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# For Now, Co-op and Condo Boards Are on the Hook for Secondhand Smoke

*By Bruce A. Cholst*

Prohibition of smoking within apartments has become a burning issue for co-op and condo boards throughout the greater New York area. Must a board impose such a ban on residents' conduct within their own homes? Can it do so? Should it? Are there any other alternative but effective and legally compliant ways to protect against the impact of secondhand smoke within a building?

A recent New York Supreme Court decision, *Reinhard v. Connaught Tower Corp.*, illuminates these issues.

Defendant Connaught Tower Corp. is a residential co-op situated in Manhattan. Plaintiff Susan Reinhard purchased an apartment there in August 2006 and spent the next several months renovating the unit. She began smelling cigarette smoke in her apartment in January 2007 and lodged her first complaint about the condition to management in May 2007. The board denied legal responsibility for addressing the smoke infiltration and suggested that Ms. Reinhard effect various apartment alterations at her own expense to mitigate the condition.

Ms. Reinhard thereupon vacated the apartment and sued for, among other things, a complete maintenance abatement.

In his decision, Justice Arthur Engeron awarded Ms. Reinhard a 100% six-year maintenance abatement totaling $120,944.38 plus attorneys' fees and interest at the rate of 9% per annum. The abatement was predicated on her constructive eviction, the co-op's near total breach of her warranty of habitability, and the co-op's total breach of her proprietary lease dating back to the month after she lodged her initial smoke complaint with management.

Justice Engeron's rationale for awarding this total abatement is simple:

> This court finds … that the value of a smoke — polluted residential apartment is zero (cancer and cardiovascular disease being no laughing matter) and that plaintiff is entitled to a 100% abatement … a plaintiff who has proven a breach of contract is entitled to benefit of the bargain damages. Here, plaintiff is entitled to the value of her apartment had it been smoke free, which the court finds to be the amount of maintenance plaintiff paid.

In justifying his decision to place what he acknowledges to be an excruciating economic burden on residential landlords to provide a

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smoke-free environment to residential tenants complaining of secondhand smoke, Justice Engeron observes:

> Building owners are capable, and tenants are incapable, of providing smoke-free apartments by imposing strict no smoking policies or by constructing or rehabilitating buildings so that smoke cannot travel between apartments. … If you (building owners) want to avail yourselves of the right to rent out residences, you assume the obligation to insure that your tenants are not forced to smell and breathe carcinogenic toxins.

So, under Justice Engeron's ruling, residential landlords, including co-op boards, are required to do whatever is necessary to abate secondhand smoke infiltration when addressed with a tenant's complaint of same. Since this is merely a trial court decision, it is not binding on other courts. However, unless and until it is reversed on appeal, this decision does have precedential value and, foreseeably, a number of courts will embrace this precedent.

Technically, this decision does not apply to condominiums as it is based on precepts of landlord-tenant law and condominium boards are not in landlord tenant relationships with their respective unit owners. However, courts may construe condominium bylaw provisions concerning boards' maintenance and repair obligations to apply in the same manner as Connaught Tower's proprietary lease provisions.

So, where does Justice Engeron's ruling leave boards who wish to comply with the law with respect to residents afflicted with secondhand smoke?

## What Building Owners Can Do

Justice Engeron offered two suggestions. Building owners can (1) rehabilitate their physical plant to contain the flow of noxious secondhand smoke into neighboring apartments, or (2) impose stringent no-smoking policies on residents so as to vitiate the problem. In view of the prevalence of central HVAC (heating, ventilation, air conditioning) systems in New York buildings, the first option is cost prohibitive and hence unrealistic. Therefore, the most feasible path to compliance is through enactment and strict enforcement of policy restrictions on residents' smoking within their respective apartments.

When framing a smoking policy, boards should remember certain key factors. First, boards are only required to address the issue of secondhand smoke when a resident complains of the condition and demands abatement. Moreover, a board's legal burden is not to eradicate secondhand smoke in the abstract, but rather to address the condition as it actually exists in the complainant's apartment. Finally, if limited measures effectively address the complainant's concerns, then complete abatement of the smoke condition is unnecessary. With these points in mind, boards have two types of policy options: implementation of either a building-wide ban on smoking in apartments, or a series of limited measures designed to contain the flow of secondhand smoke in any given case.

Building-wide bans are the most radical approach because they apply arbitrarily whether or not a particular smoke infiltration situation can be addressed through a less sweeping remedy. Moreover, they can only be enacted by means of an amendment to the co-op's proprietary lease or condominium's bylaws, which requires the approval of a supermajority of shareholders or unit owners. Furthermore, a building-wide smoking ban is worthless in terms of ameliorating legal liability unless the board is prepared to also enforce it to the fullest extent.

## New Strategies

One form of containment policy is an ad hoc case-by-case approach. Such a strategy, however, is worthless in terms of limiting legal liability unless it is successful in each and every case. In the event an approach fails in any given case, a board must be prepared to keep trying new approaches and to initiate legal proceedings against recalcitrant smokers to ensure that their approaches are successfully implemented.

Boards can also contain secondhand smoke through amendments to governing documents, which are less sweeping than a building-wide ban. For example, they can enact provisions that require owners to take specified action to curtail secondhand smoke infiltration upon a neighbor's complaint —

such as installing weather stripping, modifying the venting system, closing gaps in the walls separating neighboring apartments, and installing fans to blow smoke away from the doors — all at the smoker's expense and within a prescribed time frame following the smoker's receipt of the board's notice. These provisions can also impose fines and reimbursement of the association's attorneys' fees for noncompliance.

## Enforcing Through Legal Action

Whatever policy a board may adopt, policy enactment alone is insufficient, as successful abatement of any smoke issue is essential to vitiating legal liability. When the offending resident smoker does not voluntarily comply with the policy, a board must be prepared to enforce it through legal action. In a co-op, that legal action can be an action for injunctive relief, a "holdover" eviction proceeding, or an "objectionable conduct" proceeding. In a condo, appropriate legal action may include the levying of fines (assuming the bylaws authorize imposition of fines) and an action for injunctive relief. Boards must consult counsel before deciding which of these legal remedies is appropriate in any given instance.