

● PESTICIDES IN RENTALS AND
CONDOMINIUMS

NO MORE PESTICIDES AT HOME

Traditional American values strongly support each person's right to determine what happens inside his or her own home. These values, and common sense, tell us that no one should be forced to allow unwanted toxic chemicals into their home. As Rachel Carson eloquently wrote in *Silent Spring*, "If the Bill of Rights contains no guarantee that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight could conceive of no such problem." Unfortunately, this right is far from a reality, especially for those of us who live in rentals or condominiums.

How can you change the pest management practices of a landlord or condominium manager? Probably the best way is to deal with the issue ahead of time, by asking your landlord to amend your rental agreement with language that gives you a voice in your home's pest management.

This article also gives a brief description of the important steps to take when an unwanted pesticide application is proposed for your home. Gather information about the hazards of the pesticides proposed for use and alternative management techniques. Talk with your neighbors, your landlord, and everyone else involved in the pest management process. Share your concerns and the information you have gathered. In a condominium or large apartment complex, it is crucial to enlist the support of as many of your neighbors as possible.

Although typical landlord-tenant laws give very little protection from unwanted pesticide exposure, if you, your family, your pets, or your possessions are injured by a pesticide application in your home, there are several legal approaches you can use to recover damages.

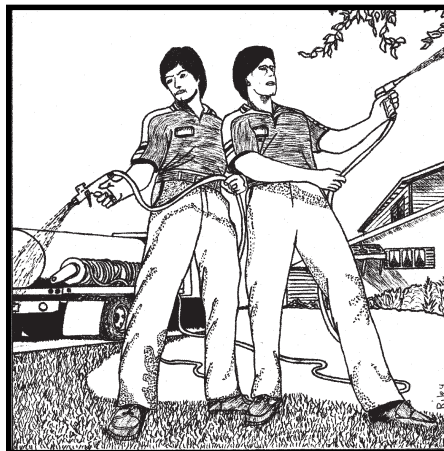
BY JONAH PAISNER

S*Scenario A: You own a condo in an artist's cooperative. The board of directors insists on spraying malathion indoors; tragically, your cat dies as a result of the poisons. You hire an attorney to find out your rights and wish to stop the onslaught. Will you be able to control toxic pesticide use in common areas of your condominium?*

S*Scenario B: You are a new mother of a baby girl. When you push her stroller down the paved path in front of your apartment, vapors from lawn care pesticides waft their way towards you. You wonder if there might be a way to get your landlord to use least-toxic lawn care techniques. How can you convince him?*

S*Scenario C: You live in a rented house. Due to recurrent outbreaks of sugar ants in*

the past, your landlord has contracted with a pest control firm to have insecticides sprayed indoors every two weeks. You can't stand the smell and wonder if you might have to move out in order to be free from noxious pesticides. Can you work with your landlord to find less- or non-toxic alterna-



symptoms of the widespread use of pesticides in the United States today. Upwards of three quarters of American households (about 75 million families) use pesticides each year: over 20 percent use pesticides on themselves or their pets; almost 70 percent use pesticides in indoor areas; and over 40 percent use pesticides in outdoor areas.¹

There are many instances where those who are exposed to pesticides did not choose to have them applied in the first place, as the above scenarios illustrate. Strategies to combat unwanted pesticide use in the residential sphere include negotiating with the pesticide user (a pest control operator or a landlord), securing an amendment to a rental agreement, implementing a pest management policy for an apartment or condominium, and lastly, legal remedies.

Information Gathering

Before taking up any of these approaches, it's important to collect information. You need to find out what kind

tives? Can you sue?

These three troublesome scenarios are

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of pesticides are used, their active ingredient(s), how often they are applied, if the use is in accordance with the label instructions, and any negative effects on people, plants or animals observed.

Next, collect information about the hazards of the pesticide in question. Since most information about a pesticide comes from the manufacturer, it can be difficult to find independent information. NCAP can help with this. Give us a call!

Part of the effort should include collecting information on alternative methods, including those that use integrated pest management (IPM). The best IPM programs use frequent monitoring to determine the level of pest problems. When significant problems are found, IPM uses physical, mechanical, biological, cultural, and educational approaches to fight pests and keep their damage at a tolerable level — least toxic chemical pesticides are only used if all other methods fail.²

Let's Talk

Naturally, it's best to start by simply talking with those involved in the decision to use pesticides, whether they be your landlord, a fellow tenant who wants a pesticide treatment, or a pest management professional. In many cases, all it takes is a brief mention of the hazards posed to people, pets and gardens in the residence and the user will happily switch to a least toxic solution. Other times, it takes a bit more coaxing.

An offer to help with the pest control effort is a good way to win the user's cooperation. So, if it's a question of using an herbicide on their lawn or garden, offer to do weeding, or ask them for a larger buffer zone with a promise to help control vegetation near the residence. If IPM methods don't completely eradicate the pest, especially where the problem is an aesthetic one like dandelions or clover in grass, try to convince the user that the lawn is functional and will be safe. In an apartment complex, suggest that the pest control company only treat specific pest-infested areas instead of an entire building. Also, have the landlord pass on preventive information to all apartment

dwellers. In general, if it's possible to show the user that an alternative is both cheaper and more effective as well as less toxic, then sticking to the current plan loses much of its appeal. If negotiations are stymied, a doctor's note or a willingness to help pay for the alternative may convince a stubborn user.

Sadly, sometimes the problem is that people aren't willing to negotiate with each other, or even worse, imagine that such compromise is a sign of weakness. Such an approach can be quite counter-productive: interactions are far more fluid when parties give each other more credit, and seek to build, not tear apart, relationships. Since the type of relationship here may already be, or could become, a long-standing one, it's unwise to angrily

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confront the user from the get-go. Try out the above mentioned negotiation tactics before rushing ahead to organize against the sprayer or threatening to sue them.

An Ounce of Prevention: Amending a Rental Agreement

Most pesticide-related conflicts arise with an established tenant or condo resi-

dent. The surest way to limit the risk of exposure, though, is with a preemptive strike in the form of a rental agreement amendment before you sign a rental agreement. If you can't get up and move to secure a new rental agreement, try adding an amendment to your existing rental agreement that covers future pesticide use

If a living space free of toxic chemicals is a top criteria for a new apartment, it's important to start right. Before signing a rental agreement, have your landlord review and accept in writing a supplement to your rental agreement which specifies your requirements. It's important to be as specific as possible. For example, you might want to insist on advance notice before use of both indoor and outdoor pesticides; a promise of the landlord to look into least toxic alternatives; or a prohibition on specific products to which you know you have a strong reaction.³ Please see “Green Amendments to a Rental Agreement” on p.4 for sample amendments.

Getting such an agreement may be difficult. An amendment such as described above is classified as an “express” warranty regarding the landlord's use of pesticides, because it specifically (expressly) states the terms regarding pesticide use. Renters are in a poor position to negotiate an express warranty due to housing shortages, standard rental agreements, discrimination, and a variety of other problems.⁴ Since a landlord — particularly when they are a large management company — may not want to commit to extra promises merely as a sign of goodwill, you may need to pay a slight charge on top of the rent to secure such a right. The extra payment would cover the landlord's extra costs for IPM, notice to you, etc. Having to pay to protect oneself from pesticide exposure is hardly just. But like the higher cost of pesticide-free vegetables, the current state of our rights does not champion the right to be free from chemical exposure.

Changing Pesticide Policy

Where a landlord is unwilling to

switch over to least toxic methods in response to one person's request, organizing a group to support change can be more successful. This approach is particularly appropriate when the user is a condominium or cooperative association, or a large apartment owner. (In order to try and keep the writing simple, the next few paragraphs will refer to these people and associations as "managers.")

Managers often contract with a private pest control company on a yearly basis to perform periodic landscape and indoor pesticide treatments. Often treatment is on such a schedule that applications happen even if there is no pest infestation or landscape problem; this might reflect the managers' wish not to be involved in the day-to-day maintenance of the property. If you want your landlord to adopt a more IPM-oriented approach, working with others living in the same complex is important because large scale property managers may ignore isolated complaints. Unless there's a chance many people will move out, and cost the management a lot of money, they are unlikely to get too involved.

Successfully promoting an alternative pest management policy requires you to take the following steps:

- Find out the current pest control products and methods.
- Research alternative methods and local pest management companies that will use these methods
- Contact fellow renters/condo owners in your complex and let them know of the hazards of the current situation and your alternatives; speak to the condo board or tenant's association.
- The condo board of directors must be persuaded to amend the condo by-laws, or the landlord must be persuaded to consider alternatives as a factor when choosing a contractor.
- You must be vigilant to make sure the policy does not get changed back to old chemical ways after the initial publicity dies down.

Ordinances: A Difficult but Potentially Rewarding Path

On a broader scale, it may be possible to get your town or city to adopt a local ordinance restricting pesticide use or requiring certain forms of pre and post-spray notification. This offers concerned citizens a chance to make major changes in the way that pesticides are used in their community, but would certainly require a much bigger organizing effort and will likely face stiff opposition from powerful

interests who support the unhampered application of pesticides.

The U.S. Supreme Court has ruled that federal law does not preempt local pesticide ordinances.⁵ However pesticide manufacturers mounted a massive campaign to pass preemption laws at the *state* level. They have succeeded in most states. As of this writing, Washington is the only state in the Northwest region that does

GREEN AMENDMENTS TO A RENTAL AGREEMENT

Convincing a landlord to accept a rental agreement amendment is tricky. We suggest you verbally approach the landlord with amendment A first. If amendment A is rejected, go on to amendment B.

These amendments will be most useful for single family homes, and possibly duplexes. Please modify them so suit your individual needs and situation before using them in a rental agreement.

Amendment A: This is an amendment to a rental agreement between _____ ("Landlord") and _____ ("Tenant") regarding the use of indoor and outdoor pesticides on all property described in this rental agreement.

All management of pests that have the potential to damage the structure of the building (termites, carpenter ants, carpenter bees, wood-boring beetles, wood-decay fungi, dry rot, or roof moss) will be done using an integrated pest management (IPM) approach. IPM is defined as pest control which uses frequent monitoring to discover pest problems, and when found, uses physical, mechanical, biological, cultural, and educational approaches to fight pests and keep their damage at a tolerable level — least toxic chemical pesticides are only used if all other methods fail. The Landlord will provide notice in person, and by posting at the property described in this rental agreement, at least 24 hours prior to application of any pesticide.

The Tenant will determine the techniques to be used for management of all other pests. The Tenant shall also carry out or contract for such treatments if the Tenant finds they are necessary.

Amendment B: This is an amendment to a rental agreement between _____ ("Landlord") and _____ ("Tenant") regarding the use of indoor and outdoor pesticides on all property described in this rental agreement.

The Landlord agrees all pest management will be done using an integrated pest management (IPM) approach. IPM is defined as pest control which uses frequent monitoring to discover pest problems, and when found, uses physical, mechanical, biological, cultural, and educational approaches to fight pests and keep their damage at a tolerable level — least toxic chemical pesticides are only used if all other methods fail. The Landlord will provide notice in person, and by posting at the property described in this rental agreement, at least 24 hours prior to application of any pesticide.

Using a compressed air sprayer to apply a pyrethrin-based insecticide in cracks and crevices. The equipment allows a smaller amount of insecticide to be used than would be the case if a broadcast application were made.

so long as they are approved by the state.

Legal Remedies

These following remedies are approaches for those already exposed to pesticides. They are concepts that can be explored with an attorney once injury has happened. Of course, a firm letter from an attorney communicating that what a landlord is about to do may be result in litigation could help push the landlord or condominium association to reconsider their current plans.

Depending on the type of injury, and any special characteristics of the person injured, the claim will be based on different laws. Broad categories include landlord-tenant, state common law tort, or even federal law.

In the Pacific Northwest, landlord-tenant laws do not specifically delineate rights and responsibilities with respect to pesticide use. Relevant sections of these laws do, however, mention the need for landlords to control pests: in California a landlord must "keep all areas under [her] control. . . free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin."⁶ (Emphasis added.) Similar lan-

guage in Oregon and Washington's laws include an affirmative requirement for landlords to maintain premises free of pests.^{7,8} Contemporary landlord-tenant law does not explicitly reflect a right to stop unwanted pesticides.

One potential avenue is broad language that requires landlords to maintain residences in a "habitable" condition, also know as the implied "warranty of habitability" referred to above. (This doctrine is accepted in California. Other northwestern states have specific habitability duties only as prescribed in state statutory language.)

Statutory language variously calls for rented property to "[be] kept in every part safe for normal and reasonably foreseeable use,"⁷ have "all common areas of the premises in a clean and safe condition,"⁹ and *not* be such that it "endangers or impairs the health or safety of the tenant."⁸ A claimant could argue that pesticide use by a landlord is in violation of the landlord's statutory duty to keep the premises "safe."

Unfortunately, for most people it is prohibitively expensive to pursue a legal action against a landlord prior to injury, and on a new, and thus far unsuccessful, legal argument. This legal argument was used unsuccessfully in a wrongful death action against a landlord, where the plaintiff argued her mother died as a result of exposure to pesticides.¹⁰

With landlord-tenant laws silent on the pesticide issue, we ask a more fundamental question: Do we have a basic right to be free from exposure to toxic chemicals? While a constitutional right to privacy, including the right to make decisions in "fundamental matters" and a right to "bodily integrity" may provide such protection, it has only been applied in the area of reproductive rights, and is untested with respect to pesticide or chemical exposure.¹¹

Probably the most promising area where a legal remedy is recognized in the case of those people identified as suffering from multiple chemical sensitivity (MCS). In the landmark case of Melinda Lebens, she won a court enforced settle-

Applying an avermectin bait product to control cockroaches. Use of baits can eliminate the need for broadcast sprays of insecticides.

not have pre-emption laws at the state level. Oregon, Idaho, Montana and California do have preemption laws, although Montana's law does allow local ordinances

Applying caulk to seal the holes left where plumbing pipes pass through a wall is an important tool for reducing pesticide use in apartments. If left uncaulked, the holes allow pests to come in from outdoors, and then to travel from one apartment to another.

ment against Country Creek Association (CCA). The settlement required Country Creek, the management company who rents to Lebens, to pursue integrated pest management.¹² This settlement was on the heels of a decision by the Department of Housing and Urban Development (HUD) that the CCA had violated the Fair Housing Act by discriminating against Lebens.¹³

Now we briefly examine the common law tort remedies as an emerging area for recovery from injury sustained as a result of pesticide exposure. When property or serious physical injury occurs in a resident setting, one or more of the following tort remedies should be examined: battery, nuisance, negligence, and premises liability.

A battery occurs when the defendant intends, or knows to a substantial certainty, that his act will result in an "offensive or harmful contact" with the plaintiff.¹⁴ Where a landlord, on his own or through a pest control operator, intentionally uses a pesticide, knowing that the vapors could cause injury, and injury does result, he could be found liable for battery. However, since using pesticides

is a common practice, a jury might not find that a reasonable landlord should have known of the risk or that the act was sufficiently "offensive." Using an outlawed pesticide like DDT, though, might be offensive. If the landlord knows the tenant to be especially sensitive to chemicals — by a request to not use pesticides, for instance — then using pesticides may constitute a battery even when viewed objectively.

One hopeful sign with this tort is to consider the case of second-hand smoke. Back in the 1950s, complaints about second hand smoke were unheard of. However, with our modern understanding of the harms from inhaling second-hand smoke, legal scholars argue that plaintiffs may soon successfully sue for battery.¹⁵

A private nuisance is an invasion of another's use and enjoyment of land, where a significant harm results from an intentional action.¹⁶ While this tort is most often used when property is damaged, as where an organic garden is contaminated with pesticides, the right to enjoy one's lawn or even live in a house can also fall under the ambit of "use and enjoy." Again, as with battery, the stan-

dard is "objective", which is to say, the jury must examine whether the harm complained of is one society deems to be sufficient for an award.

Negligence occurs when the defendant has a duty to act in a certain way with respect to the plaintiff, and acts unreasonably so as to cause injury to the plaintiff. For example, a pest control company applies pesticides in a way that breached this duty, or the landlord fails to provide adequate notice to the tenant of a pesticide that occurred. If the tenant was injured in either of these cases, a claim for negligence might be appropriate, so long as the tenant did not act negligently herself in causing the injury. This remedy, though, is dependent on a statutory duty, and as we have seen landlords appear to have virtually no such duty with respect to pesticides.

Conclusion

When trying to avoid pesticide exposure, tenants and condo owners are faced with meager protection from laws. Using non-legal means to achieve alternative pest control practices is often the best approach.

Negotiation, either on your own or through a lawyer, is the first approach. Successful arrangements might include an offer to help with the costs or time needed for alternative pest control practices. An amendment to a rental agreement can offer freedom from pesticide exposure. It is most feasible for those just moving into a new dwelling. It might be necessary to be ready to help pay the difference between IPM and conventional means.

With a condominium, organization and mobilization are the keys to securing alternative-friendly by-laws or pest control contracts. If you think you or your property was injured by pesticides, a law suit may be appropriate. However, legal claims under landlord-tenant and tort law are difficult. Avoiding injury is the preferred route. ♣

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