

Potential Legal Claims for Residents Suffering from Tobacco Smoke Drift

Potential Claims Against the Association

Disability Claims under the Federal Fair Housing Act (“FHA”). The FHA prohibits discrimination in housing against people with disabilities (including those living in condominium complexes with more than four units). However, in order to qualify as “disabled” under the FHA a nonsmoker exposed to secondhand smoke must prove a severe and long-term hypersensitivity to cigarette smoke that substantially limits one or more major life activities.¹ Therefore, mild reactions to secondhand smoke like itchy or watery eyes, coughing, etc. would not constitute being disabled under the FHA. Note that the association does have an opportunity to provide a reasonable accommodation. There is a possibility that such an accommodation could be, for example, making the premises smoke-free.²

Relief under the Americans with Disabilities Act (“ADA”). Anyone deemed disabled under the FHA would be entitled to a reasonable accommodation in the public areas of a housing complex. However, as a preliminary matter, in order to qualify under the ADA at least part of the housing complex must be open to the general public (e.g., if the complex had a pool and sold memberships to the general public it would qualify). Like a claim under the FHA, the association is entitled to make a reasonable accommodation. If no such accommodation is made, then an aggrieved party could file a complaint with the Department of Justice. Courts have noted that a ban on smoking in a public place could be a reasonable accommodation.

Breach of Contract – A resident suffering from secondhand smoke drift could bring a claim against the housing association for breach of contract if the smoking violates a provision in the association’s governing documents. As an initial step, a formal complaint should be made to the association’s governing body in accordance with the association’s governing documents. The governing body must then determine what action, if any, is reasonable to rectify the situation. Generally, an association’s action or inaction to enforce a policy is protected by the business judgment rule absent fraud or bad faith. However, while a housing association’s governing body does have the discretion to enforce the association’s policies as it sees fit, an outright refusal to take action to enforce a smoke-free policy could constitute bad faith, thus removing the protections of the business judgment rule and subjecting the decision to judicial review.

¹ Legal Options for Condominium Owners Exposed to Secondhand Smoke (A Law Synopsis by the Tobacco Control Legal Consortium), Susan Schoenmarklin (December 2006).

² *Id.*

Nuisance – A claim of nuisance *per se* might exist if smoking is prohibited in the particular housing complex’s governing documents. Absent such a prohibition, a more viable claim would be for nuisance in fact. A nuisance in fact is a substantial and unreasonable interference with one’s use and enjoyment of their property. To rise to the level of nuisance, the discomforts suffered by a person dealing with secondhand smoke drift would need to exceed what is ordinarily and reasonably expected in the community and cause unnecessary damage or annoyance. The facts and circumstances surrounding such claims are dealt with on a case by case basis. Based on precedent, the amount of secondhand smoke would need to be significant, persistent, and perhaps even rising to the level of what could result in a constructive eviction.

Negligence – The elements of negligence are duty, breach, causation, and harm. All elements of the claim must be demonstrated in order to bring a successful negligence claim. Generally, the governing documents of the association place a duty on the association itself. In Maryland, it seems that the most difficult elements to prove would be causation and harm. A plaintiff must demonstrate actual injury that was caused directly from the secondhand smoke.

Breach of the Implied Covenant of Quiet Enjoyment – If a landlord-tenant relationship exists between the unit owner and the association, there is a potential claim of breach of the implied covenant of quiet enjoyment. Under Maryland law, landlords have an obligation to ensure that tenants quietly enjoy their land. Absent an actual or constructive eviction, the covenant could be breached by the landlord if the damages caused to the tenant by the offensive conduct strike at the essence of the landlord’s obligations under the lease. In the case of secondhand smoke drift in a community housing development (assuming the existence of a landlord-tenant relationship) a plaintiff would need to demonstrate that the association’s failure to stop the secondhand smoke from entering the plaintiff’s unit was an obligation that it had under the association’s governing documents (e.g., if it was a smoke-free property and the association refused to take action to prevent a unit owner from smoking).

Breach of the Implied Warranty of Habitability – The law requires all landlords to warrant that their rental properties are fit for habitation. If a landlord-tenant relationship exists between the unit owner and the association, a claim for breach of the implied warranty of habitability could be viable if the level of secondhand smoke is so egregious that it renders the unit uninhabitable.

Potential Claims Against the Smoker

Breach of Contract – All community housing arrangements are governed by the rules and regulations contained in their bylaws, formation documents, and any other documented restrictions. Owners must agree to the terms and conditions of these agreements prior to their purchase of a unit in the complex. Therefore, in the case of secondhand smoke drift, if the association’s governing documents prohibit smoking or prohibit conduct that is a nuisance (and nuisance is either defined in the documents to include smoking or at very least smoking in certain restricted areas or the association determines that the secondhand smoke drift constitutes a nuisance) a claim for breach of contract could be brought against the smoker.

Nuisance – Similarly to an action against the association, in order to bring a successful claim for nuisance against a unit owner due to secondary smoke drift, the owner would need to demonstrate that the secondary smoke presents a substantial and unreasonable interference with the use and enjoyment of your property.

Trespass – In Maryland, a trespass is defined as an intentional or negligent intrusion upon or to the possessory interest in property of another. Secondhand smoke drift is considered an “intangible” intrusion (if it is significant enough to rise to the level of intrusion at all). Therefore, a successful claim for trespass against a smoking unit owner must provide evidence that the smoke has caused physical damage to the property.

Negligence – The elements of negligence are the same in a claim against a smoker as they would be against the association. The duty element could be satisfied by examining the association’s governing documents. Typically, owners in a community housing complex agree to refrain from certain actions to promote harmony in the community. However, as with a claim against the association, in order to successfully prove a claim of negligence against a smoker due to secondhand smoke drift, the plaintiff must provide evidence of actual injury caused by the secondhand smoke. Testimony concerning a future injury will be insufficient.

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