



COOPERATIVES AND CONDOMINIUMS

Expert Analysis

Secondhand Tobacco Smoke Revisited

This column previously discussed secondhand tobacco smoke in 2006,¹ following release of the Surgeon General's report concluding that secondhand smoke poses a serious health risk.² To date, 26 states and the District of Columbia have passed comprehensive smoke-free laws.³ However, these laws exempt the place where most Americans spend the greatest amount of time—home. Several California cities have enacted local legislation banning smoking inside multi-unit residences.⁴ However, New York City does not have such a law and few if any New York co-ops or condominiums have voluntarily become smoke-free.

Absent legislative action, a prohibition on indoor smoking in a co-op or condominium building could be procedurally difficult to enact and may lead to contentiousness between neighbors. In addition, boards may be concerned that banning smoking would result in litigation or decreased apartment values. Nonetheless, boards and managers must address legitimate complaints of occupants who wish to be free of the odor and adverse health impacts of secondhand smoke. This creates a challenge for boards and managers of buildings occupied by both smokers and non-smokers.

This column addresses these challenges and concerns, discusses recent case law and provides recommendations to boards and managers on how to deal with secondhand smoke.

Case Law

In recent years, boards and apartment owners have been involved in lawsuits seeking relief for secondhand smoke exposure based on a variety of legal theories, including breach of the warranty of habitability, nuisance, negligence, breach of the covenant of quiet enjoyment and breach of the co-op proprietary lease and House Rules or condominium bylaws, rules and regulations.

Our previous column discussed the first New York decision addressing landlord liability for secondhand smoke. In *Poyck v. Bryant*,⁵ a 2006 New York civil court found that tenants who vacated a condominium



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apartment before the lease termination date due to secondhand smoke from an adjoining apartment, could assert the warranty of habitability as a defense to their landlord's non-payment of rent proceeding, notwithstanding that the landlord had no control over the adjoining apartment.

The *Poyck* holding suggests that co-op apartment owners exposed to secondhand smoke can also assert a claim for breach of the warranty of habitability because the warranty is applicable to apartment owners who are also lessees under the proprietary lease, although not between condominium unit owners and the Board

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of Managers.⁶ One year earlier, in 2005, a New York Supreme Court held that a commercial tenant could pursue a nuisance claim for secondhand smoke emanating from the adjoining unit.⁷

In 2007, in *Zipper v. Haroldon Court Condominiums*,⁸ the Appellate Division, First Department, unanimously reversed the lower court and held that a condominium board and a unit owner could lawfully evict a tenant who permitted recurring foul odors to emanate from her apartment, finding that the odors constituted a nuisance. Although the case did not involve secondhand smoke, its holding is relevant because secondhand smoke includes odor and it too can therefore be considered a nuisance.

In 2008, condominium apartment owners sued their neighbor, alleging that secondhand smoke which permeated into the common hallway and their apartment from their neighbor's apartment was a nuisance jeopardizing the health of their 4-year-old son.⁹ Prior to filing the suit, plaintiffs complained to the board

about secondhand smoke. The board made changes to the shared ducts between the apartments, but did not address secondhand smoke in the hallway, which continued to seep into plaintiffs' apartment. The case settled two months later, after air filtration units were installed in both apartments.

And in December 2009, a New York Civil Court denied a condominium apartment owner's motion to dismiss nuisance and negligence claims asserted by neighboring apartment owners for secondhand smoke seeping into their apartment. In *Ewen v. MacCherone*,¹⁰ defendants argued that because the condominium rules explicitly banned smoking in the building's playroom and health club, smoking within apartments was permitted. However, the court noted that these rules also prohibit residents from permitting objectionable odors to interfere with the rights and comforts of other apartment owners and concluded that smoking is not permitted in individual apartments if, as a result, secondhand smoke enters other apartments.

The court further held that while the board had the right to commence an action to remedy a violation of the rules, the governing documents did not expressly prohibit apartment owners from commencing a nuisance action against other apartment owners. Finally, the court held that the condominium was not a necessary party to the lawsuit.

Remediation

Given this developing New York case law, boards and managers should be vigilant in addressing secondhand smoke. While our research has disclosed no specific remediation recommendations endorsed by governmental entities at the federal, state or local levels,¹¹ certified industrial hygienists can assist boards and managers in dealing with secondhand smoke.¹² Further, under §717 of the Business Corporation Law, directors are entitled to rely on the opinions and recommendations of professionals with expertise in the area at issue. Therefore, a board can discharge its duty if it retains a qualified professional and follows that professional's advice.¹³

Generally, effective remediation depends on obtaining access to the smoker's apartment for inspection and to seal penetrations in shared wall cavities, ceiling slabs, and the like—followed, if necessary, by the installation of an exterior exhaust filtration system in the smoker's apartment. Typical proprietary leases and condominium bylaws and rules prohibit an apartment owner from making or permitting odors to emanate from their apartment and further gives boards the right to enter an apartment and cure the owner's default for allowing odors to so emanate.

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Therefore, if a smoker refuses to remediate a secondhand smoke condition, the board can do so by obtaining a court order to compel the smoker to give access to the apartment and then performing the necessary work, all at the apartment owner's cost and expense, including payment of the legal fees incurred by the board to obtain an access order from the court.¹⁴ The installation of air filtration systems in the impacted apartment may also reduce the degree of secondhand smoke infiltration, but will not eliminate it.¹⁵

Building-Wide Smoking Ban

Although boards may be concerned about the legal consequences of implementing smoking restrictions, there could be legal consequences if they fail to do so.¹⁶ Also, as explained in our previous column, smokers are not a constitutionally protected class and smoking is not considered a handicap or disability under the federal Fair Housing Act. Therefore, a smoking ban would not be considered discrimination against smokers.

Further, while no reported New York case has challenged a co-op or condominium's right to adopt a building-wide smoking ban, in *Christiansen v. Heritage Hills I Condominium, Owners Ass'n*, a Colorado district court upheld an amendment to a condominium declaration that banned smoking inside apartments.¹⁷ The court noted that the board had tried to address secondhand smoke through remediation measures—to no avail.

Smoke-Free Advantages

While boards may be concerned that restricting the pool of apartment purchasers will have an adverse impact on apartment values, a smoking restriction may actually enhance such values. According to anti-smoking advocacy groups, only 16 percent of New York City residents are currently smokers.

A recent poll suggests that 58 percent of the city's residents would pay more to live in a smoke-free building and 68 percent might choose not to live in a smoking-permitted building.¹⁸ And a study released in April 2009 found that 56.7 percent of nonsmokers in New York City have elevated levels of the nicotine metabolite cotinine, an indicator of exposure to tobacco smoke, compared to some 44.9 percent of nonsmokers nationwide.¹⁹ These statistics suggest that there is a demand for smoke-free housing, and that co-op and condominium buildings may benefit from this demand by creating smoke-free buildings.

Further, becoming smoke-free may decrease building maintenance costs associated with smoking and reduce insurance costs. Insurance companies reportedly offer discounts on casualty and liability insurance to smoke-free buildings and on life insurance to their occupants.²⁰ There are also safety benefits. Becoming smoke-free reduces fire risk. Cigarette smoking is a leading cause of fires in residential buildings and the number one cause of fires that result in death.²¹

Recognizing the hazards of secondhand smoke, the U.S. Department of Housing and Urban Development, recently strongly encouraged public housing authorities to implement non-smoking policies in public housing.²² In New York City, several residential rental landlords have banned smoking in their buildings. In 2008, Pan Am Rentals banned smoking in all its buildings, exempting existing tenants. In November 2009, Related Companies followed suit in six of its buildings. And in December 2009, Kenbar Management opened its first smoke-free building, prohibiting smoking anywhere inside or within the immediate vicinity of the building.²³

Recommendations

When a board or manager receives a secondhand smoke complaint, advice should be sought from a qualified professional to determine the presence of the condition and develop remediation protocols. If the presence of secondhand smoke is confirmed, boards should seek to have the smoker implement the work recommended by the board's consultant. If the smoker does not cooperate, boards can pursue obtaining access to the smoker's apartment to do the necessary work.

Boards may also wish to consider a building-wide smoking ban, especially if secondhand smoke complaints are frequent and remediation efforts have been unsuccessful. In that event, the first step boards may wish to take is to obtain a sense of the building's views by conducting a survey of apartment owners. Survey questions could include: (1) is the owner a smoker; (2) has the owner experienced secondhand smoke in common areas and/or their apartment; and (3) would the owner support a smoking ban. Based on the owners' answers, the board can decide what measures are desirable and feasible in the building.

If a board determines to implement a no-smoking ban, the best way to do so is an amendment to the proprietary lease in a co-op and to the bylaws in a condominium. A court is more likely to uphold a use restriction adopted by a super majority of apartment

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owners rather than by board action. It would be prudent to delay the restriction's effective date for a short period of time to afford smokers time to adjust to the restriction or sell their apartments.

If a board decides that a less comprehensive ban would better suit the building's needs, it could: (1) adopt a total ban, but delay implementation for an extended period of time, to allow owners who smoke to sell their apartments; (2) adopt a total smoking ban but "grandfather" current owners from its requirements; (3) amend the building's governing documents to expressly deem secondhand smoke a nuisance, thereby making it easier for owners to assert a claim and boards to declare a default; or (4) reject prospective purchasers who disclose that they smoke (co-ops only).

Conclusion

Boards and managers should be alert and responsive to secondhand smoke complaints because co-ops and condominiums can be held legally accountable for failing to address this issue. Boards should also consider enacting building-wide smoking bans tailored to the needs of their buildings. Boards should not be deterred by concerns that a ban would constitute unlawful discrimination against smokers. Smoking restrictions do not violate the Fourteenth Amendment, and smokers are not members of a protected class.

www.surgeongeneral.gov/library/secondhandsmoke/report/fullreport.pdf. More recently, researchers have begun to explore the dangers of "thirdhand smoke"—the toxins left behind after a cigarette has been extinguished and smoke has dissipated—which settles on walls, furniture and clothes. See, *New York Times*, Magazine section, "Thirdhand Smoke," Dec. 13, 2009, p. 67, col. 1.

3. A comprehensive smoke-free law is one that bans smoking in almost all public places and workplaces including restaurants and bars. State Smoke Free Air Laws, American Lung Association, available at <http://slati.lungusa.org/reports/SecondhandSmokeLawsFactSheet01-10.pdf>.

4. Jesse McKinley, "Smoking Ban Hits Home. Truly," *N.Y. Times*, Jan. 26, 2009, available at <http://www.nytimes.com/2009/01/27/us/27belmont.html>.

5. 18 Misc.3d 699 (Civ. Ct. N.Y. Co., 2006). The warranty of habitability is implied in every residential lease and warrants that the premises are fit for human habitation and that occupants will not be subjected to conditions that are dangerous, hazardous or detrimental to life, health or safety. N.Y. Real Prop. L. §235-b (McKinney 2006 and Supp. 2010). See also, Richard Siegler and Eva Talel, "The Warranty of Habitability," *NYLJ*, May 3, 2006, p. 3, col. 1.

6. See, *Frisch v. Bellmarc Management Inc.*, 190 A.D.2d 383 (1st Dept., 1993); *Linden v. Lloyds Planning Services Inc.*, 299 A.D. 2d 217 (1st Dept., 2002).

7. *Herbert Paul, CPA, PC v. 370 Lex, LLC*, 7 Misc.3d 747, (Sup. Ct. N.Y. Co. 2005).

8. 39 A.D.3d 325 (1st Dept. 2007).

9. *Selbin v. Huff*, Supreme Court N.Y. Co., Index No. 102185/2008. See, Sewell Chan, "Second-Hand Smoke at the Ansonia Prompts Lawsuit," *N.Y. Times*, Feb. 8, 2008, available at <http://cityroom.blogs.nytimes.com/2008/02/08/second-hand-smoke-at-the-ansonia-prompts-lawsuit/>. See also, Anemonia Hartocollis, "Ansonia Smoking Lawsuit Is Settled," *N.Y. Times*, April 7, 2008 available at <http://cityroom.blogs.nytimes.com/2008/04/07/ansonia-smoking-lawsuit-is-settled/>. 10. 2009 WL 4432449 (Civ. Ct. N.Y. Co.).

11. See, e.g., 2009 EPA study on residential air cleaners, <http://www.epa.gov/iaq/pubs/residair.html>; NYS Department of Health, Guide to Indoor Air Quality in the Home: <http://www.nyseda.org/publications/iaq.pdf>.

12. See, e.g. www.microeologies.com.

13. Section 717 of the BCL has been expressly held to apply to condominiums. See, e.g., *Levandusky v. One Fifth Avenue Apartment Corp.*, 75 N.Y. 2d 530 (1990); *Buffalo Forge Co. v. Ogden Corp.*, 555 F.Supp. 892 (WDNY 1983), affirmed, 717 F.2d 757 (2d Cir. 1983).

14. *Residential Board of Managers of the Vanderbilt Condominium v. Goldberg*, *NYLJ*, Sept. 8, 2009, p. 18, col. 1 *(Sup Ct. N.Y. Co.).

15. See, note 11, supra.

16. See, *Grussendorf v. City of Oklahoma*, 816 F.2d 539, 541 (10th Cir. 1987), holding that the Fourteenth Amendment does not protect the right to smoke. And, in *In re HUD and Kirk and Guilford Management Corp. and Park Towers Apartment 101*, HUD Case No. 05-97-0010-8, 504, Case No. 05-97-11-0005-370 (1998), the Department of Housing and Urban Development approved a conciliation agreement in which a building was made smoke-free for future tenants, as a "reasonable accommodation." Similarly, in a lawsuit brought by the U.S. Department of Justice against the Seattle Housing Authority, transfer of a public housing tenant to another unit was considered a "reasonable accommodation." See, *United States v. Seattle Housing Authority*, Consent Decree Case No. C01-1133L (W.D. Wa., 2002) available at <http://www.justice.gov/crt/housing/Seattle.settle.pdf>. See generally, Susan Schoenmarklin, "Tobacco Control Legal Consortium, Infiltration of Secondhand Smoke Into Condominiums, Apartments and Other Multi-Unit Dwellings: 2009."

17. No. 06-CV-1256 (Colo. Dist. Ct., filed Nov. 7, 2006) available at <http://www.hoalegislature.com/archives/05258030.pdf>.

18. 2009 Annual NYC Tobacco Control Attitudes and Action Poll. Conducted July 22-29, 2009 by Zogby International Survey.

19. Roni Caryn Rabin, "New Yorkers Often Exposed to Cigarette Smoke, Study Finds," *N.Y. Times*, April 8, 2009, available at <http://www.nytimes.com/2009/04/09/health/policy/09smoke.html>.

20. Steps to Smoke-Free Housing—Landlord and Property Owners' Guide, <http://www.smokefreehousingny.org/landlords.html> (last visited Jan. 28, 2010) citing Susan Schoenmarklin and Jacque Peterson, "Smoke Signals," (December 2007), available at <http://www.tesg.org/selp/UnitsDec2007.pdf>.

21. Steps to Smoke-free Housing—Landlord and Property Owners' Guide, supra note 20, (last visited Jan. 28, 2010) citing New York State Office of Fire Prevention and Control, "Revised Regulatory Impact Statement" (published Sept. 3, 2003). Available at: <http://www.dos.State.ny.us/fire/triscig.htm>.

22. U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Office of Healthy Homes and Lead Hazard Control, "Non-smoking Policies in Public Housing," Notice PIH-2009-21, available at <http://www.hud.gov/offices/pih/publications/notices/09/pih2009-21.pdf>.

23. C.J. Hughes, "For Some Smokers, Even Home Is Off Limits," *N.Y. Times*, Nov. 15, 2009, available at <http://www.nytimes.com/2009/11/16/nyregion/16smoke.html?pagewanted=all>.

In addition, a bill has been introduced in the New York State Legislature which would allow a residential tenant to terminate its lease due to documented adverse health effects of secondhand smoke emanating from other tenants' apartments. See, A8700, 2009/2010 Regular Session (N.Y. 2009), available at: <http://open.nysenate.gov/legislation/api/1/0/html/bill/A8700>.

1. See Richard Siegler and Eva Talel, "Dealing With Secondhand Tobacco Smoke," *NYLJ*, Sept. 6, 2006, p. 3, col. 1.

2. "The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General" (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/fullreport.pdf>.