Michigan law to mean that "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."⁵² In Florida, however, the focus of the tort of trespass is "disturbance of possession."⁵³

The *Merrill* court found that under Florida law the smoker's secondhand smoke was "trespassing" on the plaintiff, and held the condominium owner liable as a landlord for the trespass of his smoking tenant.⁵⁴ 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 property of the defendant.⁵⁵ 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.⁵⁶ However, the court found that the smoke affecting the Merrill family was so excessive as to constitute a "disturbance of possession."⁵⁷



Nuisance

Nuisance law also can be applied to the issue of secondhand smoke infiltration.⁵⁸ In Utah, secondhand smoke is explicitly listed as a nuisance by statute.⁵⁹ In all other states, the issue of whether secondhand smoke constitutes a nuisance is decided under common law, which describes nuisance as an objective “interference with the interest in the private use and enjoyment of” property.⁶⁰ Courts have interpreted this to mean that the standard of liability is tied “to an ordinary resident, not a resident with unique needs.”⁶¹ In addition to common law protections against nuisance, most CC&Rs contain a standard nuisance clause that prohibits interference with the rights of other residents.

Unfortunately, courts have been reluctant to find secondhand smoke is a nuisance, especially when a condominium association permits smoking.⁶² In multi-unit housing where smoking is permitted, successful cases have involved “excessive” smoking as opposed to “ordinary” amounts of tobacco smoke.⁶³ Courts have given several rationales for denying secondhand smoke nuisance claims, including “(1) smoking is a legal activity, (2) plaintiffs have been unable to prove irreparable or unreasonable harm, and (3) secondhand smoke is merely an annoyance which landowners must endure as an inherent part of living near others.”⁶⁴

Harassment

Another claim used in secondhand smoke and housing cases is harassment. Condominium owners have used this claim, for example, in successfully obtaining an injunction against a fellow condo owner.⁶⁵ The plaintiffs alleged the defendant was harassing them by smoking in a garage located below the owners' condominium. According to the plaintiffs, concern about their exposure to secondhand smoke forced them to leave their residence "for hours at a time." The Superior Court of California issued a restraining order requiring the defendant to refrain from smoking in his garage.

Example of a Secondhand Smoke Lawsuit

In the Florida case of *Merrill v. Bosser*, a judge awarded damages to a non-smoking condominium owner against a smoker who lived one floor above her.⁶⁶ 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 plaintiff 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,⁶⁷ breached the covenant of quiet enjoyment,⁶⁸ and constituted a nuisance.⁶⁹

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.⁷⁰ Under Florida law, the focus of a tort of trespass is "disturbance of possession."⁷¹ 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.⁷² However, in the case before the court, the smoke was so excessive as to constitute a "disturbance of possession."⁷³

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."⁷⁴ 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.”⁷⁵ The plaintiff and her family had recurring illnesses due to the smoke and on several occasions were forced out of their condominium.

Section IV: Changing Condominium Complexes to Smoke-Free

There is no doubt that smoking within a condominium complex, including in individual units, may be prohibited at the time the condominium is created. Condominium owners wishing to make their complexes smoke-free can do so by pursuing an amendment to the condominium association’s CC&Rs, or by working with their condominium board to adopt rules to address smoking.⁷⁶ The vast increase in electronic cigarette use, and the legalization of medical and recreational marijuana in many states, also may present an opportunity for condominium associations to revisit their smoke-free policies to better address drifting smoke from other products, including cigarettes.

A change to CC&Rs must comply with state law and is typically subject to a formal vote by association members.⁷⁷ Rule changes are voted on by the condominium board as opposed to all association members.⁷⁸ Changes to CC&Rs must be reasonable, and there are some very persuasive arguments that going smoke-free is reasonable.⁷⁹ Secondhand smoke is carcinogenic and has been linked to myriad adverse health outcomes, both acute and chronic. ASHRAE, 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.⁸⁰ Additionally, unattended cigarettes are a leading cause of residential fires.⁸¹ The elimination of smoking would reduce the chances of fire as well as potentially reduce related insurance premiums for the condominium.

Reasonable amendments will be binding on all owners of units, including on those who bought before the amendment or bylaw was passed.⁸² For instance, a Colorado court dismissed a condominium owner’s challenge to a smoke-free amendment of the association’s CC&Rs.⁸³ In ruling that the amendment was reasonable and therefore applied to all condominiums, the court noted that: “Plaintiffs argue that this ban impacts their ability to enjoy their private home. However, the migration of smoke and/or smoke smell in this setting is like extremely loud noise. Despite numerous efforts, it cannot be contained within a single unit.”⁸⁴

Conclusion

Smoke-free condominiums are not only sound health policy, they also make sense legally. Condominium associations have the right to prohibit smoking in condominiums, which can reduce disputes between neighbors and protect an association from lawsuits over secondhand smoke incursion. Before taking any legal action, aggrieved owners should adequately prepare and they should consider alternatives to a lawsuit such as voluntary agreements, arbitration, or mediation. As growing numbers of multi-unit housing and common interest communities become smoke-free, more tenants and residents will assert their rights to smoke-free living. Condominium complexes can join this movement by amending their CC&Rs to prohibit smoking.

Endnotes

- 1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. In comparison, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit <http://www.keepitsacred.itcmi.org>. When the word “tobacco” is used throughout this document, a commercial context is implied and intended.
- 2 U.S. DEP’T OF HEALTH & HUMAN SERVS. CTRS. FOR DISEASE CONTROL & PREVENTION, THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: REPORT OF THE SURGEON GENERAL 11 (2006), https://www.ncbi.nlm.nih.gov/books/NBK44324/pdf/Bookshelf_NBK44324.pdf.
- 3 CAL. CODE REGS. tit. 17, § 93000 (2007).
- 4 Press Release, U.S. Env’tl. Protection Agency, EPA Designates Passive Smoking a “Class A” or Known Human Carcinogen (Jan. 7, 1993), <https://archive.epa.gov/epa/aboutepa/epa-designates-passive-smoking-class-or-known-human-carcinogen.html>.
- 5 Terry F. Pechacek & Stephen Babb, *Commentary: How Acute and Reversible are the Cardiovascular Risks of Secondhand Smoke?*, 328 BRIT. MED. J. 980, 983 (2004).
- 6 See Jonathan M. Samet, *Risk Assessment and Child Health*, 113 PEDIATRICS 952, 954 (2004); U.S. DEP’T OF HEALTH & HUMAN SERVS. CTRS. FOR DISEASE CONTROL & PREVENTION, HOW TOBACCO SMOKE CAUSES DISEASE: THE BIOLOGY AND BEHAVIORAL BASIS FOR SMOKING-ATTRIBUTABLE DISEASE: A REPORT OF THE SURGEON GENERAL 4 (2010), https://www.ncbi.nlm.nih.gov/books/NBK53017/pdf/Bookshelf_NBK53017.pdf.
- 7 *Id.*
- 8 For more information about how to address marijuana use in multi-unit housing, see Public Health Law Center, *Marijuana in Multi-Unit Residential Settings* (2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/Marijuana-in-Multi-Unit-Residential-Setting-2019-1.pdf>.
- 9 See AM. SOC’Y OF HEATING, REFRIGERATION & AIR-CONDITIONING ENG’RS, ASHRAE POSITION DOCUMENT ON ENVIRONMENTAL TOBACCO SMOKE (2020), https://www.ashrae.org/File%20Library/About/Position%20Documents/pd_environmental-tobacco-smoke-2020-07-1.pdf.
- 10 *Id.*

- 11 For a sample doctor's note, see ChangeLab Solutions, *How Disability Laws Can Help Tenants Suffering from Drifting Tobacco Smoke* (2018), https://www.changelabsolutions.org/sites/default/files/HowDisabilityLawsCan%20HelpTenantsSufferingfromDriftingTobaccoSmoke_FINAL_20180629.pdf.
- 12 See COLO. REV. STAT. §25-14-204(1)(p); DEL. CODE ANN. TIT. 16 §2903(15); N.J. STAT. ANN. §26:3D-58(a); N.D. CENT. CODE §23-12-09(11); R.I. GEN. LAWS §23-20.10-3(10).
- 13 See AM. NONSMOKER'S RIGHTS FOUND., U.S. LAWS FOR 100% SMOKEFREE MULTI-UNIT HOUSING (July 1, 2022), <https://no-smoke.org/wp-content/uploads/pdf/smokefreemuh.pdf>.
- 14 CAL. CIV. CODE § 5900-5920; CAL. CIV. CODE § 5925 - 5965; FLA. STAT. ANN. § 718.1255(4)(a); HAW. REV. STAT. §§ 514B-161, 514B-162; MICH. COMP. LAWS § 559.154(8); WIS. STAT. § 703.365(6)(c).
- 15 See Christopher Baum, *The Benefits of Alternative Dispute Resolution in Common Interest Development Disputes*, 84 ST. JOHN'S L. REV. 907 (2010).
- 16 For a detailed discussion of voluntary approaches to addressing drifting smoke in condominiums, see Susan Schoenmarklin, Smokefree Env'ts Law Project, *Analysis of the Voluntary and Legal Options of Condominium Owners Confronted with Secondhand Smoke from another Condominium Unit* 5-13 (2006), <http://www.tcs.org/sfelp/home.htm> (click on the "ETS & Condominiums" tab to access).
- 17 Fair Housing Act, 42 U.S.C. §§ 3601-3631.
- 18 42 U.S.C.S. § 3603(b) (exempting certain single-family homes and owner-occupied dwelling units); see also *Ho v. Donovan*, 569 F.3d 677, 682 (7th Cir. 2009) (applying the exemptions contained in 42 U.S.C.S. § 3603(b) to a condominium owner).
- 19 The Policy Surveillance Program, LawAtlas, *State Fair Housing Protections* (2019), <https://lawatlas.org/datasets/state-fair-housing-protections-1498143743>.
- 20 42 U.S.C.S. § 3602(h); 42 U.S.C § 12102(1)(A).
- 21 *Bragdon v. Abbott*, 524 U.S. 624, 639-45 (1998).
- 22 See, e.g., Memorandum from Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Dep't of Housing and Urban Dev. to Frank Keating, General Counsel, U.S. Dep't of Housing and Urban Dev. (Mar. 5, 1992), <https://www.hud.gov/sites/documents/GME-0009LOPS.PDF> (finding that Multiple Chemical Sensitivity and Environmental Illness can qualify as disabilities under the FHA).
- 23 *County of Fresno v. Fair Employment & Hous. Comm'n*, 277 Cal. Rptr. 557, 563 (Cal. Ct. App. 1991).
- 24 *Donnelley v. Cohasset Hous. Auth.*, 16 Mass. L. Rep. 318 (Mass. Super. Ct. 2003).
- 25 *Id.*
- 26 See also *Caesar v. Westchester Corp.*, 280 A.3d 176 (App. D.C. 2022) (the court ruled that the plaintiff could not prevail on her claim that she was denied a reasonable accommodation for her hypertension by her landlord because hypertension has many causes and plaintiff "was required to provide something more than her own assertions to validate her claims that [] [her neighbor's] smoking exacerbates her condition....")
- 27 For a sample demand letter, see CHANGELAB SOLUTIONS, *supra* note 11.
- 28 *Id.*
- 29 *Id.*
- 30 *Davis v. Echo Valley Condo. Ass'n*, 945 F.3d 483 (6th Cir. 2019).
- 31 *Id.* at 489.
- 32 *Id.* at 490.

33 *Id.* at 492.

34 *Id.*

35 U.S. DEPT. OF HOUSING & URBAN DEV., LEARN ABOUT THE FHEO COMPLAINT AND INVESTIGATION PROCESS, https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process.

36 U.S. DEPT. OF HOUSING & URBAN DEV., FILE A COMPLAINT, https://www.hud.gov/program_offices/fair_housing_equal_opp/online-complaint#_Types_of_Complaints.

37 *Id.*

38 For contact information for state agencies responsible for enforcing state anti-discrimination laws, visit U.S. COMM’N ON CIVIL RIGHTS, CIVIL RIGHTS DIRECTORY: STATE AND LOCAL AGENCIES, <https://www.usccr.gov/files/pubs/crd/stateloc/all.htm>.

39 See, e.g. Davis v. Echo Valley Condo. Ass’n, 945 F.3d at 488 (noting that “condo living can be trying, and board membership a thankless task” and highlighting the condominium board’s decision to install a “fresh air” ventilation system in the plaintiff’s ductwork).

40 See *id.* at 493 (discussing the duty owed by a condominium association to an owner in enforcing the association’s bylaws).

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

42 Merrill v. Bosser, No. 05-4239 COCE 53, at 6 (Fla. 17th Cir. Ct. 2005), <https://www.tobaccocontrolaws.org/litigation/decisions/us-20050629-merrill-v.-bosser>.

43 *Id.*

44 *Id.*

45 52A C.J.S. LANDLORD & TENANT § 771 (Oct. 2022 Update); 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”); 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).

46 See, e.g., Martinez v. Woodmar IV Condo. Homeowners Ass’n, 941 P.2d 218, 220-21 (Ariz. 1997) (finding that homeowner associations that function as a landlord in maintaining the common areas of a large condominium complex have a duty to exercise due care for the residents’ safety in areas under their control); Frances 11 T. v. Village Green Owners Ass’n, 723 P.2d 573, 576-77 (Cal. 1986); Cowan v. Lakeview Vill. Condo. Ass’n, No. 250251 & 251645, 2005 Mich. App. LEXIS 223, at *49 (Mich. Ct. App. Feb. 1, 2005) (finding in a slip and fall case on property controlled by the condominium association that “although the relationship in the instant case [involving a condominium] is not exactly one of lessor-lessee or landlord-tenant, the analogy is close enough that the legal principles should apply.”)

47 52 C.J.S. LANDLORD & TENANT § 717 (Oct. 2022 Update).

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

49 Heck v. Whitehurst Co., No. L-03-1134, 2004 WL 1857131, at *6 (Ohio Ct. App. Aug. 20, 2004) (in addition to the tobacco smoke seepage, the tenant alleged that there were leaking windows and a rotting wall in the apartment).

50 See 75 AM. JUR. 2D TRESPASS § 22 (Aug. 2022).

- 51 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) and *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 272 (1st Cir. 1990) (questioning whether the spreading of fumes, noise and light falls within the ordinary meaning of wrongful entry of property under the traditional definition of trespass).
- 52 24 MICH. CIV. JUR. TRESPASS § 2 (Aug. 2022).
- 53 Merrill, No. 05-4239 COCE 53, at 3.
- 54 *Id.*
- 55 *Id.* (quoting 75 AM. JUR. 2D TRESPASS § 56 (2005)).
- 56 *Id.* (citing 55 FLA. JUR. 2D TRESPASS § 9 (2009)).
- 57 *Id.*
- 58 This section discusses secondhand smoke as a private nuisance. For a detailed discussion of secondhand smoke as a “public nuisance” in outdoor common areas of an apartment complex see *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540 (Cal. Ct. App. 2009).
- 59 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. § 78B-6-1101(1), (3). See also exemptions contained in UTAH CODE ANN. § 78B-6-1101(1) (“There is no cause of action for a nuisance under Subsection 78B-6-1101(3) if the rental, lease, restrictive covenant, or purchase agreement for the unit states in writing that: (a) smoking is allowed in other units, either residential or commercial, and that tobacco smoke from those units may drift into the unit that is subject to the agreement; and (b) by signing the agreement the renter, lessee, or buyer acknowledges he has been informed that tobacco smoke may drift into the unit he is renting, leasing, or purchasing, and he waives any right to a cause of action for a nuisance under Subsection 78B-6-1101(3).”) There are no reported opinions in Utah under this statute.
- 60 RESTATEMENT (SECOND) OF TORTS § 821D (1979) (last updated Oct. 2022).
- 61 *Davis v. Echo Valley Condo. Ass’n*, 945 F.3d at 495 (finding that the plaintiff’s assertion of her unique sensitivities to smoke “undercut” her nuisance claim).
- 62 The United States Court of Appeals for the Sixth Circuit went so far as to state that unless there is something “unique” about a neighbor’s smoking habits, there is a “default rule that smoking cannot be considered a nuisance in a condo complex that allows it.” *Davis v. Echo Valley Condo. Ass’n*, 945 F.3d at 495.
- 63 *Harwood Capital Corp. v. Carey*, No. 05-SP-00187 (Boston Hous. Ct. March 10, 2005) (case involved what was described as “heavy smoking”), <https://www.mass.gov/doc/harwood-v-carey-housing-court-2005/download>; Merrill v. Bosser, No. 05-4239 COCE 53, at 6.
- 64 Nicholas Evoy, *Secondhand Smoke as a Private Nuisance: Lost in the Fog*, 44 REAL EST. L.J. 20, *36 (2015); see also *Davis v. Echo Valley Condo. Ass’n*, 945 F.3d at 494 (citing various cases where courts have found no right to relief on nuisance theories for secondhand smoke in condominium complexes where smoking is permitted).
- 65 News Release, Esther Schiller, Smokefree Air for Everyone (S.A.F.E.), Restraining Order Protects Condo Dwellers from Secondhand Smoke (describing *Layon v. Jolley*, No. NS004483 (Cal. Super. Ct. Los Angeles County 1996))
- 66 *Merrill v. Bosser*, No. 05-4239 COCE 53, at 6 (Fla. 17th Cir. Ct. 2005), <https://www.tobaccocontrolaws.org/litigation/decisions/us-20050629-merrill-v.-bosser>.

67 *Id.* at 3.

68 *Id.* at 6.

69 *Id.* at 5.

70 *Id.*

71 *Id.* at 3.

72 *Id.*

73 *Id.* at 6.

74 *Id.*

75 *Id.* at 5.

76 ChangeLab Solutions, *How to Make a Condo Complex Smokefree* (2011), https://www.changelabsolutions.org/sites/default/files/CLS_Condo_FactSheet_FINAL_20120517_0.pdf.

77 *Id.*

78 *Id.*

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

80 AM. SOC'Y OF HEATING, REFRIGERATION & AIR-CONDITIONING ENG'RS, *supra* note 9.

81 MARTY AHRENS, NAT'L FIRE PROT. ASSOC., HOME FIRES STARTED BY SMOKING (2019), <https://www.nfpa.org/-/media/Files/News-and-Research/Fire-statistics-and-reports/US-Fire-Problem/Fire-causes/ossmoking.ashx>.

82 See, e.g., Villa de Las Palmas Homeowners Ass'n v. Terifaj, 90 P.3d 1223.

83 Christiansen v. Heritage Hills 1 Condo. Owners Ass'n, Case No. 06CV1256 (Colo. Dist. Ct. Nov. 7, 2006), <https://www.tobaccocontrolaws.org/litigation/decisions/us-20061107-christiansen-v.-heritage-hills>.

84 *Id.* at 8.

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