

Legal Cases on Secondhand Smoke For Property Management

The following information summarizes actual lawsuits filed by residents in various apartment dwellings throughout the country. The data presented can provide property management companies, managers, and interested individuals with support for making a safe living environment.

See Utah Laws 1997, chapter 230; Utah Code Annotated, 1953, sec. 78-38-.5; Groskind, N., "Q&A: Smoke Distresses Condo Owner," Boston Globe, April 26, 1998, F4; White, E., "Today, Where There's Smoke, There's a Neighbor's Lawsuit," Wall Street Journal, July 13, 1998, B1, B6; Hansen, M., "Smoke Gets in Your High-Rise," American Bar Association Journal, November 1998, 24; Tansey, B., "In Pursuit of Smoke-Free Living Space; Apartment Dwellers Fear Health Risk from Neighbors' Cigarettes," San Francisco Chronicle, June 28, 1999, A1; Walsh, J., "Breath of Fresh Air," Multifamily Executive, January 2000, 26, 86; Kline, R., "Smoke Knows No Boundaries: Legal Strategies for Environmental Tobacco Smoke Incursions Into the Home Within Multi-Unit Dwellings," Tobacco Control, June 2000, 201-205; Silverman, F.,

"A Kick in the Butts: Why Condos, Rentals May Not Let You Light 'Em Up Even in Your Unit," Hartford Courant, September 7, 2003, J5; and Martin, A., "On Tobacco Road, It's a Harder Sell," New York Times, February 8, 2004.

Lipsman v. McPherson, 6.2 TPLR 2.345, 19 M.L.W. 1605 No. 90-1918, (Middlesex, MA, Superior Court 1991). A nonsmoking tenant sued a smoking tenant of an apartment in the same building, alleging nuisance and negligence because the smoke from the defendant's apartment regularly seeps into plaintiff's apartment, causing him annoyance, discomfort and increasing his risk of physical harm due to exposure to secondhand tobacco smoke and of fire. Defendant filed a motion to dismiss; on September 11, 1990, the motion was allowed as to negligence and risk of fire but denied as to private nuisance (Botsford, J.). A jury-waived trial took place from March 11 through 13, 1991. The court (Lauriat, J.) entered judgment for the defendant, ruling that the "annoyance" of smoke from 3 to 6 cigarettes per day "is not substantial and would not affect an ordinary person" and that the "plaintiff may be particularly sensitive to smoke, but an injury to one who has specially sensitive characteristics does not constitute a nuisance." See "He May Have Lost Out This Time, But She Better Not Burn the Toast," Wall Street Journal, June 14, 1991, B1. Shortly after this decision, the Defendant moved out.

Donath v. Dadah, et al., No. 91-CV179 (Worcester Cty., MA, Housing Court Dept. 1991). On April 23, 1991, a woman sued her landlord for nuisance, breach of warranty of habitability, breach of the covenant of quiet enjoyment, negligence, battery and intentional infliction of emotional distress due to exposure to secondhand tobacco smoke in her home coming from the second floor (where the defendants live) of the building in which she lives. Plaintiff alleges that she has suffered asthma attacks, labored breathing, wheezing, prolonged coughing bouts, clogged sinuses and frequent vomiting due to the exposure to secondhand smoke in her home. Plaintiff moved out of the apartment shortly after filing the lawsuit. The case was settled for an undisclosed sum of money in December 1992.

Fox Point Apt. v. Kippes, No. 92-6924, (Lackamas County (OR) Dist. Ct. 1992). A landlord moved a known smoker into the apartment below a nonsmoking tenant who began to suffer nausea, swollen membranes and respiratory problems as the cigarette smoke entered her

apartment. The tenant sued, alleging that the landlord had breached its statutory duty to keep the premises habitable and the covenant of peaceful enjoyment which the common law implies in every rental agreement. The six-person jury unanimously found a breach of habitability, reduced rent by 50% and awarded the tenant an amount of money to cover her doctor's bill. The landlord moved for the judge to enter a judgment notwithstanding the verdict, claiming that protection from cigarette smoke is outside the intended scope of the law.

Contract Management Services, Inc., et al. v. Kuykendahl Joint, Inc. and Kamen Management, Inc., Dist. Ct. Harris County (TX), 61st Jud. Dist., No. 93-006228 (1993). Defendants, companies that lease and manage office space, were sued by a company (known as CMSI) and the manager of CMSI's Harris County office, Kathleen Thomas, for breaching a lease in that it did not prevent smoking by other tenants. The smoke produced by those tenants "was continually coming into CMSI's space and making ill Kathleen Thomas and other employees of CMSI." The plaintiffs allege that they have expended about \$3000 in an attempt to prevent the smoke from affecting their offices and have "suffered damages including for lost profits from lost contracts, lost profits from continuing contracts, lost profits from contracts Kathleen Thomas would have obtained from CMSI, for lost employee working time, and for expenses of moving the office in September 1994." The case was scheduled for trial on April 24, 1995.

Dworkin v. Paley, 638 N.E.2d 636, 93 Ohio App. 3d 383, (Ohio App. 8 Dist. 1994). A nonsmoking tenant, Dworkin, entered into a one-year lease with the Paley to reside in a two-family dwelling; the lease was later renewed for an additional one-year term. During the second year, the Paley, a smoker, moved into the dwelling unit below Dworkin's. Two weeks later, Dworkin wrote to Paley that her smoking was annoying him and causing physical discomfort, noting that the smoke came through the common heating and cooling systems shared by the two units. Within one month, Dworkin vacated the premises; eight months later, he brought an action to terminate the lease and recover his security deposit from Paley. The suit, which alleged that Paley had breached the covenant of quiet enjoyment and the statutory duties imposed on landlords (including doing "whatever is reasonably necessary to put and keep the premises in a fit and habitable condition") was dismissed on a motion for summary judgment. The Court of Appeals, Cuyahoga County, reversed the dismissal, concluding that a review of the affidavits "reveals the existence of general issues of material fact concerning the amount of smoke or noxious odors being transmitted into appellant's rental unit." The case was thus remanded for further proceedings.

Pentony v. Conrad et al., NJ Super. Ct. (1994). The plaintiffs sought to enjoin their downstairs neighbors from smoking between 4:00 P.M. and 9:00 A.M. (when the Pentonys would be home from work) in their apartment because the secondhand smoke seeped throughout the Pentony's apartment. After a two-hour hearing on April 28, 1994, a judge ordered the apartment complex directors to try to resolve the dispute out of court. See "2 Smokers Are Sued by Neighbors in Apartment Above Them," *New York Times*, April 28, 1994, B6; "US Couple Sue Downstairs Neighbours for Smoking," *The Times*, April 29, 1994; Gold, J., "Judge Rejects Bid to Stop Neighbors Smoking," *The Record* (Bergen County, NJ) S06; Hanley, R., "Judge Turns Down Couple in Quest of Anti-Smoking Order Against Their Neighbors," *New York Times*, April 29, 1994, B5; "Couple Whose Neighbors Smoke Sent to Co-op Board," *Orlando Sentinel*, April 30, 1994, A18; "Judge: Neighbors' Smoking Dispute Must be Resolved by Board," *The Legal Intelligencer*, May 2, 1994, 8; "Complex Orders Repairs in Fight Over Smoking," *The Record* (Bergen County, NJ), May 13, 1994, A27; "Truce Is Reached in a Co-op Clash Over Smoking," May 13, 1994, B4; Boronson, W., "Love Thy Neighbor: Different Ways to Cope with the Nuisance Next Door," *The Record* (Bergen County, NJ), May 15, 1994, R1; and "Upstairs, Up in Smoke," *National Law Journal*, May 23, 1994, A23. The neighbors settled their dispute in 1995;

the terms of the settlement remain confidential. See "Neighbors Settle Smoking Dispute," *The Record* (Bergen County, NJ), March 2, 1995, C12.

Snow v. Gilbert, Middlesex Cty. (MA) Superior Ct., Docket No. MICV94-07373 (1994). A woman suffering from pulmonary fibrosis and CREST, a form of scleroderma, won a temporary injunction against her landlord to prevent him from renting the units below hers to smokers, at least until she succeeds in her efforts to find another apartment elsewhere. Despite an earlier agreement not to rent the units to smokers, the landlord, who was about to sell the building, informed his tenants that they could smoke in their apartments. The smoke from those units seeped into the plaintiff's apartment, causing a severe reaction, since she suffers from multiple chemical sensitivity.

Rathbun v. Will County Public Building Commission, No. 95 MR 02782 (Cir. Ct., 12th Jud. Cir., Will County, IL 1995). An attorney filed suit alleging that smoking in a cafeteria/coffee shop located within the county courthouse is a public nuisance. The shop has been designated as the only smoking area in the four-story building. See Merrifield, B., and Presecky, W., "Lawyer Aims to Clear Courthouse Air," *Chicago Tribune*, June 1, 1995, sec. Metro Southwest, p. 2.

Platt v. Stella Landi, et al., No. BC 152452, Calif. Super. Ct., Los Angeles County, (1996). A nonsmoking owner of a condominium unit sued his downstairs neighbor and the condo association because of the cigarette smoke that drifts through his open windows from the unit below. He sought to prohibit his neighbors from smoking anywhere in the development or from smoking in their condominium, except with the windows closed and under certain conditions. Platt also wanted the landlords to refrain from renting the neighboring condominiums to smokers. See Liss, R., "Non-Smoker Sues Neighbors," *Los Angeles Daily Journal*, June 28, 1996; and Simon, S., "Smoke and Ire: Man's Suit Over Neighbors' Cigarettes Could Open New Front in War on Tobacco," *Los Angeles Times*, July 5, 1996, B2.

The trial court dismissed Platt's causes of action at the pleading stage. Platt appealed. Platt has sold his unit and no longer lives in the building. The Court of Appeal, Second Appellate District, Division One ruled on August 17, 1999, that since both Platt and the Landis have moved from the building, the case is moot. Also, the court did not overturn the trial court's ruling awarding attorneys' fees to the defendants, pursuant to language in the Declarations of Covenants, Conditions and Restrictions.

Layon et al. v. Jolley, et al., Case No. NS004483, Superior Ct. of Calif., Los Angeles County, (1996). Plaintiffs' brought an action seeking an injunction prohibiting harassment. According to the complaint, plaintiffs' condominium sits above a garage where the defendants have been smoking marijuana, cigarettes and cigars. The exposure to ETS has forced the plaintiffs "to evacuate our own home for hours every time the defendant goes in his garage to smoke." The court issued a restraining order, specifying, "Defendant must stay away from his garage while smoking." See Russell, K., "Court Clears the Air," *Press-Telegram*, April 26, 1996.

In re: U.S. Department of Housing and Urban Development (HUD) and Kirk and Guilford Management Corp. and Park Towers Apartments, HUD Case No. 05-97-0010-8, 504 Case No. 05-97-11-0005-370 (1998). Two complaints were filed in September 1996 by Nancy V. Kirk under Section 504 of the Rehabilitation Act of 1973, as amended, and the Fair Housing Act of 1968, as amended against Guilford Management Corp. and Park Tower Apartments which are located in Loves Park, Illinois. Ms. Kirk has a respiratory condition aggravated by her neighbors' secondhand tobacco smoke entering her apartment at Park Tower, which is a HUD-subsidized high-rise for the elderly and the disabled. A conciliation agreement was entered into by the

parties in late 1997 and approved by HUD in January 1998. The terms of the agreement provide that Park Tower will go smoke-free, beginning with new tenants moving in on or after March 15, 1998. [The no-smoking policy will not affect current tenants.] Park Tower will not preclude smokers from moving in as long as they agree to comply with the no-smoking policy. Violators of the no-smoking policy will receive written warnings; after the issuance of three warning letters to a violator within a one-month period, eviction proceedings shall begin. Since the transition to a smoke-free building will take many years, Park Tower agrees to inquire of several tenants currently residing in an area of the building having fewer smokers as to their willingness to be relocated to another apartment, thereby vacating an apartment to allow Kirk to move into a less smoke-filled area.

50-58 Gainsborough St. Realty Trust v. Haile, et al., 13.4 TPLR 2.302, No. 98-02279, Boston Housing Court (1998). A nonsmoker who lives with her husband in an apartment directly above a smoky bar was sued by her landlord for failure to pay rent. The tenant had withheld the rent, alleging that the amounts of smoke seeping into her apartment deprived her of the quiet enjoyment of that apartment. A Housing Court judge (Daher, J.) ruled that the amount of smoke from the bar below had made the apartment "unfit for smokers and nonsmokers alike." The judge further ruled that "the evidence does demonstrate to the Court the tenants' right to quiet enjoyment was interfered with because of the second-hand smoke that was emanating from the nightclub below." See Estes, A., "Tenant Wins Suit over Smoky Home," Boston Herald, June 10, 1998, 1, 4; and "Judge: Landlord Must Stop Secondhand Smoke," The Recorder (Greenfield, MA), June 11, 1998, 9.

Weil, Gotshal & Manges LLP v. Longstreet Associates, L.P., et al., 13.4 TPLR 3.188, Supreme Court of the State of New York (1998). A law firm in a large New York office building filed suit against the landlord and a tenant located one floor below its offices. The law firm alleges that the secondhand smoke emanating from the floor below has caused some of the firm's partners, associates and employees "illness, discomfort, irritation and endangerment to their health and safety" and prevented some of their personnel from being able to use or occupy their offices. The firm alleges that the landlord breached its contract and constructively evicted the plaintiff and further alleges that both defendants permitted a nuisance, engaged in trespass and were negligent. See Gregorian, D., "Law Firm Smokin' Mad at Neighbors," New York Post, June 23, 1998 22; and Arena, S., "Lawsuit Raises Stink Over Cigar Smoking," Daily News (New York), June 23, 1998, 17. The law firm later dropped the suit because the owner and the tenant agreed to remedy the smoke problem. See "Law Firms Drops Smoking Lawsuit," Crain's New York Business, September 14, 1998, 1.

Gottlieb, et al., v. Marquardt, et al., 99-CV-100, Waukesha (WI) County Circuit Court (1999). A nonsmoking couple sued their former landlord, alleging that large amounts of cigarette smoke poured into their condo unit for many months. They also allege that faulty construction of their condo was a contributing factor to the smoke seepage. See "Pair Sues Over Condo Smoke; Defendants Deny Their Allegations," Capital Times (Madison, WI), January 21, 1999, 7A.

Babbitt v. DiPuzo, et al., Superior Court of California, County of Riverside Desert Judicial District, Indio Branch, No. 029645. According to DiPuzo's cross-complaint, Babbitt "routinely and regularly smokes cigars on the exterior of the patio" of his condo and that "cigar smoke is allowed to waft into the windows of the DiPuzo Condo." In May 2002, Babbitt claimed that DiPuzo had assaulted him. A temporary restraining order against DiPuzo was dissolved by the court after a hearing. DiPuzo claims that he has suffered a diminution of value of his condo in excess of \$50,000 as a result of the presence of the cigar smoke. See Carmony, D., "Home

Smoker Facing Lawsuit, "Press-Enterprise (Riverside, CA), February 19, 2003; and Mahr, C., "Cigar Smoke Suit Moves Toward Trial," The Desert Sun (Palm Springs, CA), March 3, 2003.

McCormick v. Moran, 182 Misc. 2d 568, 699N.Y.S. 2d 273, 1999 N.Y. Misc. LEXIS 505, Small Claims #5176, City Court of New York, Watertown (1999). Plaintiff tenant entered into a written lease with the defendant landlord. Upon the end of the lease, the plaintiff vacated the premises and sued for a refund of the security deposit. The defendant filed a counterclaim, seeking costs in connection with extensive cleaning due to the smoke residue left by McCormick's heavy smoking. The Court found that "the plaintiff's conduct of excessive smoking while in the house caused the tobacco smoke residue to collect on various surfaces of the house creating an offensive odor and a potential health risk that may arise to others who may use the premises. "The defendant was awarded \$455.64 for the cost to clean the house of tobacco smoke residue, with the plaintiff entitled to an offset for the \$375 security deposit.

Donnelly v. Cohasset Housing Authority, Norfolk County (MA) Civil Action No. 01-00933, 16 Mass. L. Rptr. 318, 2003 WL 21246199 (2003). A nonsmoking tenant filed suit, claiming that the defendant housing authority committed negligence and breach of the covenant of quiet enjoyment by not responding to her complaints regarding infiltration of her apartment of tobacco smoke from a downstairs apartment. A Superior Court judge awarded the defendant summary judgment on the basis of the plaintiff's failure to prove the presence of smoke in her apartment and any defect for which the defendant should be held liable. "The evidence of smoke in the plaintiff's apartment is, in essence, that the plaintiff and others smelled smoke there, and that she experienced symptoms that she attributed to smoke. Notably absent from the record is any evidence that anyone has ever tested the air in the plaintiff's apartment for the presence of cigarette smoke. Evidence is similarly lacking of the existence of any defect, of which the Housing Authority had notice, resulting in smoke infiltration," the Court ruled.

On October 1, 2004, the Appeals Court of Massachusetts, at 62 Mass. App. Ct. 1104, 815 N.E.2d 1103, 2004 Mass. App. LEXIS 1114, reversed summary judgment on counts I, II and III of the complaint and affirmed summary judgment of Count IV.

Heck v. Whitehurst Co., 200 Ohio 4366; 2004 Ohio App. LEXIS 3972. A tenant claimed that excessive cigarette smoke had been entering his apartment and that the landlord had not made the repairs necessary to keep the apartment in a fit and habitable condition. Based on a magistrate's recommendation, the trial court ordered the landlord to correct the problem within 21 days, granted the tenant a 50 percent rent abatement and ordered the landlord to pay the tenant \$639. The landlord appealed. The Court of Appeals of Ohio, Sixth Appellate District, affirmed the trial court's judgment, noting that "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections."

Zangrando v. Kuder, (Summit County (OH) Court of Common Pleas, 2004). Plaintiff and his wife owned a condominium that is part of a 28-unit condo association. In May 2002, the defendant and her husband rented the unit next to the plaintiff's unit. Several times per day, the defendant smoked on a small, shared front porch that joins her unit with the plaintiff's unit. The plaintiff often asked the defendant to move about 30 feet away to smoke; the defendant refused. The plaintiff then wrote letters to the condo Association's trustees to try to resolve the problem; the officials refused. In April 2003, the plaintiff hired an attorney to try to negotiate a resolution to the problem. After that effort failed, the plaintiff filed a lawsuit in January 2004, seeking \$25,000 in compensatory damages and \$100,000 in punitive damages and an order that the defendant not be allowed to smoke on the porch. In July 2004, the defendant and her family

moved to another residence. In September 2004, a jury rendered a verdict for the defendant. See Farkas, K., "Man Sues Smoker in Next Condo; She Will Puff in Back Yard Till Trial," Plain Dealer (Cleveland, OH), January 29, 2004, A1, Farkas, K., "Assault-by-Smoke Trial Fires Up Today," Plain Dealer (Cleveland, OH), June 28, 2004, Farkas, K., "Secondhand-Smoke Suit Fumes in Court," Plain Dealer (Cleveland, OH), September 20, 2004, Chancellor, C., "Smoking Dispute Goes Before Jury," Beacon Journal (Akron, OH), September 21, 2004, Miller, M., "Smoker Defends Actions," Beacon Journal (Akron, OH), September 22, 2004, Trexler, P., "Smoking Opponent Criticized As Whiner," Beacon Journal (Akron, OH), September 23, 2004, Trexler, P., "Neighbor Kept Track of Smoking Incidents," Beacon Journal (Akron, OH), September 24, 2004, Trexler, P., "Man Illustrates Case against Ex-Neighbor," Beacon Journal (Akron, OH), September 25, 2004, Farkas, K., "Nonsmoking Jury Sides with Smoker in Lawsuit," Plain Dealer (Cleveland, OH), September 28, 2004, Trexler, P., "Smoker Cleared in Civil Lawsuit," Beacon Journal (Akron, OH), September 28, 2004, A-1, Schunk, A., Stow (OH) Sentry, October 3, 2004, 1.

The Court of Appeals of Ohio, Ninth Appellate District, Summit County, at 2006 Ohio 1549, 2006 Ohio App. LEXIS 1442, affirmed the judgment, ruling that plaintiff had received a fair trial and that the trial court's jury instructions were not in error.

Paul, CPA, PC, v. 370 Lex, L.L.C., et al, 794 N.Y.S. 2d 869, 2005 N.Y. Misc. LEXIS 477 (Sup. Ct. NY, NY Cty. 2005). The Plaintiff, a professional corporation having an office at 370 Lexington Avenue, sued pursuant to a lease. Plaintiff is seeking damages for breach of the covenant of quiet enjoyment, violation of the New York City Smoke-Free Air act, and nuisance. Plaintiff alleges that smoke from an adjoining suite seeped into its office, make its employees suffer from the ill effects of secondhand smoke and making certain rooms in the plaintiff's suite totally unusable. After receiving complaints about the smoke, defendant Murray Hill, which is the managing agent for the building, assured Mr. Paul that the problem would be resolved. Defendant Anderson continued to smoke in his office. Plaintiff eventually moved to another building and is seeking damages for its moving costs and for its inability to use the rooms in plaintiff's suite. Defendants moved for summary judgment on all claims. The Supreme Court of New York, New York County, ruled that "plaintiff has demonstrated that there are issues of fact for trial on the cause of action for breach of the covenant of quiet enjoyment," and that the New York City Smoke-Free Act does not provide for an individual cause of action. The Court also ruled that the plaintiff has a nuisance cause of action against the smoker, Anderson, but not against the owner (370 Lex, L.L.C.) or the managing agent. See Lin, A., "Lawyer's Lawsuit Against Smoking Neighbor Proceeds," New York Law Journal, March 7, 2005.

Harwood Capital Corp. v. Carey, (Boston Housing Court Docket No.05-SP-00187, 2005). A landlord sought to evict two tenants after receiving complaints from abutting residents about the strong smell of smoke emanating from their apartment. The tenants' lease did not mention smoking. The tenants worked out of the unit; they combined to smoke about 40 to 60 cigarettes per day. After a three-day trial, a jury returned a verdict that the Carey had breached his lease under a clause in the standard Greater Boston Real Estate Board lease prohibiting tenants from creating a nuisance or engaging in activity that substantially interfered in the rights of other building occupants. The jury also ruled that, therefore, the landlord was entitled to possession of the unit. See Scally, J., "Jury Finds Tenants Can Be Evicted for Smoking in Unit," Massachusetts Lawyers Weekly, June 13, 2005, 1, 31, Ranalli, R. and Saltzman, J., "Jury Finds Heavy Smoking To Be Grounds for Eviction," Boston Globe, June 16, 2005, B1, B11, Blumberg, D., "Even Home Isn't Haven for Smokers," Christian Science Monitor, June 22, 2005, 17, Shaffer, S., "Lighting Up in Your Condo? Think Again," National Law Journal, July 4, 2005, 6 and White, N., "Tenants Evicted for Smoking," Lawyers Weekly USA, July 4, 2005, 1.

Merrill v. Bosser, (County Court of the 17th Judicial Circuit, Broward County, FL 2005). The Plaintiff and her family purchased a condominium. The defendant, who smokes about one pack of cigarettes per day, was living in a unit one floor up and one unit over from the Plaintiff. The smoke from that unit was not a problem for the Plaintiff and her family until the Defendant acquired a tenant who smoked heavily. After that tenant moved in, the health of the Plaintiff and her family deteriorated; on one occasion, the Plaintiff's smoke detector went off while on several other occasions, they had to move out. After numerous complaints, the association advised the defendant that the tenant had to move out. After the tenant left, the smoke problem stopped. The Plaintiff sued seeking damages under the theories of trespass, common law nuisance and breach of covenant. The court found the Defendant liable, ruling that the "unique facts" of this case indicate that the amount of smoke gave rise to a "disturbance of possession." The facts of this case "demonstrate an interference with property on numerous occasions that goes beyond mere inconvenience or customary conduct. The court, which awarded the Plaintiff \$1000 in damages and \$275 in costs, concluded that the case is not about secondhand smoke but, rather, "about excessive secondhand smoke."

Duntley v. Barr, 2005 N.Y. Misc. LEXIS 2041, 20.6 TPLR 2.873, No. 2005/00131 SC, N.Y. Sup., Syracuse Co.). A nonsmoking apartment resident sought to recover \$5000 in damages for harm to his apartment allegedly caused by Barr's smoking. The court ruled that the Legislature specifically exempted private residences from the Public Health Law that regulates smoking in certain public areas.

Birke v. Oakwood Worldwide, et al., (Calif. Superior Court, Los Angeles County, Northwest District, Docket No. LC075094, 2006). A father sued on behalf of his 5-year-old asthmatic daughter, alleging in a "Complaint for Public Nuisance," that "Defendants have allowed, encouraged and approved a toxic, noxious, hazardous, offensive - and in fact carcinogenic - condition to be present in all of the outdoor common areas of the [apartment] complex, including enclosed areas." See "Asthmatic's Father Sues Over Secondhand Smoke, Los Angeles Times, June 30, 2006, B4. On December 5, 2006, a judge dismissed the lawsuit, ruling that the girl did not have the legal standing needed for the lawsuit to proceed. The judge also gave Sohigian two months to file an amended complaint or appeal the ruling.

Poyck v. Bryant, et al., 2006 N.Y. Misc. LEXIS 2278, 2006 N.Y. Slip Op. 26343. The Bryants had lived in condominium unit 5-D for three years when new neighbors moved in next door. The new neighbors constantly smoked in their unit 5-C and in the common fifth floor hallway. The smoke penetrated the Bryants' unit. The Bryants complained to Poyck, who was the owner and lessor of the condominium. The landlord took no action to curtail the neighbors' smoking. The Bryants decided to vacate the premises due to the incessant secondhand smoke entering their unit. The landlord then sued the tenants for unpaid rent; the Bryants counterclaimed for constructive eviction due to the secondhand smoke. The landlord moved to strike the Bryants' affirmative defenses and counterclaims. The Civil Court of the City of New York denied the landlord's motion to strike and/or dismiss, ruling that "in the context of implied habitability, secondhand smoke is just as insidious and invasive as the more common conditions such as noxious odors, smoke odors, chemical fumes, excessive noise and water leaks and extreme dust penetration." See Romano, J., "New Impetus to Ban Secondhand Smoke," New York Times, October 1, 2006.

Christiansen, et al., v. Heritage Hills #1 Condominium Association, No. 06CV1256, Jefferson County (CO) District Court. The Plaintiffs, who are smokers, brought an action seeking declaratory and injunctive relief, specifically that the court find invalid an amendment of the Association's declaration banning smoking within the boundaries of the Project. The property is

an older building subdivided into four multilevel condominium units with split entries. The Association's Declaration of Covenants, Conditions and Restriction states that "[n]o nuisance shall be allowed on the Property, nor shall any use or practice be allowed which is a source of annoyance to residents or which interferes with the peaceful possession and proper use of the Property by its resident."

Ms. Christensen received complaints about her smoking in her unit and did not agree with a proposed compromise of her having to smoke outside the building. A nonsmoking neighbor spent thousands of dollars trying to seal her unit to keep the smoke out of her unit. After a heated meeting of the Association, three of four owners passed an amendment to ban smoking. After a two-day trial, the Court found for the Defendant, ruling that the "smoking ban was reasonably investigated, drafted and passed by three out of four owners after years of trying to address the problem by other means. There can be no finding that the passage was arbitrary or capricious or done in bad faith." See Schrader, A., "Couple's Smoking at Home Snuffed," Denver Post, November 16, 2006.

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