

Is It Time To Prohibit Smoking Within Condominium or Cooperative Apartment Units?

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There is little or no question that second hand smoke is a carcinogen which poses a serious cancer risk and can cause other health problems to persons who are exposed to it. Over six years ago the New Jersey Legislature enacted the "New Jersey Smoke Free Air Act" which prohibits smoking in indoor public places, which includes apartment building lobbies or other public areas in an otherwise private building; however, this Act does not apply to individual apartment units. Moreover, the Act supersedes any other statute, municipal ordinance and rules or regulations adopted pursuant to law concerning smoking in an indoor public place, subject to limited exceptions. However, it does not expressly preempt private restrictions or rules and regulations of community associations.

In view of the foregoing, perhaps the time has come for every condominium and cooperative board to address the problems caused by second hand smoke seeping from individual apartments into and permeating other units and common areas.

While there may be one or more physical remedies for this problem such as (i) the installation of smoke eaters in the smoker's apartment, (ii) the upgrading of the common ventilating systems, (iii) the sealing of fugitive air pathways in the walls of the building, etc., it may be more practical and economical to consider the elimination of a second hand smoke problem by enforcement of private nuisance restrictions in the governing documents and/or the amendment of same to expressly prohibit smoking in individual units (perhaps with a grandfather clause for existing smokers in order to obtain their vote). However, absent the express prohibition of smoking within a unit, there may be other ways to force the issue and achieve the desired result. These other approaches may include: (i) the enforcement of existing rules and regulations prohibiting

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noxious^[1], offensive activities, (ii) legal action by unit owners against an association and/or board for failure to discharge either a statutory or other duty to protect the health, safety and general welfare of the residents of the building or (iii) a lawsuit commenced by the board and/or individual unit owners seeking injunctive relief against the offending smokers if practical remedies such as the suspension of privileges, the imposition of fines or ADR do not achieve a positive result.

It is important to note that there is no reported case law in New Jersey which addresses any of these suggested legal approaches in the context of a prohibition against smoking in a unit. However, logic would seem to dictate that in today's world the health hazard created by second hand smoke would outweigh the smoker's individual right to enjoy his habit in the privacy of his apartment. Nevertheless, it must be kept in mind that the key to a successful outcome will be the production of expert testimony as to the presence of toxins which have been produced by the tobacco smoke and the potential or actual adverse harm to the health of other residents. Moreover, any remedial steps taken by the Association to physically eliminate or mitigate the second hand smoke problem may have a favorable impact upon any court's decision.

It must be clearly understood, however, that absence of any reported judicial precedent in New Jersey dealing with this issue makes the legal outcome of any lawsuit uncertain. Accordingly, it is imperative that any association or individual seeking to address the problem of second hand smoke emanating from a neighbor's apartment explore in depth with their attorney as to how best to proceed given the particular circumstances, relevant governing document provisions and applicable law as well as the chance for success.

[1] Defined in Webster's Dictionary as "physically harmful or destructive to living beings".