Legal Options for Tenants Suffering from Drifting Tobacco Smoke

April 2007 (revised August 2009)

If tobacco smoke drifts into your apartment from a neighboring unit, causing you illness or discomfort, you may wonder whether you can take legal action. Suing your neighbor or landlord is an option, but it should be your last resort. Lawsuits are time consuming, expensive, and contentious, and the outcome is always uncertain. In a lawsuit regarding drifting tobacco smoke in an apartment building, the result is especially unpredictable because very few cases, and no state laws, are directly relevant.

Before suing, you should try to reach an agreement with your neighbor to limit where and when s/he smokes. You also could ask your landlord or property manager to make certain areas of the building smokefree. In addition, you could work to pass a law in your community to address the problem of drifting smoke in multi-unit residences. If these approaches fail, you may even want to consider moving.

If you reach the point where a lawsuit seems to be your only option, this fact sheet outlines several things to consider.

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Evaluating Your Case

To help you evaluate your potential lawsuit, ask yourself three questions: What harm have I suffered? Who is responsible? And what do I want to get out of a lawsuit?

What harm have I suffered?

As a general rule, it is unwise to file a lawsuit unless you have suffered significant harm. Your chance of convincing a court that you have a justifiable legal claim is far better if you can show that you have been harmed badly by repeated, unwanted exposure to secondhand smoke in your apartment —for instance, if you have visited a doctor with frequent respiratory complaints, missed work due to illness caused by the smoke, stayed away from home when you know your neighbor tends to smoke, or kept your windows closed in hot weather or your heater off in cold weather to prevent smoke from entering your unit.

Who is responsible?

Depending on your situation, it may be your neighbor *and* your landlord. Your neighbor could be responsible for harming you directly by smoking, and your landlord could be responsible for knowing about the drifting smoke and failing to do anything to protect you from it. So you may be able to sue both your landlord and your neighbor, or you may be able to sue only one or the other.

If you are considered to be disabled under state or federal law and secondhand smoke makes your condition worse, you might be eligible for special legal protections that are not addressed in this fact sheet. TALC has developed a separate fact sheet that applies specifically to people with disabilities, available at *www.phlpnet.org*.

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What do I want to get out of a lawsuit?

The goal of any lawsuit is to obtain a "remedy" that either stops or compensates for the harm. In a case involving secondhand smoke exposure in an apartment building, you would probably seek money from the person you sued ("money damages") and/or an order from the court requiring the person you sued to do or stop doing something (an "injunction"). Money damages might help you cover moving costs, medical bills, or lost pay. An injunction might force your landlord to designate certain units smokefree or provide you with a different unit, or it might order your neighbor to smoke only at certain times or places. Before filing a lawsuit, consider what you are hoping for and whether it is worth a legal fight.

Possible Legal Claims

Depending on your circumstances, there are a variety of legal claims that might serve as the basis of your argument in court.[1] Later in this fact sheet you will see why, if you take your case to small claims court, you do not need to learn the names or details of these legal claims. If you hire a lawyer to bring your case in trial court, your lawyer will evaluate which claims are best suited to your situation.

In California, very few cases apply directly to the problem of drifting tobacco smoke in an apartment building. Moreover, state law currently does not restrict smoking in apartments.[2] Unless you live in one of the few cities in California that has specifically prohibited smoking in multi-unit housing or declared secondhand smoke to be a nuisance, your lawsuit would rest on broad legal claims that are not specifically designed to solve your situation.

Legal claims that might be brought against a neighbor include **battery, harassment, intentional infliction of emotional distress, negligence, nuisance,** and **trespass.**

At least two courts in California have been open to claims brought against a neighbor for harms caused by drifting tobacco smoke. In 1996, a Los Angeles couple sued their neighbor for harassment because he smoked on a regular basis in the garage under their unit, forcing them to leave their home for hours at a time. The trial court issued a restraining order instructing the neighbor to stay away from his garage while smoking.[3] In 2004, a trial court in Riverside County ruled against a smoking neighbor.[4] The court held that it is possible to win negligence and nuisance claims for exposure to drifting tobacco smoke if it is sufficiently extreme, constant, and noxious. Although these two cases suggest that courts in California might be sympathetic to apartment residents who suffer from a neighbor's secondhand smoke, neither case is a "published" decision, which means that they cannot be used to support future lawsuits.

Legal claims that might be brought against a landlord include **nuisance, constructive eviction, violation of the implied covenant of quiet enjoyment, negligence,** and **violation of the implied warranty of habitability.**

In 2009 a California court held that a landlord who allowed smoking in outdoor common areas could be held liable for creating a public nuisance,[5] after the family of a young girl with asthma sued the landlord based on nuisance and other claims.[6] A California Court of Appeal ruled that secondhand smoke in the outdoor common areas of an apartment complex could in fact constitute a nuisance. The Court of Appeal sent the case back to the lower court for trial to determine whether the secondhand smoke in the outdoor areas of this particular complex is enough to constitute a legal nuisance. [7]

> TALC has developed a glossary to accompany this fact sheet (available at *www.phlpnet.org*), which provides more detail about the legal claims that might apply to your situation.

Courts in other states have also held landlords liable for drifting smoke.[8] In an Oregon case, a jury found that a landlord breached the warranty of habitability by moving a known smoker into an apartment below a nonsmoking tenant who was sensitive to secondhand smoke.[9] The jury awarded the tenant a 50 percent rent reduction and damages to cover her medical bills. The housing court in Boston held that drifting cigarette smoke from a downstairs bar was a serious enough intrusion into a tenant's apartment to violate both the warranty of habitability and the covenant of quiet enjoyment.[10] The court awarded money damages to the tenant and ordered the landlord to fix the problem. In New York, a trial court ruled that secondhand smoke

from a neighboring unit or common area can give rise to a breach of the warranty of habitability and a constructive eviction when the landlord fails to take any action to remedy the situation.[11]

In addition to the case in California holding that drifting secondhand smoke in an apartment complex may constitute a nuisance, there are scientific findings that should help boost your case against your neighbor and/or landlord. The California Air Resources Board has added secondhand smoke to its list of toxic air contaminants,[12] and the U.S. Surgeon General has declared there is no risk-free level of exposure to secondhand smoke.[13] These findings, along with a vast amount of other evidence documenting the negative health effects of secondhand smoke, could help convince a court that you have suffered serious harm from repeated, unwanted exposure to drifting smoke in your apartment.

Trial Court or Small Claims Court?

If you decide that you want to file a lawsuit, there are two types of courts available to hear your case: regular trial court and small claims court. (Every trial court in the state must have a small claims court division that is designed to resolve minor civil disputes.) These two types of courts differ in at least three important ways.

Role of attorneys

In trial court, both sides generally hire lawyers to represent them. In small claims court, the parties must represent themselves. Note that California law requires small claims courts to provide advisory services to help the parties navigate the process from start to finish. In addition, helpful guides to using small claims court are available on the Internet.[14]

> It may be difficult to find a lawyer to represent you because of the legal uncertainty involved in this type of case. TALC's *California Legal and Dispute Resolution Services (*available at *www.phlpnet.org*) lists lawyer referral services for each county in California.

Formality of proceedings

A trial court case is governed by elaborate rules about filing the case, presenting evidence, and so on. Small claims court actions are informal; they use a simple approach to conflict resolution enabling the judge to decide a case quickly, focusing on basic principles of fairness instead of legal technicalities. In order to file a small claims court case, an individual must be able to tell his or her side of the story but does not have to name the legal claims that apply to the case.

Available remedies

A trial court judge has the ability to award a wide range of remedies, including money damages and an injunction ordering the person being sued to do or stop doing something. A small claims court, however, may only hear cases involving $7,500 or less and cannot generally issue an outright injunction. A small claims court may instead issue a "conditional judgment," which allows the person being sued to choose between taking a certain action or paying a fine. For example, a conditional judgment might instruct a tenant to either stop smoking on her patio or pay $5,000 to her neighbor.

Given these three essential differences between trial court and small claims court, one or the other may seem better suited to your case.

Trial court would be a good choice if you can find a lawyer willing to represent you who can make solid legal arguments about how some of the claims mentioned above apply to your case. If you win in trial court, you would not only benefit yourself, but you could also contribute to advancing the law by clarifying how certain general legal theories apply to drifting smoke in multi-unit housing.

You might choose to sue in small claims court if you cannot find a lawyer to represent you or if you want your case resolved quickly and efficiently. A small claims court judge will be less worried about the exact legal basis of your claim than about finding a fair solution to your problem. Given that there is barely any law in California addressing secondhand smoke in apartments, the focus on fairness over legal precision may end up working in your favor.

Conclusion

If a lawsuit seems to be your only option, do not give up hope. Our society is gradually beginning to recognize the problem of drifting tobacco smoke in multi-unit housing—and so are the courts. California has joined an increasing number of states across the country where courts have found in favor of tenants who sued their neighbors or landlords over drifting secondhand smoke. Your case might contribute to this trend in California.

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[1] For a comprehensive discussion of how many of these legal claims might apply in a lawsuit regarding a neighbor's drifting tobacco smoke: *see* Ezra DB. "'Get Your Ashes Out of My Living Room!' Controlling Tobacco Smoke in Multi-Unit Residential Housing." *Rutgers Law Review*, 54(135): 163-65, 2001; For a useful summary of cases addressing real property and nuisance claims relating to secondhand smoke: *see* Sweda EL. "Summary of Legal Cases Regarding Smoking in the Workplace and Other Places." *Tobacco Products Liability Reporter*: 41-46, 2005.

[2] A few local jurisdictions in California have passed laws to address the problem of drifting secondhand smoke in multi-unit housing. For example, Belmont and Calabasas have adopted laws to prohibit smoking inside almost all units of multifamily housing. See Belmont, Cal., Municipal Code § 20.5-3; Calabasas, Cal., Municipal Code § 8.12.055. In addition, the cities of Dublin and Calabasas have explicitly declared secondhand smoke to be a nuisance. *See* Dublin, Cal., Municipal Code § 5.56.160 (2006); Calabasas, Cal., Municipal Code § 8.12.035.

[3] *Layon v. Jolley,* No. NS004483 (Cal. Super. Ct. 1996).

[4] *Babbitt v. Superior Court*, WL 1068817, at *2 (Cal. App. 4th Dist. 2004).

[5] *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540 (2009). The full text of the court decision in this case is available at: http://fsnews.findlaw.com/cases/ca/caapp4th/slip/2009/b203093.html.

[6] *Id.*

[7] *Id.*

[8] *See, e.g., Dworkin v. Paley*, 638 N.E.2d 636 (Ohio Ct. App. 1994); *see also Donnelly v. Cohasset Housing Authority*, 815 N.E.2d 1103 (Mass. App. Ct. 2004); *see Paul, PA, PC v. 370 Lex.*, LLC, No. 50258(U), slip op. (N.Y. 2005). (All allowing cases to go forward in which a tenant sued a landlord for a failure to ameliorate the problem of another tenant's secondhand smoke.)

[9] *Fox Point Apt. v. Kippes*, No. 92-6924 (Or. Dist. Ct. Lackamas County 1992).

[10] *50-58 Gainsborough St. Realty Trust v. Haile*, No. 98-02279 (Boston Housing Ct. 1998).

[11] *Poyck v. Bryant*, No. 26343, slip op. at 4-5 (N.Y. Aug. 24, 2006).

[12] Resolution 06-01, Cal. Air Resources Bd. (2006) at 5. Available at: www.arb.ca.gov/regact/ets2006/res0601.pdf.

[13] US Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General.* 2006, p. 31-32. Available at: www.surgeongeneral.gov/library/secondhandsmoke/report/chapter2.pdf.

[14] *See* California Courts Self-Help Center. *Small Claims*. Available at: www.courtinfo.ca.gov/selfhelp/smallclaims/; *see also* California Department of Consumer Affairs, *The Small Claims Court: A Guide to Its Practical Use.* Available at: www.dca.ca.gov/legal/small_claims/small_claims.pdf.

Additional Resources

Americans for Nonsmokers' Rights (ANR)

www.no-smoke.org

ANR provides advocacy information on such topics as clean indoor air ordinances, smokefree apartments, and tobacco industry activity. The "Going Smokefree" section of ANR's website contains resources on smokefree housing.

California Courts Self-Help Center

www.courtinfo.ca.gov/selfhelp/smallclaims

The California Courts Self-Help Center offers information and assistance for individuals who are suing or being sued in small claims court. The website includes general background on small claims and mediation, as well as county-specific court information.

California Department of Consumer Affairs

www.dca.ca.gov/publications/small_claims

The Department of Consumer Affairs has produced a thorough handbook that includes answers to frequently asked questions and provides a step-by-step guide to small claims court procedures. See *The Small Claims Court: A Guide to Its Practical Use* at www.dca.ca.gov/publications/small_claims/small_claims.pdf.

California's Clean Air Project (CCAP)

www.ccap.etr.org

CCAP provides technical assistance, training, and educational materials statewide on secondhand smoke issues. The Secondhand Smoke Resources section has a category devoted to smokefree multifamily housing.

The Center for Tobacco Policy and Organizing

www.center4tobaccopolicy.org

The Center, a project of the American Lung Association of California, provides assistance with community organizing strategies and serves as a tobacco policy resource. Its website contains a variety of resources on smokefree housing.

Smokefree Apartment House Registry

www.smokefreeapartments.org

The Registry provides guidance on how to implement smokefree housing policies and maintains a database of vacant units in apartment complexes where at least half of all adjacent units are nonsmoking.

Glossary of Legal Claims

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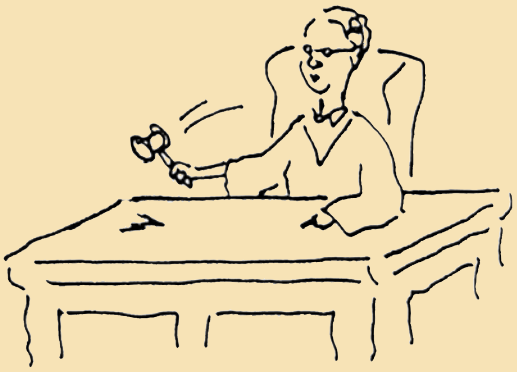

This glossary, designed to accompany TALC's "Legal Options for Tenants Suffering from Drifting Tobacco Smoke," defines the legal claims mentioned in that fact sheet. Depending on your situation, you may be able to sue your neighbor or your landlord, and sometimes you may be able to sue both *of them because you have legal claims against each. Remember, if you decide to file a lawsuit, it is very difficult to predict the outcome because there have been so few cases about drifting secondhand smoke.*

Each entry summarizes the legal claim and gives an example of a case involving that claim. Where possible, the examples are cases from California concerning drifting tobacco smoke in an apartment. However, since there are only a few California cases on this issue, some examples are from an analogous situation or from other states. Although the cases in the examples provide useful illustrations, a California court would not be required to follow the rulings in the cases from outside California.

If you take your case to trial court, your lawyer will evaluate which claims are best suited to your situation. If you choose to bring a case in small claims court—where lawyers are not allowed—you do not need to learn the names or details of these legal claims.

Possible Claims Against a Neighbor

Battery

Intentional contact with another person that results in harm or offense.[1] A battery can involve intentionally causing another person to come into contact with a foreign substance.[2]

Example: A Georgia court held that it is possible for a smoker to inflict a battery on another person with his tobacco smoke.[3] The court reasoned, "We are not prepared to accept [the] argument that pipe smoke is a substance so immaterial that it is incapable of being used to batter indirectly. Pipe smoke is visible; it is detectable through the senses and may be ingested or inhaled. It is capable of 'touching' or making contact with one's person in a number of ways."[4]

Harassment

Willful conduct directed at a specific person that seriously alarms or annoys the person, and that serves no legitimate purpose.[5]

Example: A California court ruled in favor of a couple who sued their neighbor for harassment because he smoked on a regular basis in the garage under their unit, forcing them to leave their home for hours at a time.[6]

Intentional infliction of emotional distress

Extreme and outrageous conduct that intentionally or recklessly causes severe emotional suffering.[7]

Example: A Georgia court held that a smoker can be liable for intentional infliction of emotional distress if his smoking is "deliberately or recklessly and wantonly" directed at another person and results in emotional harm to that person.[8]

Negligence

Failure to exercise the amount of care that a reasonable person would use in a similar circumstance.[9]

Example: A California court ruled that, although negligence claims associated with secondhand smoke may be novel, the law leaves room for a neighbor to be found negligent for generating secondhand smoke that harms a neighbor. The court noted that "the dangers of 'secondhand smoke' are not imaginary, and the risks to health of excessive exposure are being increasingly recognized in court."[10]

Nuisance

Anything harmful to health, or indecent or offensive to the senses, so as to interfere with the comfortable enjoyment of life or property.[11] Courts require that, in order for something to be considered a nuisance, the interference must be both "substantial" and "unreasonable."[12]

Example: A California court held that a neighbor's secondhand smoke can constitute a nuisance if it is a "substantial and unreasonable" invasion "comparable to the reeking manure piles" left unattended by a dairy (the subject of another case).[13]

Trespass

Unauthorized invasion of another's property.[14] It can include the "deposit of particulate matter"[15] or the "casting of substances"[16] upon someone's property.

Example: A Florida court found that a condominium owner who subjected a neighbor to "excessive secondhand smoke" was liable for trespass because he "discharge[ed] a foreign polluting matter [e.g., drifting tobacco smoke]" from his condominium, which invaded the neighbor's condominium.[17]

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Possible Claims Against a Landlord

Constructive eviction

When a landlord, by acting or failing to act, makes an apartment unfit for occupancy or deprives a tenant of the use of the unit, and the tenant moves out.[18] In such a situation, the landlord has not dispossessed the tenant but has done something which makes the unit uninhabitable.[19]

> **Example:** A New York court ruled that "it is axiomatic that secondhand smoke can be grounds for a constructive eviction" from an apartment if the smoke is sufficiently pervasive.[20]

Covenant of quiet enjoyment

Requires that a landlord must not interfere with the tenant's ability to possess and use an apartment for the purposes outlined in the rental agreement (e.g., residential living).[21] In order to violate the covenant, a landlord must *substantially* interfere with a tenant's right to possess and use the unit.[22]

> **Example:** A Massachusetts court held that drifting cigarette smoke from a downstairs bar was a substantial enough intrusion into a tenant's apartment to violate the covenant of quiet enjoyment.[23]

Negligence

A landlord owes a general duty of care to a tenant to provide and maintain safe conditions on the rental property.[24] A landlord can be found legally negligent for causing an injury to a tenant by failing to fulfill this duty of care.

> **Example:** In a case analogous to a situation involving drifting smoke in an apartment building, a California court held that a landlord can be liable for negligence for failing to protect a tenant from a physical assault by another tenant when that landlord should have foreseen—based on knowledge of the violent tenant's ongoing assaults—that this tenant eventually would injure the victim.[25]

Nuisance

Anything harmful to health, or indecent or offensive to the senses, so as to interfere with the comfortable enjoyment of life or property. Courts require that, in order for something to be considered a nuisance, the interference must be both "substantial" and "unreasonable."

> **Example:** A California Court of Appeals ruled that a tenant may sue the landlord for creating a nuisance in outdoor common areas of an apartment building where the landlord permits smoking.[26]

Warranty of habitability

Requires the landlord to guarantee that the rental property is and will remain habitable.[27] Habitability is usually determined by the landlord's compliance with certain code requirements, such as the obligation to meet specified heating and ventilation standards.[28] However, the California Supreme Court has recognized that the actions of people within or nearby the building can affect the habitability of a residence.[29]

> **Example:** An Oregon jury found that a landlord breached the warranty of habitability by moving a known smoker into an apartment below a nonsmoking tenant who was sensitive to secondhand smoke.[30]

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[1] Restatement (Second) of Torts § 18(1) (1965); Cal. Penal Code § 242 (West 2007) (defining a battery as "any willful and unlawful use of force or violence upon the person of another").

[2] Restatement (Second) of Torts § 18 cmt. c (1965); *Inter-Insurance Exchange of Auto. Club of Southern Cal. v. Lopez*, 238 Cal. App. 2d 441, 445 (1966) (explaining that the common law concept of battery includes "any forcible contact brought about by a… substance … set in motion by a defendant").

[3] *Richardson v. Hennly*, 434 S.E.2d 772, 775 (Ga. Ct. App. 1993), rev'd on other grounds, 444 S.E.2d 317 (Ga. 1994).

[4] *Id.*

[5] Cal. Civ. Proc. Code § 527.6(b) (West 2007); *see also*, Cal. Civ. Proc. Code § 527.6(a) (West 2007). (A person who has suffered harassment may ask a court to issue a temporary restraining order and an injunction prohibiting the conduct.)

[6] *Layon v. Jolley*, No. NS004483 (Cal. Super. Ct. 1996).

[7] Restatement (Second) of Torts § 46 (1965); *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 336 (1952) (first recognizing intentional infliction of emotional distress as an independent tort in California).

[8] *Richardson v. Hennly*, *supra* note 3, at 776.

[9] Restatement (Second) of Torts § 283 (1965).

[10] *Babbitt v. Superior Court*, WL 1068817, at *2 (Cal. App. 4th Dist. 2004).

[11] Cal. Civ. Code § 3479 (West 2007).

[12] *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal. 4th 893, 938 (1996). Examples of nuisances that California courts have found to cause "substantial" interference are: noxious odors from a municipal sewage plant that gave the plaintiffs teary eyes and nausea; and "great volumes of offensive smelling, thick, black smoke" emitted from a smokestack and blown into the plaintiff's home; *Varjabedian v. City of Madera*, 20 Cal. 3d 285, 294 (1977) (sewage plant); *Dauberman v. Grant*, 198 Cal. 586, 589-90 (1926) (smoke). An activity found to constitute an "unreasonable" interference was dust created by the scratching of a neighbor's chickens, which blew on the neighbor's vines and trees. *See McIntosh v. Brimmer*, 68 Cal. App. 770 (1924). By contrast, the noise caused by a bouncing ball and the chatter of players from a neighbor's basketball court, occurring for thirty minutes, five times a week, was found to be neither substantial nor unreasonable. *See Schild v. Rubin*, 232 Cal. App. 3d 755 (1991).

[13] *Babbitt v. Superior Court, supra* note 10, at 3.

[14] 5 Witkin Sum. Cal. Law Torts § 693, 10th ed. (2006).

[15] *Wilson v. Interlake Steel Co.*, 32 Cal. 3d 229, 232 (1982).

[16] *Elton v. Anheuser-Busch Beverage Group, Inc.*, 50 Cal. App. 4th 1301, 1306 (1996); see also Restatement (Second) of Torts § 159(1) (noting that "a trespass may be committed… above the surface of the earth").

[17] *Merrill v. Bosser*, No. 05-4239 (Fla. Broward County Ct. June 29, 2005) (emphasis in original).

[18] *Cunningham v. Universal Underwriters*, 98 Cal. App. 4th 1141, 1152 (2002); *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 670 (1944).

[19] *Stoiber v. Honeychuck*, 101 Cal. App. 3d 903, 925-6 (1980).

[20] *Poyck v. Bryant*, No. 26343, slip op. at 2 (N.Y. 2006).

[21] Cal. Civ. Code § 1927 (West 2007); *Petroleum Collections Inc. v. Swords*, 48 Cal. App. 3d 841, 846 (1975).

[22] *Andrews v. Mobile Aire Estates*, 125 Cal. App. 4th 578, 589 (2005).

[23] *50-58 Gainsborough St. Realty Trust v. Haile*, No. 98-02279 (Boston Housing Ct. 1998).

[24] Cal. Civ. Code § 1714 (West 2007); *Peterson v. Super. Ct.*, 10 Cal. 4th 1185, 1196 (1995).

[25] *Madhani v. Cooper,* 106 Cal. App. 4th 412, 413-17 (2003).

[26] Birke v. Oakwood Worldwide, 169 Cal. App. 4th 1540 (2009). The full text of the court decision in this case is available at: http://fsnews.findlaw.com/cases/ca/caapp4th/slip/2009/b203093.html.

[27] Cal. Civ. Code § 1941 (West 2007); *Green v. Superior Court*, 10 Cal. 3d 616, 622-29 (1974) (first recognizing that there is a common law implied warranty of habitability in residential leases in California).

[28] Cal. Civ. Code § 1941.1 (West 2007); Cal. Health & Safety Code § 17920.3 (West 2007).

[29] *Knight v. Hallsthammar*, 29 Cal. 3d 46, 59 n.10 (1981) ("'violation of a housing code or sanitary regulation is not the exclusive determinant of whether there has been a breach'"). Quoting *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 327 (1979) (discussing the implied warranty of habitability doctrine and noting that it applies not only to code violations but also to "conditions occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disaster").

[30] *Fox Point Apt. v. Kippes*, No. 92-6924 (Or. Dist. Ct. Lackamas County 1992).