

COOPERATIVES AND CONDOMINIUMS

Expert Analysis

Second-Hand Smoke And Smoking Bans

The damaging health effects of second-hand smoke are widely recognized by the established scientific community. Second-hand smoke has been linked to lung cancer, heart disease, diabetes, strokes, emphysema and other respiratory conditions.¹ Recently, hearing loss in teenage children has been linked to second-hand smoke.² Third-hand smoke, a newcomer to health concerns, results from compounds in tobacco residue that become embedded in furniture, carpets and other exposed surfaces and can be inhaled for as long as two years after a room where smoking took place on a regular basis is vacated.³

As the known risks associated with smoking increase, so do the number and intensity of smoking-related complaints received by co-op and condominium boards and managers, including demands that building-wide smoking bans be implemented.



By
**Richard
Siegler**



And
**Eva
Talel**

Smokers or owners concerned with whether a smoking ban will decrease the value of apartments may oppose such bans.⁴

In 2006 and 2010, this column addressed the then-evolving health and legal concerns regarding second-hand smoke and whether smoking could be prohibited in co-op and condominium buildings, including within apartments.⁵ This column updates our prior ones, analyzes recent legislation and case law regarding smoking, provides recommendations for boards and managers in dealing with second-hand smoke complaints and discusses steps that can be taken by boards to ban smoking in co-op and condominium buildings.

Legislation

The clear trend in New York is to restrict spaces where smoking is permitted. New York City's Smoke Free

Air Act, enacted in 2002 to prohibit smoking in public places and places of employment, was amended in 2011 to ban smoking in public parks and places of recreation.⁶

New York City's Mayor Michael Bloomberg, who has made restricting smoking a key element of his public health policy, has proposed a bill to require residential buildings—including co-op and condominium buildings—to adopt and disclose to prospective tenants and apartment purchasers a smoking policy stating whether smoking is permitted inside apartments, on balconies and rooftops and in courtyards.⁷

At the federal level, in June 2012, the U.S. Department of Housing and Urban Development launched an initiative to encourage the adoption of smoke-free policies in federally assisted public housing. Although this initiative does not ban smoking, it does advise landlords and housing authorities to advertise units as non-smoking, include no-smoking policies in leases, and enforce smoke-free rule violations as they would any other lease infraction.⁸

Lastly, in October 2012, San Rafael County, a San Francisco suburb, banned smoking in new or exist-

RICHARD SIEGLER is of counsel to *Stroock & Stroock & Lavan* and is an adjunct professor at *New York Law School*. EVA TALEL is a partner at *Stroock* and an adjunct professor at *Cardozo Law School*. MARGARET JONES, a research librarian at *Stroock*, assisted in the preparation of this column. *Stroock* is counsel to the *Real Estate Board of New York*.

ing multifamily structures and condominiums.⁹ California is the only state where local jurisdictions (nine to date) have banned smoking inside condominiums.¹⁰

Case Law

In 2011, in *Ewen v. Maccherone*,¹¹ the Appellate Term, First Department, addressed whether a condominium apartment owner can be sued for negligence and nuisance where second-hand smoke allegedly seeped from the owner's apartment into a neighbor's apartment. Although defects in the building's ventilation system allegedly contributed to the smoke migration, the condominium was not sued.

The defendant owner moved to dismiss the case, arguing that the condominium was a necessary party and that the condominium bylaws did not prohibit smoking within apartments. The lower court denied the motion but the Appellate Term, although recognizing the health hazards of second-hand smoke, reversed, holding that plaintiff failed to state a claim for nuisance or negligence because no statute, or condominium bylaw or rule prohibited smoking within defendant's apartment or obligated defendant to prevent smoke from seeping into other apartments.

Importantly, the court strongly implied that if there had been a condominium bylaw, rule or regulation expressly banning smoking within apartments, the court would have enforced it and would not have dismissed the case.

In *Upper East Lease Associates v. Cannon*,¹² involving a rental building, a lease addendum expressly provided that the tenant acknowledged that second-hand smoke may

constitute a nuisance and health hazard and that tenant would take all measures necessary to prevent second-hand smoke infiltration into the building's common areas and other apartments. A tenant withheld rent and vacated her apartment prior to the end of her lease term, claiming that unremediated second-hand smoke from the apartment below breached the warranty and constituted a constructive eviction. The landlord sued for unpaid rent and the court, relying on *Poyck v. Bryant*,¹³ found that second-hand smoke could breach the warranty of habitability and was grounds for a constructive eviction, and held that unabated second-hand smoke was a sufficient nuisance to entitle the tenant to a rent abatement.

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In *Reinhard v. Connaught Tower Corporation*,¹⁴ a co-op apartment owner sued the co-op and its board for failing to remediate second-hand smoke that she claimed was migrating into her apartment from defects within the building's walls, alleging breach of the warranty of habitability, constructive eviction and negligence. Plaintiff and the co-op presented conflicting evidence from their professional consultants regarding whether the smoke odor was sufficiently pervasive to breach the warranty and constitute an eviction, thereby requiring a trial. Howev-

er, the court was clear in its holding that pervasive second-hand smoke can constitute a breach of the warranty of habitability and constructive eviction. Similarly, the court found disputed issues of fact regarding plaintiff's negligence claim. However, relying on the Multiple Dwelling Law as imposing on landlords a duty to maintain the premises in a reasonably safe condition,¹⁵ the court held the co-op could be liable for negligence if it created an unsafe condition or had actual or constructive notice of same.

Although the cases discussed above are all lower court decisions, they point to a trend—to hold landlords, including co-op boards, accountable for remediating pervasive second-hand smoke; to sustain claims for breach of the warranty of habitability and constructive eviction for pervasive second-hand smoke; and to encourage adoption of co-op and condominium rules regarding the migration of second-hand smoke.

Smoke Complaints

Given this evolving case law, boards and managers should be vigilant in addressing second-hand smoke. When a board or manager receives a complaint, advice should be sought from a qualified professional to determine whether the condition is present and pervasive and, if so, to develop remediation protocols. Boards should seek to have the smoker implement the recommendations of the board's consultant and, if the smoker does not cooperate, boards can pursue obtaining access to the smoker's apartment to do the necessary work. If the smoke is emanating

from or through a building system or defective condition, boards should also obtain cost estimates to determine the feasibility of remediation. In addition, boards may wish to consider implementation of a smoking ban, especially if remediation costs would be prohibitive.

If a board is considering a smoking ban, obtaining the input of the building's apartment owners by way of a survey is recommended. If a board determines to implement a smoking ban, the best way to do so is by an amendment to the proprietary lease in a co-op and to the bylaws in a condominium, both of which require consent from a super majority of apartment owners.

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.¹⁶ Therefore, directors cannot be held liable and can satisfy the requirements of the business judgment rule if a qualified professional is retained and that professional's advice is followed.

Adopting a Smoking Ban

No reported New York case has challenged a co-op or condominium's right to adopt a building-wide smoking ban. Indeed, New York courts, as suggested in the *Reinhard* case, have strongly intimated that if a building were to adopt a smoking ban, including within apartments, the ban would

be upheld. As of March 2012, at least 14 apartment buildings in New York City, including rentals, co-ops and condominiums, have reportedly banned smoking.¹⁷

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If a board decides that a less comprehensive ban would better suit the building's needs, it could: (1) propose that apartment owners adopt a total ban, but delay implementation for an extended period of time, to allow owners who smoke an extended period within which to sell their apartments; (2) propose that owners adopt a total smoking ban but "grandfather" current owners from its requirements; (3) propose that owners amend the building's governing documents to expressly deem second-hand smoke a nuisance, thereby making it easier for owners to assert a claim and boards to declare a default; and/or (4) reject prospective purchasers who disclose that they smoke (co-ops only).¹⁸

Given the health hazards linked to second-hand smoke, prudent boards should establish procedures for addressing the issue and consider proposing, for apartment owner input and determination, some form

of building-wide smoking ban. Boards would be well-advised to consult with counsel, architects, engineers and certified industrial hygienists in addressing these issues.

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1. "The Health Consequences of Involuntary Exposure to Tobacco Smoke" available at: http://www.cdc.gov/tobacco/data_statistics/sgr/2006/index.htm (last visited Feb. 22, 2013); CDC Factsheet on the health effects of second-hand smoke available at: http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/health_effects/.

2. Nicholas Bakalar, "Hazards: Secondhand Smoke May Affect Hearing," *New York Times*, July 19, 2011, at D6.

3. Alice Park, "New Smoke Alarm," *Time Magazine*, Nov. 8, 2010 at pg. 66; "Global Advisors Smokefree Policy, Thirdhand Smoke (THS) is a Public Health Concern," available at <http://www.njgasp.org/th3.htm> (last visited 2/22/2013); Adrian Burton, "Does the Smoke Ever Really Clear? Thirdhand Smoke Exposure Raises New Concerns." *Environ Health Perspect.* 2011 February; 119(2). See *Cerny v. Bauers*, Case No. CI 05-2342, Order and Judgment (County Court, Lancaster Co. Nebraska 2/7/2007) (damages awarded for misrepresentation as to whether previous occupants smoked).

4. See Richard Siegler and Eva Talel, "Secondhand Tobacco Smoke Revisited" NYLJ, March 3, 2010, p. 3, col. 1 and Richard Siegler and Eva Talel, "Dealing With Second-hand Tobacco Smoke," NYLJ, Sept. 6, 2006, p.3, col.1.

5. Siegler and Talel, *supra*, note 4.

6. Smoke-Free Air Act, NYC Administrative Code, Title 17, Chapter 5, amended by 2011, Local Law 11. A similar ban on smoking in parks and recreational areas was enacted by Clayton, Montana in 2010. In 2011, an outdoor smoker brought a suit in federal court lawsuit, challenging its constitutionality and also sought a declaration recognizing smoking as a "fundamental right." The U.S. Court of Appeals for the Eighth Circuit declined to recognize a right to smoke and held that Clayton had a rational basis for restricting smoking—to protect the public's health, safety and welfare relying on the 2006 Surgeon General's report which found that there is no risk-free level of exposure to second-hand smoke. *Gallagher v. City of Clayton*, 699 F.3d 1013 (8th Cir. 2012).

7. NYC Int. 0833-2012: See also *Anemona Hartocollis*, "Bloomberg Calls for Residential Smoking Rules," *New York Times*, April 18, 2012 at A22. Smoking is already prohibited by law in hallways, lobbies, laundry rooms, stairwells and other common areas of multiple dwellings, including co-op and condominium buildings. 17 N.Y.C. Admin. Code §17-502.

8. HUD, HHS and Health Groups Announce New Smoke-Free Housing Tools, HUD Press Release #12-106, 6/19/2012, available at: http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2012/HUDNo.12-106 (last visited 2/22/2013).

9. San Rafael, CA, Ordinance No. 1908 (Oct. 15, 2012) available at: <http://library.municode.com/index.aspx?clientId=16610> (last visited 2/22/2013).

10. http://www.nbcnews.com/id/49425957/ns/us_news-environment/t/california-city-bans-smoking-multi-family-homes/.

11. 32 Misc.3d 12 (App. Term 1st Department 2011), reversing 2009 WL 4432449 (Civ. Ct. N.Y. Co. 2009).

12. 13 Misc. 3d 699 (Dist. Ct. Nassau Co. 2011).

13. 13 Misc.3d 1213(A) (Civ. Ct. N.Y. Co. 2006). In our March 3, 2010 column, the *Poyck* decision is fully discussed. See note 4, *supra*.

14. 2011 WL 6119800 (Trial Order) (Sup. Ct., New York Co. 2011).

15. N.Y. Mult. Dwell. Law §78 (McKinney 2012).

16. 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 v. Ogden Corp.*, 555 F. Supp. 892 (WDNY 1983), affirmed, 717 F.2d 757 (2d Cir. 1983).

17. See, e.g., http://www.brickunderground.com/blog/2012/12/2013_NYC_real_estate_forecast.

18. See "REBNY's Residential Management Council Proposes Guidelines for Implementing No-Smoking Policies," available at https://members.rebny.com/pdf_files/pr_040512_Residential_Smoking_Issue.pdf.