



Drifting Tobacco Smoke & Legal Solutions for Business Owners

Tobacco smoke that infiltrates a business can have an adverse economic impact in many ways, including increased medical costs, absenteeism, and cleaning and maintenance expenses. This Tobacco Control Legal Consortium fact sheet provides general information on a few legal options for a business owner confronted with drifting secondhand smoke from a neighboring establishment. The fact sheet supplements material that the Consortium has already developed that addresses drifting tobacco smoke in residential settings.¹

Under U.S. law, corporations and other legally-created business entities are considered legal “persons,” a term of art that conveys to the business the same rights to sue or be sued as a natural person.² Most causes of action available to a homeowner or renter would thus be available to a business owner, although the difference in use between a residence and a business could come into play regarding expectations, tolerable levels of intrusion, damages, etc. The information below is organized by possible legal actions for businesses with and without a common landlord.

Smoke Drifting from Neighbor - No Common Landlord

Nuisance

A common law nuisance is generally defined as something that substantially and unreasonably interferes with the enjoyment of one’s life or property. Although there are no reported decisions in which a business or any other plaintiff prevailed in a nuisance lawsuit based on drifting secondhand smoke, several cases suggest that such a claim could be successful.³ Moreover, business plaintiffs have similar rights regarding nuisances as private resident plaintiffs.⁴

Even if a business is legal, licensed or otherwise state-sanctioned, it can be sued for nuisance. In *Baltimore & P.R. Co. v. Fifth Baptist Church*, for example, the U.S. Supreme Court found that a railroad engine house and repair shop was liable for damages and granted equitable relief for smoke emanating from smokestacks even though the stacks were built to local code.⁵

The *Baltimore* case also demonstrates the relief that an aggrieved neighbor can seek in this type of case. The defendant (a church) was able to collect damages based on a finding that “the building of the plaintiff was thus rendered less valuable for the purposes to which it

was devoted.”⁶ A business can also recover monetary damages under a nuisance claim. In *Fogarty v. Junction City Press Brick Co.*,⁷ the Kansas Supreme Court found that when a company “uses a process in burning that generates noxious gases, that are wafted upon the adjacent lands of the lessor, injuring and destroying a growing crop of wheat, this is such a nuisance that the lessor may maintain an action to recover damages by reason thereof.”⁸

Damages have occasionally been sought when a nuisance drives away customers. In *Synder v. Kelter et al.*, for example, an Alaska federal court awarded damages to the owner of a boarding house because potential customers were driven away by the nuisance of a neighboring brothel house.⁹

Trespass

A trespass is an improper physical interference with one’s person or property that causes injury to health or property.¹⁰ While no legal consensus exists as to whether drifting tobacco smoke constitutes a trespass,¹¹ lawsuits in several states have raised such a claim.¹² In *Reynolds Metals Co. v. Martin*,¹³ a federal district court in Oregon found that fluoride fumes and particles from an aluminum plant constituted both trespass and nuisance. Another federal court in Michigan denied a claim of trespass in a case of noxious odors from an animal rendering plant, absent proof that particles or substances had settled on the property and caused damage, leaving open the possibility that trespass would lay if such evidence could be found.¹⁴ In the Washington case of *Bradley v. American Smelting & Refining Co.*, a federal court held that drifting particulates of arsenic and cadmium – known toxins – do not constitute trespass unless actual damages are proven.¹⁵ However, the Bradley court noted that had the facts demonstrated the existence of a health hazard, the result would have been different.¹⁶

The key in these cases is demonstrating that the injury results from the trespass. In *Bradley*, the court adopted a standard of “real and substantial” damage,¹⁷ whereas a federal court in Kentucky required a showing of “actual harm.”¹⁸ In the Kentucky case, which involved microscopic substances, actual harm requires proof of the particles’ hazardous nature.¹⁹ Several courts have taken judicial notice of the deleterious effects of secondhand tobacco smoke, and such notice should be sought in any legal action for the intrusion of tobacco smoke onto a property.²⁰ In addition, the U.S., along with much of the global community, has signed the Framework Convention on Tobacco Control, the world’s first health treaty, which recognizes “that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.”²¹

Harassment

Harassment is words, conduct, or action directed at a specific person, which annoys, alarms, or causes substantial emotional distress to that person and serves no legitimate purpose.²² There is only one reported case where a plaintiff successfully sued a neighbor over drifting tobacco smoke under the theory of harassment.²³ The remedy was a limited injunction, or an order to stop the behavior. As for monetary damages that could be

awarded to a business due to drifting tobacco smoke, a harassment claim alone would appear to give little chance of relief, particularly for monetary damages. Still, it could be raised in conjunction with another argument.

Battery

Common law battery is the intentional and offensive touching of another without lawful justification.²⁴ A key element of battery is the hostile intent of the defendant. Thus, this cause of action can only apply if the defendant knew that the drifting tobacco smoke was likely to harm the plaintiff.

In general, battery does not require a showing of actual damage – only contact. Still, at least one state has found that for cigarette smoke to constitute battery, physical damage must be proven.²⁵ In Illinois, however, both state and federal courts have denied battery claims regarding secondhand smoke solely on the issue of intent, implying that a claim of battery from secondhand smoke could be successful if such intent can be shown.²⁶

Interference with a Prospective Business Advantage

This type of legal claim is based on defendant interference with a relationship or potential relationship between plaintiff and a third party, and goes by several different terms, depending on the jurisdiction.²⁷ In general, the plaintiff must plead and prove that the defendant was aware of, and actually interfered with, the plaintiff's existing or reasonably expected relationship with a third party, and that this relationship was likely to provide future economic benefits to the plaintiff.²⁸ Some courts have insisted on the existence of a contract between the plaintiff and the third party.²⁹

In most cases, a defendant brings this tort as a counterclaim in a business dispute, which is typically related to the plaintiff's efforts to mitigate the defendant's conduct prior to litigation. This claim is often pleaded alongside other torts, such as battery, nuisance or intentional infliction of emotional distress.

Negligent Interference with Economic Relationship

This type of legal claim, which is only recognized in California, is very similar to interference with a prospective business advantage, but requires that the defendant owe a duty of care to the plaintiff.³⁰ Generally, this cause of action is brought when a third party is injured by the defendant's negligent act under a contract. In at least one case, however,³¹ a federal court explicitly negated this requirement, stating that "negligent performance under a contract can give rise to tort liability where plaintiff's business is disrupted by the negligence of the defendant when performing a contract."³²

The Supreme Court of California has developed a six-part test to analyze this particular form of negligence: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's

conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm.³³ In a case involving drifting tobacco smoke from a neighboring business, it can be difficult to meet the first part of this test, primarily due to the intent requirement, although this type of negligence would undoubtedly affect a tenant or neighbor. This is a developing area of law, and should be watched carefully.

Infliction of Emotional Distress

An action for intentional infliction of emotional distress requires proof that: (1) the defendant's conduct was outrageous; (2) the defendant acted intentionally or recklessly; (3) the plaintiff suffered severe emotional distress; and (4) the defendant's conduct was the proximate cause of the emotional distress suffered.³⁴ Prevailing in a secondhand smoke case under this cause of action is likely to be difficult. "Outrageous" is normally defined as "beyond all possible bounds of decency" and "atrocious and utterly intolerable in a civilized community,"³⁵ a standard that would almost require the defendant to be found guilty of several other torts or even criminal statutes. If the defendant's actions do rise to this level, then intentional infliction of emotional distress should be included in the list of causes of action.

In a claim of negligent infliction of emotional distress, the plaintiff need not prove intent, but must show a physical manifestation of the emotional distress suffered. Negligent infliction of emotional distress has been recognized in about half the states, but under very limited sets of circumstances, usually occasioned by the witnessing of traumatic injuries.³⁶

Smoke Drifting from Neighbor - Common Landlord

If the defendant and plaintiff lease their premises from a common landlord, several types of claims related to tenants' rights become available as causes of action. These may also apply against the plaintiff's landlord, even if the offending smoke emanates from a third party unrelated to or involved with either party.

Covenant of quiet enjoyment

A landlord breaches the covenant of quiet enjoyment by acting or failing to act in such a way as to substantially interfere with the tenant's use or enjoyment of the leased premises.³⁷ When the tenant is a commercial enterprise, a breach will occur if there is substantial interference with the tenant's ability to conduct normal business operations.³⁸ There are no reported cases where drifting tobacco smoke was found to have breached the covenant of quiet enjoyment, but at least one state court has allowed it to be argued.³⁹

In another case, *Northern Terminals, Inc. v. Smith Grocery & Variety, Inc.*,⁴⁰ the Vermont Supreme Court found a breach when the landlord built a new store adjacent to the property, overburdening the parking lot and reducing business for a hardware store, and awarded damages for lost business and back rent. The *Northern* court found a breach of the covenant where "subsequent to the tenant's entry, through no fault of the tenant, a change in the condition of the leased property caused by the landlord's conduct . . . makes

the leased property unsuitable for the use contemplated by the parties, (and) the landlord does not correct the situation within a reasonable period of time after being requested to do so.⁴¹ This legal reasoning might be applied to a situation in which a landlord leases a property for use as a cigar bar or other facility next to an existing tenant whose business would foreseeably be damaged by such activity.

Constructive Eviction

A constructive eviction occurs when a landlord acts or fails to act in a way that renders a substantial portion of the leased premises unfit for the purposes for which they were leased.⁴² The act or failure to act must be intentional, but intent may be implied by the circumstances. Constructive eviction differs from a breach of the covenant of quiet enjoyment in that the tenant must abandon the property in a reasonable amount of time after the circumstances become apparent. A constructive eviction can be caused by another tenant if the landlord knew of the problem and took no effective steps to mitigate or abate it.⁴³

Constructive eviction applies to leased commercial properties, although in some jurisdictions additional elements may need to be shown for commercial properties, such as a lack of knowledge of the condition when the lease was signed (whether through an inability to inspect or due to nonexistence of the condition),⁴⁴ and the ability of the landlord to remedy the situation without excessive economic loss.⁴⁵ The remedy for constructive eviction is normally back rent and other damages stemming from the eviction.

Warranty of Habitability

Most courts have found that the common law warranty of habitability does not apply to commercial leases.⁴⁶ A minority, however, recognize an implied warranty of suitability for commercial purposes.⁴⁷ Normally, this cause of action involves latent structural defects, and there are no reported cases involving tobacco smoke or other drifting particulate matter. Still, a breach of the warranty of habitability has been found in cases of persistent water leakage.⁴⁸ The implied warranty of suitability for commercial purposes, where it is recognized, can be used to defend a claim brought by a landlord who tries to collect back rent, to cancel the lease, or to collect for damages to the tenant's personal property.⁴⁹ There are no reported smoking-related cases in which the court granted damages to commercial property.

Conclusion

Business owners concerned about the infiltration of tobacco smoke in the workplace can pursue several legal actions against a neighbor. Many of these legal actions, which also are available to renters and homeowners, depend on whether or not the business has a common landlord. For additional smoke-free policy information for businesses, see the Tobacco Control Legal Consortium's *Workplace Smoking: Options for Employees and Legal Risks for Employers* (2008), available at

http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-workplace-2008_0.pdf.

The information contained in this document is not intended to constitute or replace legal advice. We encourage anyone considering the implementation of any tobacco-related law or policy to seek out local legal counsel to obtain legal advice on these issues.

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¹ See, for example, Susan Schoenmarklin, Tobacco Control Legal Consortium, *Infiltration of Secondhand Smoke into Condominiums, Apartments and Other Multi-Unit Dwellings: 2009* (2009), available at http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-condos-2009_0.pdf; Susan Schoenmarklin, Tobacco Control Legal Consortium, *Secondhand Smoke Seepage into Multi-Unit Affordable Housing* (2010), available at http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-secondhand-2010_0.pdf.

² See *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (U.S. 1886) (stating that juristic persons are entitled to equal protection according to the Fourteenth Amendment).

³ Susan Schoenmarklin, *Legal Options for Condominium Owners Exposed to Secondhand Smoke*, Tobacco Control Legal Consortium (2006); *Flansburgh v. Coffey*, 370 N.W.2d 127; and *Duncanson v. City of Fort Dodge*, 11 N.W.2d 583, 585 (1943). See also *Birke v. Oakwood Worldwide*, 169 Cal.App.4th 1540 (Cal. Ct. App. 2009) (finding a cause of action in nuisance for drifting secondhand smoke). But see *Lipsman v. McPherson* (No. 191918) (Super. Ct. of Mass., Middlesex 1991) (finding that smoke from three to six cigarettes a day did not constitute a nuisance because it did not meet the level of a substantial effect); and *DeNardo v. Corneloup*, 163 P.3d 956 (Alaska 2007) (finding no cause of action in nuisance or trespass for a neighboring apartment's drifting secondhand smoke).

⁴ *Ross v. Butler*, 19 N.J. Eq. 294, *9 (N.J.Ch. 1868) (holding that “a dense smoke, laden with cinders, caused by the burning of pine wood and continued for twelve hours, twice in each month, falling upon and penetrating houses at a distance of from forty to two-hundred feet,” amounts to a legal nuisance, although the inhabitants work at trades occasioning some degree of noise, smoke, and cinders).

⁵ 2 S.Ct. 719 (U.S.D.C. 1883). See also *Maddox v. Hardy*, 187 P.3d 486 (Alaska 2008) (holding that “[r]egardless of the type of business involved, noise and traffic associated with a business may be actionable as a nuisance”).

⁶ *Id.* at 727.

⁷ 31 P. 1052 (Kan. 1893).

⁸ *Id.*

⁹ 4 Alaska 447 (D.Alaska 1912).

¹⁰ See 75 AM. JUR. 2D Trespass § 25 (1991).

¹¹ *Supra* note 3, at 5 and *DeNardo*.

¹² *Supra* note 3, at 5 and FNs 38-40.

¹³ 337 F.2d 780 (C.A.Or. 1964).

¹⁴ *Ramik v. Darling Intern. Inc.*, 60 F.Supp.2d 680 (E.D. Mich. 1999).

¹⁵ 635 F.Supp. 1154 (W.D. Wash. 1986).

¹⁶ *Id.* at 1157.

¹⁷ *Id.* at 1156.

¹⁸ *Mercer v. Rockwell Intern. Corp.*, 24 F.Supp.2d 735 (W.D.Ky. 1998).

¹⁹ *Id.* at 743.

²⁰ See Kathleen Dachille & Kristine Callahan, *Secondhand Smoke and the Family Courts: The Role of Smoke Exposure in Custody and Visitation Decisions*, Tobacco Control Legal Consortium (2005), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-family-2005.pdf> and Ed Sweda, *Lawsuits and Secondhand Smoke*, 13 TOBACCO CONTROL (Supplement 1) (2004).

²¹ World Health Organization Framework Convention on Tobacco Control, Article 8(1), available at http://fctc.org/index.php?option=com_content&view=article&id=25&Itemid=31.

²² BLACK'S LAW DICTIONARY (8th ed. 2004).

²³ *Layon v. Jolley*, No. NS004483 (Cal. Super. Ct. Los Angeles County 1996). See also discussion *supra* note 2.

²⁴ BLACK'S LAW DICTIONARY (8th ed. 2004).

²⁵ See *Faircloth v. Duke University*, 267 F.Supp.2d 470, 476 (M.D.N.C. 2003), citing *McCracken v. Sloan*, 252 S.E.2d 250, 252 (1979).

²⁶ See *Pechan v. DynaPro, Inc.*, 622 N.E.2d 108 and *Bell v. Elmhurst Chicago Stone Co.*, 919 F.Supp. 308 (N.D.Ill. 1996).

²⁷ Examples include **interference with prospective economic advantage**, *Byczek v. Boelter Companies, Inc.*, 264 F. Supp. 2d 720 (N.D. Ill. 2003); *Rogers v. MacAdam*, 2003 WL 21026718 (Me. Super. Ct. 2003); **wrongful interference with advantageous business relations**, *Biomet, Inc. v. Smith*, 238 F. Supp. 2d 1036 (N.D. Ind. 2002); *Dziamba v. Warner & Stackpole LLP*, 778 N.E.2d 927 (2002), review denied, 782 N.E.2d 516 (2003).; **interference with an advantageous relationship**, *Mangan v. Rumo*, 226 F. Supp. 2d 250 (D. Me. 2002); **intentional interference with prospective advantage**, *M & D Cycles, Inc. v. American Honda Motor Co., Inc.*, 208 F. Supp. 2d 115 (D.N.H. 2002), *aff'd*, 70 Fed. Appx. 592 (1st Cir. 2003); **interference with prospective contractual relations**, *A Fisherman's Best, Inc. v. Recreational Fishing Alliance*, 310 F.3d 183 (4th Cir. 2002); **tortious interference with prospective business advantage**, *Hutton v. Priddy's Auction Galleries, Inc.*, 275 F. Supp. 2d 428 (S.D. N.Y. 2003); *Cobra Capital, LLC v. RF Nitro Communications, Inc.*, 266 F. Supp. 2d 432 (M.D. N.C. 2003); *Isabel S. Weil v. Express Container Corporation*, 2003 WL 21790483 (N.J. Super. Ct. App. Div. 2003); or **tortious interference with economic opportunity**, *Logan Graphic Products, Inc. v. Textus USA, Inc.*, 2003-1 Trade Cas. (CCH), 2002 WL 31507174 (N.D. Ill. 2002).

²⁸ 24 CAUSES OF ACTION 2d 571 (2008).

²⁹ See *Paul v. Howard University*, 754 A.2d 297 (D.C. 2000).

³⁰ See *J'Aire Corp. v. Gregory*, 598 P.2d 60, 65 (1979).

³¹ *Hsu v. OZ Optics, Inc.*, 211 F.R.D. 615 (N.D.Cal. 2002).

³² *Id.* at 620, citing *North American Chemical Co. v. Superior Court*, 69 Cal.Rptr.2d 466 (1997).

³³ See *J'Aire Corp. v. Gregory*, 598 P.2d 60, 61 (Cal. 1979).

³⁴ 7 CAUSES OF ACTION 663 (2008) .

³⁵ See Restatement Second, Torts § 46(1). See also *Growth Properties I v Cannon*, 669 S.W.2d 447 (1984); *Danyew v Phelps*, 676 P.2d 707 (Colo App. 1983).

³⁶ See *Dillon v. Legg*, 441 P.2d 912 (1968) (discussing recovery under state law for negligent infliction of emotional distress).

³⁷ 29 CAUSES OF ACTION 2d 511 (2008). See also discussion for residential properties *supra* note 2 at 5.

³⁸ See *American Dairy Queen Corp. v. Brown-Port Co.*, 621 F.2d 255 (7th Cir. 1980).

³⁹ *Dworkin v. Paley*, 638 N.E.2d 636, 639 (1994) (finding that whether tobacco smoke could breach the covenant of quiet enjoyment was a factual issue precluding summary judgment). The appellate court remanded the case for further proceedings, finding that a review of the affidavits presented "the existence of general issues of material fact concerning the amount of smoke or noxious odors being transmitted into appellant's rental unit."

⁴⁰ 418 A.2d 22 (1980).

⁴¹ *Id.* at 26, citing Restatement (Second) Property s 5.4 (Tent. Draft No. 2, 1974).

⁴² 42 AM. JUR. PROOF OF FACTS 2d 317.

⁴³ *See, e.g.*, *Cohen v Werner*, 368 N.Y.S.2d 1005, *affd* 378 N.Y.S.2d 868 (1975) (where continuous noise caused by other tenants rendered uninhabitable plaintiff tenant's apartment and where landlord could have taken steps to try to make premises habitable but chose not to do so); *Home Life Ins. Co. v Breslerman*, 5 N.Y.S.2d 272 (1938) (where conduct of family of overhead tenant resulted in continual noises and disturbances depriving other tenant of beneficial enjoyment of leased premises, and where landlord, with ample notice of existent conditions, took no effective steps to abate nuisance as he was authorized to do under lease with overhead tenant).

⁴⁴ *See, e.g.*, *A. H. Woods Theatre v. North American Union*, 246 Ill. App. 521 (1927) (no constructive eviction where there was opportunity to inspect commercial premises prior to execution of lease); *Bahcall v. Gloss*, 12 N.W.2d 674 (1944) (knowledge of offending conditions); *Bilicke v Janss*, 112 P. 201 (1910) (knowledge of use of adjacent premises at inception of commercial lease).

⁴⁵ *Supra* note 40 at § 9.

⁴⁶ 43 AM. J. PROOF OF FACTS 3d 329 at § 8.

⁴⁷ *See, e.g.*, *Levitz Furniture Co. of Eastern Region, Inc. v. Continental Equities, Inc.*, 411 So.2d 221 (Fla. App. D3 1982), *cert. den.* 419 So.2d 1196 (Fla. 1982); *Green v. Hodges Stock Yard, Inc.*, 508 So.2d 934 (La. App.4th Cir. 1987), *appeal after remand* 552 So.2d 435 (La. App. 4th Cir. 1989); *Vermes v. American Dist. Tel. Co.*, 251 N.W.2d 101 (1977); *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (1969); *Teodori v. Werner*, 415 A.2d 31 (1980); *Gober v. Wright*, 838 S.W.2d 794 (Tex. App. Houston (1st Dist) 1992), *writ den.* (Mar 24, 1993) and *rehearing of writ of error overruled* (Apr 21, 1993).

⁴⁸ *See, e.g.*, *Houma Oil Co. v. McKey*, 395 So.2d 828 (La. App. 1st Cir. 1981), *cert. den.* 401 So.2d 356 (La. 1981); *Reste*, 251 A.2d at 268; and *Gober*, 838 S.W.2d at 794.

⁴⁹ *Davidow v. Inwood North Professional Group*, 747 S.W.2d 373, 376-77 (Tex. 1988) (recognizing an implied warranty of suitability for commercial purposes, subject to alteration or waiver by agreement).