

**Feinstein v. Rickman** (Alhambra Condominium), February 17, 2016 – Condominium residents brought action against neighbors, real estate agent, management company, and board of managers, seeking to recover damages for negligence, fraudulent misrepresentation, private nuisance, trespass, and intentional infliction of emotional distress. Action dismissed as to the condominium and the managing agent. The complaint failed to state a viable cause of action against the neighbors, since their “conduct in smoking in the privacy of their own apartment was not so unreasonable in the circumstances presented as to justify the imposition of tort liability against them”.

**Reinhardt v. Connaught Tower Corp.**, February 1, 2016. – The case presents two stark issues, one factual, one legal. The factual issue is whether plaintiffs’ co-operative apartment was significantly polluted by second-hand cigarette smoke seeping in from other apartments in the building, and assuming it was, the legal issue is what the appropriate remedy is.

The Court took judicial notice of the overwhelming, irrefutable, ubiquitous evidence that second-hand smoke causes or contributes to lung and other cancers and cardio-vascular disease, citing to the American Cancer Society website. In addition, there is no absolute rule that holds that while a tenant is not occupying the apartment he/she is not entitled to abatement. In this Court's view, the owners of pieds-a-terre, no less than the inhabitants of primary residences, are entitled to smoke-free environments. A tenant should not have to develop lung cancer to obtain an abatement. 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.

The Court did not say, and “presumably would not have the power to say”, that you cannot smoke in your apartment. However, if you want to avail yourself of the right to rent out residences, you assume the obligation to ensure that your tenants are not forced to smell and breathe carcinogenic toxins. The court awarded a complete abatement of maintenance and attorney’s fee, but declined to issue an injunction.

**Bd. of Managers of 400 Cent. Park West Condominium v. Henriquez-Berman**, January 17, 2017 – Plaintiff condominium, seeking to recover unpaid common charges and enjoin violations of its by-laws upon theories of breach of contract and nuisance, now moves to preliminarily enjoin the defendants from smoking marijuana in unit — of the condominium and permitting marijuana smoke and excessively loud noises from infiltrating into the common areas and other units of the condominium.

Defendant has received cease and desist letters and been fined at least 10 times for these smoke and noise violations. By this proof, the plaintiff has demonstrated a likelihood of success on the merits. The holding of *Ewen v Maccherone*, cigarette smoke emanating from an apartment does not alone support a private nuisance claim by one tenant against another where smoking is not expressly prohibited in the by-laws.

However, the court noted that such a claim may lie where the condominium's by-laws impose some duty on the tenants and the board is made a party to the action. Here, the by-laws impose such a duty by prohibiting any nuisances or practices which annoy another resident or interfere with peaceful possession or use of the property, and authorize the condominium board to enforce the by-laws, as per this action. The injunctive remedy sought here is proper. It has been held that exposure to second-hand smoke from a neighboring apartment does not give rise to cause of action to recover money damages.

However, a court may issue a preliminary injunction prohibiting a unit owner from violating the by-laws. Since any injury caused by the smoke conditions arising from the defendants' conduct here is not compensable by money damages, the plaintiff has demonstrated that irreparable injury, requiring injunctive relief, would result should the smoke condition be permitted to persist.

**Reinhard v. Connaught Tower Corp.**, May 4, 2017 – The finding of liability against the cooperative was not based on a fair interpretation of the evidence.

The evidence failed to show that the odor of cigarettes rendered plaintiff's apartment uninhabitable, breached the proprietary lease, or caused plaintiff to be constructively evicted. In particular, plaintiff's evidence failed to show that the odor was present on a consistent basis and that it was sufficiently pervasive as to materially affect the health and safety of occupants. Plaintiff's witnesses testified that they smelled smoke in the apartment on a handful of occasions over the years, and the source of the smoke was never identified. Moreover, plaintiff lived in Connecticut and only intended to stay in the apartment occasionally.

The complaint was dismissed, and the matter remanded for a hearing as to attorneys' fees