

**Can You Be Sued Because Your Tenants Smoke?
(A Smokin' Liability)
From the Smokefree Apartment House Registry**

How exposed are your profits to claims arising from secondhand smoke?

A young couple, Jack and Jennifer Jones, who has been renting one of your units for several years, has just brought home their new baby, Jane. The tenants in that building have all been there for some time and everyone seems to get along. Just last month, one of the tenants in a unit adjacent to Jack and Jennifer moved out and a new tenant moved in. As it happens, the new tenant, Jeremy, smokes and the smoke is drifting into Jack and Jen's unit.

The former tenant did not smoke and neither do other nearby neighbors of Jack and Jen so the subject never came up. Now, however, with the smoke drifting into their unit, they are both bothered by the smoke and concerned for the health of little Jane. They speak to Jeremy about their concern and ask him to please not smoke where it can drift into their apartment. Jeremy doesn't "see what the big deal is" and claims he has the right to smoke, particularly in his own home. Jack and Jen come to you with a complaint and while you are investigating the best course of action; little baby Jane goes to sleep for a nap and never wakes up. The cause of death is determined to be Sudden Infant Death Syndrome and Jack and Jen, who had been doing research on the effects of secondhand smoke on infants and children, know that a leading risk factor for SIDS is exposure to SHS. They sue. For big money.

Naturally, you notify your insurance carrier. Now, you think, all those premiums you've paid will finally be worth it. You are more than surprised and dismayed when you get notice from your carrier denying coverage, citing the pollution exclusion. Could this happen? It appears increasingly likely.

While the policy you purchased to cover liability is designed to cover a host of claims for bodily injury or property damage to someone or something other than you or your property, there are certain specific exclusions. While criminal acts are automatically excluded from coverage, a claim involving secondhand smoke is most likely to be brought in civil court. Other civil suits regarding secondhand smoke have made claims based on negligence, harassment, breach of the common law covenant of quiet enjoyment, and breach of statutory duty to keep the premises habitable. Many of these claims are also expressly excluded from coverage, as they are violations of law. However, as smoking is a legal activity, many property owners would assume a claim resulting from exposure to secondhand smoke would be covered.

Generally, your policy would provide coverage for a claim of negligence such as in a "trip and fall" claim that resulted from someone tripping over a gardening tool or torn carpeting in the hallway. Many property owners would think a claim arising out of exposure to secondhand smoke would be handled in the same manner. The Standard Pollution Exclusion, however, excludes claims of "bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants." The policy defines pollutants as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Since the EPA has designated secondhand smoke as a Class A carcinogen (meaning there is no safe level of exposure) and since it contains over 400 toxic chemicals (such as hydrogen cyanide, arsenic, naphthalene and carbon monoxide) it is easily a pollutant. Furthermore, secondhand smoke has been shown to travel not just through ventilation systems but also through electrical and plumbing fixtures, and between walls. Under Utah law, residential smoking can be considered a nuisance.¹

Furthermore, the federal Housing Act of 1988 requires that "reasonable accommodations" be made in "rules, policies, practices, or services" to ensure equal access to and enjoyment of a dwelling unit. Refusal to do so can be considered discrimination under the Act.² Persons with certain medical conditions that are exacerbated by exposure to secondhand smoke have made successful claims of discrimination based on their disability.³

Philip Morris' own website states: "Public health officials have concluded that secondhand smoke from cigarettes causes disease, including lung cancer and heart disease, in non-smoking adults, as well as causes conditions in children such as asthma, respiratory infections, cough, wheeze, otitis media (middle ear infection) and Sudden Infant Death Syndrome. In addition, public health officials have concluded that secondhand smoke can exacerbate adult asthma and

cause eye, throat and nasal irritation. Philip Morris USA believes that the public should be guided by the conclusions of public health officials regarding the health effects of second hand smoke in deciding whether to be in places where secondhand smoke is present, or if they are smokers, when and where to smoke around others. Particular care should be exercised where children are concerned, and adults should avoid smoking around them.”⁴

In fact, a recent survey of 602 apartment residents in Southern California showed 69% of respondents would favor requiring all apartment buildings to offer non-smoking sections⁵. According to the Centers for Disease Control, only 16.2% of California adults smoke and that number is reduced to 13% in Orange County, which has the lowest adult smoking rate of any major metropolitan area in the country.

In this new social climate, people expect smokefree air and are willing to pursue it as a necessity. This pursuit is starting to include litigation; a trend likely to continue unless landlords take precautions that will satisfy the growing number of nonsmoking tenants.

Non-smokers bothered by secondhand smoke have won monetary settlements or injunctive relief in situations where secondhand smoke was drifting into their units.⁶ Claims for bodily injury could easily be more expensive than a nuisance claim and conceivably could be added to claims of nuisance, increasing the expense even further. Whether monetary damages are awarded or rents are reduced or withheld until the affected person can find new accommodations, it can be costly to the property owner to withstand such a claim, particularly if the insurance carrier denies coverage. This will also likely leave the property owner to pay for his or her own defense.

If a large property management company owns the apartment where Jack and Jennifer live, additional lawsuits could potentially be filed. Let’s say that just prior to baby Jane’s untimely demise that the Board of Directors had considered proposals to either have separate smoking permitted and non-smoking buildings, or even to prohibit smoking altogether, but ultimately rejected the idea on the premise that it might lead to a higher vacancy rate.

The directors and officers do have an obligation to make decisions that will be in the best interest of investors, presumably that would be to make the property as profitable as possible. However, investors are likely to reasonably expect that the BOD will not make decisions that expose the owners or managers to a risk of lawsuits. While it is up to the courts to decide the merits of any particular case, and while it may turn out that many cases are decided in favor of the landlord, they can be costly to defend as well as unnecessary.

Should a sizable judgment go against the property owners, they may quite conceivably turn around and sue their Board of Directors. Those who serve on such boards should consult with their agents as to whether or not their particular Directors and Officers policy will pick up coverage. There are several exclusions common to many D&O policies that would likely result in the denial of coverage for such a claim.

What can a property owner and/or management firm do to protect themselves from these types of claims? **Apartment owners have several rights that they can exercise to help reduce the likelihood and cost of litigation over secondhand smoke:**

1. They have the right to make their properties smokefree, in whole or in part.
2. They can refuse to rent to people who smoke, just as they can refuse to rent to those who have pets. It is well established that there is no legal right to smoke.⁷
3. It is legal to ask tenants to acknowledge in the lease or rental agreement that they do not and will not smoke, nor will any visitors in their unit. In a month-to-month rental agreement, the tenant agrees that if s/he starts smoking, s/he will move within 30 days. If your property is subject to rent control, you will have to check with local authorities to determine if you are allowed to change the conditions of tenancy.

It makes sense, therefore, for landlords to clarify in their lease agreements where smoking is allowed, if at all. Because smoke often drifts from common areas such as swimming pools and other outdoor areas, it is probably wise to prohibit smoking in these areas. Also, California’s smokefree workplace law prohibits smoking in laundry rooms and other indoor common areas if the property has employees at any time. As renters may not be familiar with that portion of the law, it makes sense to specify these restrictions in the lease.

If an owner wants to allow smoking on his/her property or some portion thereof, s/he should consult with their attorney about having tenants sign an agreement acknowledging that they will be exposed to secondhand smoke; that they will accept any consequences resulting from that

exposure; and that they will hold the landlord harmless for any bodily injury or property damage that results from exposure to secondhand smoke. It is important to note that such an agreement may not eliminate claims. However, an attorney that specializes in landlord tenant law would be a good choice to draft or review such agreements in a way that would reduce the chance of any such claim being brought and the likelihood that it would succeed.

Landlords can survey their tenants to find out if and where people smoke in their building(s) and if drifting secondhand smoke bothers anyone. Tenants can be moved so that non-smokers live in separate areas from those that smoke. You will likely have to pick up the moving expenses, but this may save money in the long run.

Increased security deposits can be required for people who smoke, as it can for pet owners. Just be sure to stay within the legal limits. Additional clauses can also be inserted into rental agreements that make the tenant responsible for any damage caused by smoking.

Clearly delineating smokefree areas in large complexes and creating smokefree properties in a number of locations will help those who are sensitive to secondhand smoke find housing that is suitable for their needs, while still allowing enough housing for those that choose to smoke, and simultaneously reducing complaints about secondhand smoke and feuds between tenants.

For sample lease agreements and more information on how you can make your property smokefree call 818/363-4220 or visit www.smokefreeapartments.org.

The Smokefree Apartment House Registry, which is currently funded by a Proposition 99 grant from the California Department of Health Services, provides a free vacancy listing service at www.smokefreeapartments.org to landlords who have adopted no-smoking policies for their buildings. In order to qualify for this service, at least 50% of the units next to each other must be non-smoking. For further information, call (818)363-4220 or email smokefreeapartments@pacifinet.net

¹ Utah Code Ann. 1953 § 78-38-1 provides: (1) A nuisance is anything which 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. A nuisance may be the subject of an action. . . .(3) A nuisance under this section includes tobacco smoke that drifts into any residential unit a person rents, leases, or owns, from another residential or commercial unit and this smoke: drifts in more than once in each of two or more consecutive seven-day periods; and creates any of the conditions under subsection (1).(4) Subsection (3) does not apply to:

- (a) residential rental units available for temporary rental, such as for vacations, or available for only 30 or fewer days at a time, or
- (b) hotel or motel rooms.

² 42 U.S.C. § 3604(f)(3)(b).

³ re HUD and Kirk and Guilford Management Corp. and Park Towers Apartment, HUD Case No. 05-97-0010-8, 504 Case No. 05-97-11-0005-370 (1998), cited in "Infiltration of Secondhand Smoke into Condominiums, Apartments and other Multi-Unit Dwellings", Susan Schoenmarklin, Tobacco Control Legal Consortium (2004), available at:

<http://www.wmitchell.edu/tobaccolaw/resourcesTCLC.html>. And "Providing Healthy Options for Tenants" A program of the American Lung Association of California, Superior Branch

⁴ Philip Morris USA website: www.pmus.com/health_issues/secondhand_smoke.asp as of October 20, 2004

⁵ American Lung Association, The Center for Tobacco Policy and Organizing Survey data available at http://californialung.org/thecenter/community/documents/SFH-Survey-Data_001.doc

⁶ Fox Point Apt. v. Kipples, No. 92-6924 (Or. Dist. Ct. Lackamas County 1992); 50-58 Gainsborough St. Realty Trust v. Haile, No. 98-02279 (Boston Housing Ct. 1998), cited in "Infiltration of Secondhand Smoke into Condominiums, Apartments and other Multi-Unit Dwellings", Susan Schoenmarklin, Tobacco Control Legal Consortium (2004), available at: <http://www.wmitchell.edu/tobaccolaw/resourcesTCLC.html>.

⁷ See "There is No Constitutional Right to Smoke," prepared by the Technical Assistance Legal Center (TALC), available at www.talc.phil.org.