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FEATURE

Secondhand Smoke Now a Nuisance

by David Wasserman

In September 2005, the California Environmental Protection Agency (CEPA) publicly confirmed a report by the California Air Resources Board that links tobacco smoke to a variety of health effects ranging from asthma to Sudden Infant Death Syndrome (SIDS) to increased incidences of breast cancer in nonsmoking women.

The report cites new evidence, according to the Office of Environmental Health Hazard Assessment, confirming that secondhand smoke is likely to cause serious health problems for nonsmokers. "Secondhand smoke is more than just an annoyance. The scientific record is increasingly clear that smokers are putting their families and friends at risk if they regularly smoke in their presence," said Joan Denton, director of OEHHA.

According to CEPA, in California each year tobacco smoke is responsible for the release of 40 tons of nicotine, 365 tons of breathable particulate matter and 1,907 tons of carbon monoxide. What do all of these findings mean to landlords?

California law requires landlords to keep their tenants safe from foreseeable harms. In recent years, the courts have awarded tenants damages for personal injuries that occur on the property, as well as for criminal acts committed in or around the apartment building. For example, the family of a woman murdered by an ex-boyfriend who gained access to her unit by way of a broken door successfully sued the apartment complex. In another case, parents of a child killed by oncoming traffic sued the landlord for maintaining an unsafe driveway. Last year, tenants prevailed in a claim against management for injuries caused by a stray bullet from adjacent gang activity, arguing that the absence of exterior lighting encouraged crime.

Responsible owners must now take heightened measures to ensure that their properties are safe, clean, well lighted and free from known dangers. But should smoking be in the same league as gates, common area lighting and good locking devices? In light of current scientific findings—probably.

Traditionally, a tenant was allowed to smoke in the unit and in common areas. Yet times have changed, and everyone now accepts the premise that smoking is hazardous to the smoker's health as well as to those breathing in the secondhand smoke.

Not surprisingly, a lease may prohibit smoking in the unit and/or in the building. Such a prohibition is lawful. In rent-controlled jurisdictions, a landlord may not be able to unilaterally impose a prohibition against smoking inside a unit where the existing rental agreement contains no such rule. In addition, when a "service" such as smoking is withdrawn, the tenant could petition the local rent board for a rent reduction.

However, given the evidence in support of secondhand smoke's dangers to other residents, landlords may at least want to prohibit smoking in all common areas. Such a prohibition serves the health and safety interests of the building residents and would most likely comport with the local rent regulations restricting the imposition of new lease rules. Landlords should also consider prohibiting in-unit smoking for all new tenancies; leases such as the PPMA Residential Tenancy Agreement contain such a covenant.

What happens when a tenant, who is allowed to smoke in the unit, causes secondhand smoke to permeate common areas or, more alarmingly, an adjacent unit? Some local landlord attorneys have successfully used such an intrusion to terminate the tenancy if the offending tenant refuses to stop puffing. Under state and local law, a tenancy may be terminated if the tenant commits a "nuisance." A nuisance is defined as an act injurious to health, indecent or offensive to the senses, or that which interferes with the comfortable enjoyment of property by others. Given the weight of the evidence supporting the harmful effect of secondhand smoke, courts should have no problem accepting the notion that secondhand smoke is a nuisance, and therefore allow evictions of tenants who cause their tobacco smoke to travel.

Landlords and their attorneys can use the CEPA report, and the huge amount of scientific research that backs it up, as testament to the offensive nature of secondhand smoke. So even if a lease allows smoking inside the unit, if the smoke trespasses into another's unit, or the common areas, the smoking tenant is probably liable for committing a nuisance. Consequently, the landlord could face problems for failure to abate the nuisance if another tenant is injured as a result of the secondhand smoke. Imagine the claim a pregnant tenant could make for being exposed to these toxins.

Another problem for owners arises from tenant exposure to secondhand smoke in buildings that contain ground floor restaurants and bars where patrons frequently light up, either inside the premises, or more commonly on the sidewalk. Management may not be able to stop the offending activity in these circumstances. According to OEHHA, even a small amount of secondhand smoke increases the chances of premature and low birth-weight babies, SIDS, bronchitis, pneumonia, and the induction and exacerbation of asthma, as well as middle ear infections in children. Surely the list of harms to babies and children will be expanded in the near future. Given these findings, landlords may want to disclose, in writing, the existence of tobacco toxins to prospective tenants so that future and current parents can appreciate the health risk of

renting above the local saloon. Such forthrightness may keep the unit on the market longer, but it will likely save the owner from an expensive lawsuit.

In addition, bounty-hunter law firms have recently targeted landlords for Proposition 65 violations. Prop. 65 was an initiative measure passed in November 1986 as the "Safe Drinking Water and Toxic Enforcement Act," and business operators with 10 or more employees are required to issue warnings about potential exposure to chemicals known by the State of California to cause cancer, birth defects or other reproductive harms. Tobacco smoke is prominent on the list of known harms.

Apartment owners have been sued in increasing numbers for not adequately warning their tenants about potential exposure to harmful substances, such as tobacco smoke. CAA recently sought to implement a global settlement with a group of Prop. 65 plaintiffs, hoping to establish warning guidelines to protect all apartment owners from enforcement action. This settlement was recently rebuffed by California's Court of Appeal, in a case entitled Consumer Defense Group v. Rental Housing Industry Members, after the attorney general filed a challenge. In light of the legal uncertainty created by this decision, and because secondhand smoke is a Prop. 65 substance, all owners, especially those who have smokers in or near their buildings, should post the Prop. 65 signs in building common areas, as well as distribute the Prop. 65 informational brochure to residents. Both the sign and brochure are available for sale at SFAA's office.

So, in conclusion, be aware of the dangers posed by secondhand smoke. Consider eliminating smoking in your building, both in the common areas and inside each unit, and consult with a qualified attorney to determine how to quash this danger before a claim can be made against you.

The opinions expressed in this article are those of the author and do not necessarily reflect the viewpoint of SFAA or the San Francisco Apartment Magazine. David Wasserman is the vice president of the SFAA and serves on the Government Affairs Committee of the California Apartment Association. He is also a former member of the Code Advisory Committee for the SF Department of Building Inspection. He can be reached at Wasserman-Stern Law Offices, (415) 567-9600. Copyright © 2006 by the San Francisco Apartment Magazine. All rights reserved.



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