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Advising Boards on Handling Secondhand Smoke Issues

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Some of the most intense combat occurring in modern times may not be that which has taken place on the battlefield, but rather in the ongoing conflicts that occur between shareholders, owners, and renters of apartments in multiple dwelling buildings, between themselves and/or with their respective cooperative boards of directors, landlords, or condominium boards of managers, over the infiltration of secondhand cigarette smoke into personal living spaces. However, like most wars, steps could have been taken to prevent the smoke and noise disputes that have occurred; steps that could have won the war without firing a shot. This article will discuss the current state of the law regarding secondhand smoke infiltration and how condominium and cooperative boards and landlords should attempt to deal with smoking issues in the future.

The law is still being developed respecting secondhand smoke. At present, there are very few reported cases, but given the amount of inferior new construction and renovations that has occurred over the past decade, it is likely there will be a significant increase of litigation over smoke issues in the near future. It should be noted, however, that the law applied to cooperative corporations and rental landlords differs in some respects from the law applied to condominiums.

There is no clear answer to the question of how much smoke infiltrating into a neighboring apartment will trigger potential liability. It is generally agreed, however, that "proof of a 'single occurrence' plainly will not suffice" and that the answer in each case is "necessarily fact sensitive."[1]

Warranty of Habitability

Cooperatives and Rental Buildings. Cooperative boards and landlords are subject to the statutory implied Warranty of Habitability contained in RPL 235-b(1) which governs all rental leases and all cooperative proprietary leases:

In every written or oral lease or rental agreement for residential purposes the landlord or lessor shall be deemed to covenant and warrant that

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the premises so leased or rented and all areas used in connection therewith in common with the other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.

Residential cooperative corporations and landlords of rental buildings are fully subject to the requirements of RPL 235-b and must protect their shareholders and tenants against any condition that unreasonably interferes with the ability of the shareholders and tenants to use their apartments for their intended residential purposes.

The cases of *Poyck v. Bryant*[2] and *Reinhard v. Connaught Tower Corporation*[3] have held that a landlord and a cooperative corporation (as landlord) can be held liable for breach of the RPL 235-b implied warranty of habitability, which applies to both ordinary rental leases and cooperative leases, for not preventing conditions that allow secondhand smoke to infiltrate from a common area and/or from a smoker resident's apartment to a neighboring resident's apartment. However, at present, there are no appellate rulings holding secondhand tobacco smoke subject to the RPL 235-b implied warranty of habitability.

In addition, under *Reinhard*, the corporation may be held liable (a) for breach of contract where secondhand smoke infiltration interferes with the peaceable possession and use of the apartment, and (b) for negligence where it had actual notice of the condition and failed to take any action to remediate the condition. *Reinhard* also holds that, despite a building's construction (which may facilitate the smoke infiltration from one apartment to another) being typical for the time in which it was built, that low standard will not be a defense to claims that the corporation was not also negligent for failing to take action to remediate the condition.

Moreover, although proprietary leases generally provide that the cooperative shall not be responsible for the nonobservance or violation of house rules by any other shareholder-tenant, cooperative boards, nevertheless, "must act for the benefit of the residents collectively."[4]

To the extent, therefore, that a board fails to enforce a bylaw prohibiting or restricting smoking, and thereby subjects the cooperative to possible suit for breach of the warranty of habitability, the board can be said to be acting contrary to the collective interests of all residents in breach of its fiduciary duty.[5] Shareholder-tenants aggrieved by a smoking neighbor may thus sue the board for failing to enforce the anti-smoking bylaw if, by failing to enforce the bylaw, the board has permitted a condition to exist that denies aggrieved shareholder-tenants peaceable possession and use of their apartments.

Condominiums. Not being subject to the warranty of habitability requirement of RPL 235-b, the condominium board's obligation is based on RPL 339-v(b)(i) which requires all condominium by-laws to include:

Such restrictions on and requirements *respecting the use and maintenance of the units* and the use of the common elements, not set forth in the declaration, *as are designed to prevent unreasonable interference with the use of their respective units* and of the common elements by the several unit owners. (Emphasis added).

As stated in *Ewen v. Maccherone*,[6] the only appellate court that has ruled on secondhand smoke issues:

In this regard, the board of managers of the subject condominium is specifically authorized to make determinations regarding the operation,

care, upkeep, and maintenance of the common elements in the building, and to enforce any bylaws and rules among unit owners, including the rule prohibiting one resident from interfering with the rights, comforts or conveniences of other unit owners.

Condominium boards, like cooperative boards, "must act for the benefit of the residents collectively," and they likewise have a fiduciary duty to enforce, in a non-discriminatory fashion, their bylaws and rules among unit owners. To the extent, therefore, that a condominium board fails to enforce a bylaw prohibiting or restricting smoking, and thereby subjects the condominium to possible suit and recovery of damages by aggrieved unit owners, the board is acting contrary to the collective interests of all residents in breach of its fiduciary duty.

Under *Ewen*, in the event that the board fails to enforce a bylaw designed to limit the effects of secondhand smoke, or fails to prevent secondhand smoke from infiltrating into apartments from the common areas, or where a building-wide ventilation problem facilitates the circulation of the secondhand smoke, the offended unit owners' sole recourse against "unintentional" secondhand smoke infiltration (from a neighbor's apartment or from a common area) is against the condominium board.

Tools to Regulate Smoking

Most older proprietary leases, by-laws, and house rules do not prohibit smoking within the building or within individual apartments. However, authority to do so can be established through provisions of the proprietary lease signed by each shareholder of the cooperative and in provisions of the cooperative's by-laws and house rules. Nevertheless, changing the terms of existing proprietary leases and bylaws is not an easy task. Obtaining either a majority of shareholder votes cast or, when provided in the certificate of incorporation, a two-thirds vote of all voting shareholders,[7] is difficult to achieve.

Cooperative proprietary leases and rental leases generally provide that shareholder-tenants and rental tenants are obliged to comply with all laws affecting the occupancy and use of the property. Accordingly, cooperative boards and landlords may enforce smoking restrictions by reference to the New York City Air Pollution Control Code which, by virtue of such lease and bylaw provisions, is necessarily incorporated into their leases and by-laws.

NYC Administrative Code, Title 24, Chapter 1 (Air Pollution Control), Sub-Chapter 6, §24-141, provides as follows:

No person shall cause or permit the emission of air contaminant, including odorous air contaminant, or water vapor if the air contaminant or water vapor causes or may cause detriment to the health, safety, welfare or comfort of any person, or injury to plant and animal life….

This code provision expressly provides that "the prohibition of this section includes…contaminants" derived from "coal tar products manufacture," the kind of contaminants that are typically found within secondhand cigarette smoke. Such laws should provide enough ammunition to seek a court's intervention to regulate a smoking problem between residents. For cooperatives, in extreme cases, the business judgment rule permits an offending shareholder's cooperative tenancy to be terminated, if the proprietary lease contains a provision authorizing such termination (known as a "*Pullman*" clause), and if the termination is based on a board or shareholder's vote terminating the lease as a result of the shareholder-tenant's objectionable conduct and done in accordance with the procedures specified in the corporate documents.[8]

A condominium's authority to act on smoking problems derives from RPL 339-j of the Condominium Act, which requires each unit owner to "comply strictly with the by-laws and with the rules, regulations, and resolutions adopted pursuant thereto," and which empowers the condominium board to sue an offending unit owner for damages or injunctive relief, or both, or "in any case of flagrant or repeated violation by a unit owner," to require the offending unit owner to "give sufficient surety or sureties for his future compliance with the by-laws, rules, regulations, resolutions and decisions."[9]

Condominium by-laws also generally require that unit owners comply with all laws, regulations, zoning ordinances, and requirements of any governmental agency relating to any portion of the property. Therefore, condominium boards may also take action against smoking based on the New York City Air Pollution Control Code, without amendment of their bylaws, by levying a fine and foreclosing on a lien on the fine, if the bylaws otherwise permit.

However, while cooperatives may pursue a fairly quick eviction proceeding, condominiums must sue in state Supreme Court for injunctive relief and damages or foreclosure. As a result of the cost of litigation and the lack of any eviction-type leverage, such proceedings by condominiums can extend for several years without a satisfactory result.

Reducing Liability

To reduce their potential liability from secondhand smoke-related issues, condominium and cooperative boards and landlords of rental buildings can attempt to adopt rules and by-laws or lease terms that clearly address smoking issues. (Although changing the terms of a rent-stabilized lease, even at renewal time, is virtually always prohibited).

However, knowing the difficulty of this task, our firm has been using some unorthodox means to achieve the same goals. As cooperatives can reject an application for any reason that does not violate anti-discrimination laws, our clients have been adding an agreement to the application whereby the prospective tenant-shareholder signs that he/she agrees to not smoke in the apartment or interfere with another resident's privacy. These signed contracts can be used to enforce the building's "no smoking" rules. Many landlords have been using the newest Blumberg lease forms that prohibit smoking entirely within the apartment or that permit the tenant to be evicted for interfering "with the health, comfort, or safety of other occupants of the Building."[10]

Condominiums have less leverage to ban or regulate smoking, but many have been adding these no smoking agreements to their entrance applications. Unfortunately, in the event that a prospective owner refuses to sign the "no smoking" agreement, the condominium can only exercise its right of first refusal to purchase the selling unit owner's apartment or delay the waiver of its right of first refusal until the closing. However, as most condominiums are in no position to exercise their right of first refusal, a new purchaser who refuses to sign an anti-smoking agreement is likely to prevail if the condominium refuses to waive the right of first refusal.

Other peaceful, but less effective, means that boards and landlords may employ to ban or regulate smoking include (1) displaying "public notices" on building bulletin boards and/or in letters circulated to all apartment residents stating clearly where in the building smoking is permitted and where it is not permitted and what residents may do to alleviate the effects of smoking upon their neighbors; (2) giving periodic written notice to all residents of the building's policies, rules, and by-laws regarding the building smoking policy; and (3) upon receiving notice of violation of building smoking policies, sending letters directly to the offending resident restating the rules and demanding compliance.

Other non-litigation measures that have been successful in the past include holding meetings with the offenders and the alleged victims of secondhand smoke, sending letters with the threat of litigation, and reminding offenders that if the building prevails in litigation, the bylaws or the lease, as is true in most cases, contains a clause entitling the building to an award of its attorney fees. (For cooperatives and rentals, RPB §234 makes this right reciprocal for the tenant.)

Overseeing Repairs

Shoddily constructed buildings are one of the

main causes of smoke infiltration, but so too are gut renovations of existing apartments. Boards and landlords should also be diligent in overseeing alterations and repairs, to ensure that unit owners, shareholders, and tenants comply with building codes when such work is done in their apartments. Care should be taken to ensure that gut renovations of apartments do not result in conditions that will allow secondhand smoke to travel through walls, floors, ceilings, or passageways.

Building alteration agreements customarily require that the scope of work and plans and specifications for any proposed work within an apartment be submitted to the board, for review by the building's engineer or architect, before the alteration is approved and work is permitted to start. In addition, residents seeking approval for the work are normally required to pay for the building's engineer to inspect and approve the planned alterations. This practice should be followed to ensure compliance with smoking abatement code requirements and any additional requirements imposed by the building.

Engineers are more important than lawyers when considering the various ways to abate noise, smoke, and other forms of nuisance. The engineer is in a position not only to discover potential defects in construction, but also to evaluate whether the proposed construction is lawfully permissible. The engineer and the alteration agreement go hand in hand. Requiring an inspection by an engineer as part of the alteration agreement is essential to enforcing the obligations set forth in the agreement. The alteration agreement should require that the building's engineer "sign-off" on the work after it is completed.

Conclusion

Battles over secondhand smoke are, besides noise disputes, the "hottest" problem affecting buildings at the present time. Hopefully, adoption by boards and landlords of the recommendations contained in this article will not only save buildings tons of money, but may also enable boards and landlords to achieve the peaceful resolution of these disputes when they arise.

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Endnotes:

1. *Upper East Lease Associates v. Cannon*, 30 Misc.3d 1213(A), 924 NYS2d 312 (District Court, Nassau Co., 2011); see also *East End Temple v. Silverman*, 199 AD2d 94, 606 NYS2d 56 (1st Dept. 1993).
2. 13 Misc.3d 699, 820 NYS2d 774 (N.Y. Civil Court, 2006).
3 2011 WL 6119800 (Trial Order) (Sup. Ct., New York County, 2011).
4. *Levandusky v. One Fifth Avenue*, 75 NY2d 530, At 538 (1990).
5. See *Board of Managers of the Fairways at North Hills Condominium v. Fairway at North Hills*, 193 AD2d 322, 603 NYS2d 867 (2d Dept. 1993); see also Yuko Ito v. Suzuki, 57 AD3d 205 (1st Dept. 2008).
6. 32 Misc.3d 12, 927 NYS2d 274 (App. Term, 1st Dept., 2011).
7. See BCL §614(b).
8. See, e.g., *40 West 67th Street v. Pullman*, 100 NY2d 147 (2003).
9. See *Ewen v. Maccherone*, Note 6 supra; see also *Board of Managers of Village House v. Frazier*, 81 AD2d 760, 439 NYS2d 360 (1st Dept. 1981) (Permanent injunction granted enjoining unit owner from leasing or otherwise permitting occupancy of his unit other than in strict conformity with the condominium's by-laws).
10. See, e.g., Blumberg Form 86: Sublease of a Cooperative Apartment in New York (drafted by the authors' firm and available at http://alblawfirm.com/index.cfm?pageid=63&itemid=1289) and Blumberg Form 102: Lease For a Rental of a Condominium Unit in New York (drafted by the authors' firm and available at http://alblawfirm.com/siteFiles/News/043344A29C80022899DF5A7E6C5B551B.pdf). Smoking within the apartment is banned in the cooperative sublease and banned within the unit in the condominium lease.