

# SECOND-HAND TOBACCO SMOKE IN RESIDENTIAL APARTMENTS

*By Steven Troup*



A recent court decision regarding second-hand tobacco smoke from the Housing Court in Manhattan has possibly wide-ranging ramifications to apartment buildings, cooperatives, condominiums and rentals alike.

The case involved a condo unit owner suing former tenants for unpaid rent which had accrued after the tenants moved out prior to the lease expiration. A respected Housing Court judge refused to dismiss the tenants' defenses and counterclaims which were based on the warranty of habitability. The tenants had complained that tobacco smoke was filtering into their apartment, a condo unit, from a neighboring apartment and the hallway and rendered their apartment uninhabitable. One of the tenants was a cancer survivor.

The warranty of habitability is a statutory requirement that every landlord of residential units must provide their tenants with a safe and habitable home. Over the years, a huge body of case law has been written on this subject, largely in favor of tenants, especially in New York City.

The judge declined to grant the motion of the landlord, apparently the owner of just that one condo apartment, to dismiss the habitability defenses, finding that a landlord has a duty to take reasonable steps to provide a habitable environment, including the right to be free from offensive odors and smoke. A question of fact existed as to whether the landlord took any steps to address the situation with the neighbor, and if so, whether those steps were reasonable.

As you probably know, the rights of smokers and non-smokers are a fast changing area of the law. If it is further developed, and it is highly likely that it will be, more and greater duties are likely to be imposed on landlords, including cooperatives where a landlord-tenant relationship exists between the co-op

corporation and each tenant-shareholder, to provide smoke-free environments (or nearly so) for all residents of their buildings. Co-ops and rentals are subject to the warranty of habitability because of the landlord-tenant relationship that exists, whereas the relationship between condo boards and their unit owners is not, but it should not come as a surprise if this hot button issue is expanded and duties to maintain a smoke-free environment to all residential building occupants are imposed on condominiums as well as rentals and co-ops.

We had a case several years ago where a shareholder-tenant in our co-op client's building had complained to the Department of Health about second-hand smoke, and a violation was issued. The Health Department's administrative law judge (not a sitting court judge) ruled that the co-op must take reasonable steps to prevent smoke from filtering into other tenants' apartments. As a result, the co-op spent several thousand dollars to remedy the situation.

To limit potential liability, we recommend that our co-op, condo and landlord clients consider sending out notices to all residents reminding them that each resident is obligated to take steps to assure that offensive odors and gases do not escape his or her unit, that second-hand smoke is included in that category, and that if complaints are made, the landlord or co-op/condo board may be required to take action. Further, in co-ops and condos, if remedial work becomes necessary, such as sealing openings in walls, floors or ceilings, weather stripping doors, etc., the offending smoker will be responsible for paying for it.

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## *About Steven Troup, Partner*

*Steve practices in areas of cooperative and condominium law, real estate transactions, business transactions, and commercial and real estate litigation. Steve is also experienced in counseling small businesses with respect to contract, corporate and related issues. Steve can be reached at [stroup@tarterkrinsky.com](mailto:stroup@tarterkrinsky.com).*