

**LEGAL ISSUES:
ETS EXPOSURE IN
MULTI-UNIT HOUSING**
Indoor Air 2008 - August 21, 2008

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Karen Blumenfeld - Bio

- ▶ Karen Blumenfeld, Esq. has worked in tobacco control for more than 17 years.
- ▶ Her areas of expertise including emerging issues in smokefree air, such as casinos, residential housing, smokefree cars when children are present, outdoor smokefree initiatives.
- ▶ She is currently the Executive Director of New Jersey GASP, a 34 year old nonprofit, and Director of its Policy and Legal Resource Center.

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- ▶ Important: Please read Disclosures and Disclaimers that apply to this presentation (see end slides). This presentation is not to be construed as legal advice.

Overview of Presentation:

- ▶ Public policy for smokefree homes supports legal remedies.
- ▶ Global public policy initiatives for smokefree homes.
- ▶ Legal remedies for ETS exposure in multi-unit residential housing
- ▶ Court decisions
- ▶ Home can be workplaces; protecting workers
- ▶ Laws to make homes smokefree, for children who are wards of the government

Introduction

- ▶ Public policy initiatives that promote smokefree homes, through education and research, **e.g. air monitoring/testing**: result in raising the awareness of:
 - ETS exposure in residential settings, and
 - the legal remedies available to nonsmoking tenants and condominium owners, who are exposed to drifting ETS from their neighbors.

Global public policy support for smokefree homes:

- ▶ UICC meets in late August 2008 in Geneva.
World Cancer Campaign 2007-2012:

- Theme is “Today’s children, tomorrow’s world”
- “*To provide a smokefree environment for children (no smoking in homes)*”

<http://www.worldcancercampaign.org/>

World Health Organization:

- Home is often the highest source of SHS exposure for children.

http://www.who.int/tobacco/resources/publications/wntd/2007/pol_recommendations/en/index.html citing: *Summary of findings of the California EPA, 2005*; U.S Surgeon General's Report, 2006

WHO Policy Recommendation #4

May 2007

- ▶ Use public education to reduce smoking in the home: smokefree legislation increases the likelihood that people will make their homes smokefree. (p. 6)
- ▶ “Policies need to be developed to address this setting, if public health is to be adequately protected.” (p. 21)

http://www.who.int/tobacco/resources/publications/wntd/2007/pol_recommendations/en/index.html

European Environment & Health Committee

- ▶ Children are entitled to grow and live in healthy environments, in the spirit of the Convention on the Rights of the Child of November 1989.
- ▶ Implement the FCTC and to reduce the exposure of children to SHS.

Children's Environment and Health Action Plan for Europe ,
June 2004. European Environment and Health Committee,
WHO Regional Committee for Europe.

<http://www.euro.who.int/document/e83338.pdf>

2007 U.S. EPA Campaign

Smoke-free Homes and Cars

Program:

- ▶ Outreach to 1 million Head Start families:
 - Community events
 - Brochures, placemats, decals
 - Smokefree homes action kit CD-Rom
 - Pledge posters
 - Booklets on local programs promoting smokefree homes

<http://www.epa.gov/smokefree/>

<http://www.epa.gov/iaq/headstart/index.html>

<http://www.epa.gov/smokefree/publications.html>

2006 Canada's Ministry of Health Campaign for smokefree homes/cars:

- ▶ Make your home and car smoke-free: A guide to protecting your family from second-hand smoke

www.hc-sc.gc.ca/hl-vs/pubs/tobac-tabac/second-guide/index_e.html

- ▶ Keep it Outside Campaign

www.keepitoutside.com/keepitoutside.asp

Legal basis for a smokefree home in a multi-unit building:

- Smokefree air laws
- Nuisance claims
- Lease-based causes of action
 - Right to quiet enjoyment of premises
 - Warranty of Habitability
 - Nuisance provision in the lease
- Trespass
- Disability laws
- Building code violations

www.tcsg.org/sfelp/condos.htm

Examples of drifting ETS, that can give rise to a legal cause of action:

- ▶ ETS drifts from one apartment/condominium to another (through floorboards, electrical outlets, shared ventilation/heating units).
- ▶ ETS drifts from the common areas, like a hallway, into a private unit.
- ▶ ETS drifts up from a private patio/balcony or window, into the private unit above.
- ▶ ETS drifts from an outdoor common area, into a private unit.

Smokefree air laws can enforce:

- ▶ New Jersey's (USA) 2006 Smoke-Free Air Act forbids smoking in the common areas of apartment buildings and condominiums.
- ▶ Wafting ETS from a common area is not permissible, and is enforced by the local health departments or the State Department of Health and Senior Services.

Nuisance laws can enforce:

Definitions of a nuisance

- ▶ General definition: “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.”
- ▶ Specific definition: “Nuisance includes tobacco smoke that drifts into a residential unit from another residential unit or a commercial unit.” (Utah state law)

Nuisance claims can be brought by applying specific ETS nuisance laws:

- ▶ Some jurisdictions have a specific ETS nuisance law (country, state or local), that classifies the presence of ETS as a nuisance.
- ▶ Once ETS is detected, a nuisance violation is issued (in legal terms, a “nuisance per se”), and the abatement requirements proceed.
- ▶ Examples:
 - State law in Utah (USA)
 - Local ordinances in the California cities of Dublin and Calabasas

Nuisance claims can be brought by applying general nuisance codes or laws:

- ▶ Countries, states and local governments may have general nuisance laws that do not specifically refer to ETS as a nuisance, but refer to general types of nuisances, wherein ETS could be classified as a nuisance.
- ▶ Problem: Classifying ETS as a nuisance is not automatic, so it leaves open to interpretation by a judge, whether or not the ETS is in fact, a nuisance, and should be abated.

A nuisance claim can be filed against the tenant who smokes, and/or the landlord:

- ▶ against neighboring tenant/condo or coop owner
 - directly causing the problem, by smoking
 - bound by lease or condo/lease agreement not to interfere with another unit
- ▶ against landlord
 - if given notice about the drifting SHS problem
 - if given notice about the harmful effects of SHS (judicial notice)
 - does not stop the problem
- ▶ file in municipal court, and/or state court, e.g. landlord-tenant court, depending on the jurisdiction

General lease or condominium provisions can enforce:

▶ *Breach of Covenant of Quiet Enjoyment*

- Tenant /condo owner shall enjoy the property free from interference or disturbance, e.g. ETS is interfering with/disturbing the enjoyment of the property.
- Implied in the lease from general landlord/tenant law in the jurisdiction.
- Can be written into the lease/contract.

▶ **Breach of Warranty of Habitability**

- Landlord must maintain the premises in a condition that is suitable for human habitation, e.g. ETS wafting into a nonsmokers' apartment renders the nonsmokers' apartment uninhabitable, due to the hazardous of ETS exposure.
- Implied in lease from general landlord/tenant law in the jurisdiction.
- Can be written into the lease/contract.

Trespass laws can enforce:

- ▶ Definition of trespass:
 - ▶ "discharging a foreign polluting matter at a point beyond the boundary of reality."
 - ▶ ETS migrating into the private space of an apartment or condominium, goes beyond the boundaries of acceptance, and may then be considered a trespass.
 - ▶ Needs to be determined by a court of law, so open to interpretation.

Court Decisions Ruled in Favor of Nonsmoker:

- ▶ Merrill vs. Bosser, Broward County, Florida (2005)
 - Palm Aire condo owner in Pompano Beach
 - Court relied on condo agreement to find breach of:
 - trespass - "discharging a foreign polluting matter at a point beyond the boundary of reality."
 - nuisance - frequent, harmful SHS interfered with the use and enjoyment of the home
 - breach of covenant of quiet enjoyment - "obstructed, interfered, and to away the beneficial use of the plaintiff's property"

Massachusetts Housing Court, Boston rules in favor of nonsmoking residents:

Gainsborough State Realty Trust. v. Haile (1998)

- smoke from a nightclub below drifted into unit
- breach of covenant of quiet enjoyment

Harwood Capital Corp. v. Carey

- ▶ court evicted the smoking tenants, for nuisance
 - condo agreement clause: prohibits offensive noise, odor or fumes; or any hazard to health

Ohio (USA) Court Decisions - Mixed

- ▶ Dworkin v. Paley, Ohio Court of Appeals (1994)
 - ruled against landlord, who lived/smoked on first floor, tenant above.
 - breach of covenant of quiet enjoyment, when took away from the tenant "in a substantial degree the beneficial use of the leasehold."
- ▶ Zangrando v. Kuder, Summit County Court, Ohio
 - Next door neighbor smoked on a shared condo porch
 - Jury decided against the plaintiff's nuisance claim

Disability laws can enforce:

- ▶ State and federal disability laws (in USA) ensure that people with disabilities have equal access to and use of their homes.
- ▶ Landlord may be required to make reasonable modifications to accommodate tenant's disability.
- ▶ “Breathing disability” is defined under the Americans With Disabilities Act as: “A mental or physical condition that substantially limits a major life activity such as breathing, walking, or performing manual tasks.”

Examples of a Reasonable Accommodation under the ADA:

▶ Examples:

- Ask landlord to prohibit smoking in common areas, if that is the source of the smoke
- Ask to move to a vacant unit in the complex, away from drifting SHS
- Ask landlord to prohibit smoking in all apartments / balconies surrounding the unit
- Ask to “break” the lease without incurring any financial penalties, so tenant can move

Building code violations can enforce:

▶ Examples:

- Fire codes may require certain thickness of walls, which can prevent ETS seepage.
- Building codes may have certain types of construction requirements that can result in eliminating ETS seepage.

Homes are also workplaces, and employees need protection from ETS exposure:

- ▶ Nursing homes*
- ▶ Residential health care facilities*
- ▶ College dormitories (resident directors)*
- ▶ Visiting nurses to private homes
- ▶ Home health aides
- ▶ Contractors

*New Jersey state law requires all to be 100% smokefree. Other jurisdictions have similar laws.

Example of no smoking during employee visits to home

- ▶ Liverpool, England – city council
 - Residents to not smoke ½ hour before a visit from council staff, social workers, enforcement officers and planning officers.
 - Residents to open windows before visit.
 - Residents to not smoke during home visit.
 - Applies to council houses and private homes.

Special interest to protect children who are wards of the government

- ▶ Resource family children, foster children
 - Legal/Ethical/Moral – government obligation to ensure a child is in a safe and healthy home environment.
 - No effect on applications for foster parents.
 - Small children cannot communicate, or fearful to talk.
 - Consistent with what children are taught in school, that SHS is harmful.

Jurisdictions requiring smokefree homes/cars for foster children

- Precedent set by child custody determinations ruling in favor of nonsmoking parent/guardian.
- ▶ Jurisdictions that require smokefree resource family/foster homes and cars:
 - 8 States in the U.S. and 3 California counties require smokefree foster homes.
 - 6 States in the U.S. ban smoking in cars while transporting foster children.

Special Thanks to:

- ▶ NJ GASP
- ▶ Jim Bergman, Smokefree Environments Law Project
- ▶ Americans for Nonsmokers' Rights
- ▶ Dr. Stan Glantz, UCSF
- ▶ Dr. James Repace, PhD, Repace Associates
- ▶ Tobacco.org
- ▶ Dr. Daniel J. Blumenfeld, MD

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