

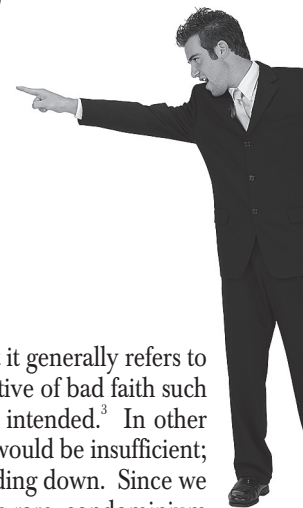
## Legally Speaking...



Adam J. Cohen, Esq.

# Paying the Price for “Misconduct” *Holding Unit Owners Responsible Under the New CIOA Revisions*

By Adam J. Cohen, Esq.



In case you hadn't heard, the Connecticut legislature has adopted amendments to the Common Interest Ownership Act (CIOA) which will significantly change the way condominiums and other communities operate in this state effective this summer. One of the most controversial changes is found in Section 31 of the new Act, which will restrict the manner in which a Board can hold someone financially responsible for causing physical damage to the community.

CIOA currently states that “If any common expense is caused by the misconduct of any unit owner, the association may, after notice and hearing, assess that expense exclusively against his unit.”<sup>1</sup> Most attorneys and other industry professionals have interpreted this to mean that a board has discretion to determine that a unit owner must pay for repair costs and other expenses resulting from that owner's careless or unreasonable behavior – what the law refers to as “negligence.” For example, if a unit owner left a candle burning unattended near a curtain, causing the building to catch fire, the Board would be able to charge the repair costs to him alone after a fair hearing instead of dividing them among all of the unit owners. If that one owner was unwilling or unable to pay, the expenses would be enforceable as a lien against his unit in the same way as though he had not paid his common charges.

Effective July 1, 2010, however, this statute will be very different. The new text will provide:

*If any common expense is caused by the wilful misconduct, failure to comply with a written maintenance standard promulgated by the association or gross negligence of any unit owner or tenant or a guest or invitee of a unit owner or tenant, the association may, after notice and hearing, assess the portion of that common expense in excess of any insurance proceeds received by the association under its insurance policy, whether that portion results from the application of a deductible or otherwise, exclusively against that owner's unit.*<sup>2</sup>

This new law will arguably expand the Board's powers in some respects. It clarifies that a unit owner can be held responsible for not only his own actions as the statute now says, but also those of his tenants, guests, and invitees (which is the legal term for commercial visitors like repairmen). The new language also makes clear that any insurance deductible or shortfall can be among the charges which the Board considers imposing. Nevertheless, once this new law takes effect, there will apparently be three types of situations – and no others – in which a Board will have the power to take any action at all against the responsible unit owner.

The first situation is where the misconduct at issue was “wilful.” The Connecticut Supreme Court has explained that the meaning of

the word “wilful” depends on its context, but that it generally refers to conduct which is highly unreasonable and indicative of bad faith such that both the act and its result were deliberately intended.<sup>3</sup> In other words, carelessly leaving a candle near a curtain would be insufficient; the unit owner must have meant to burn the building down. Since we can all hope deliberate destruction like this will be rare, condominium boards will probably not be relying on this provision of the statute very often.

The second situation is where the unit owner has violated a written maintenance standard. A classic example of this is failing to turn off a unit's heating system during a winter vacation, which causes the pipes to freeze and burst. The Act will require all maintenance standards to be formally approved by the Board, made available to all unit owners upon request, and attached to resale certificates issued to unit purchasers.<sup>4</sup> Unless a maintenance standard is properly adopted and clearly applicable to a unit owner's conduct which damages the common elements, the Board will apparently not be able to rely on this provision to assess the repair expense against him.

The third situation provided by the new Act is where the person is guilty of “gross negligence.” This is another legal term that means something less than “wilful,” but exactly what is anyone's guess. In fact, the Connecticut Supreme Court has bluntly asserted that “gross negligence has never been recognized in this state as a separate basis of liability in the law of torts.”<sup>5</sup> While some other state statutes do mention the phrase, the precise definition of gross negligence – and how much “worse” than regular negligence the conduct must be to qualify for it – has flummoxed generations of lawyers and judges alike. For example, would falling asleep with a lit cigarette be merely “negligent” or “grossly negligent”? The difference is crucial, since if it is the former, the Board would have no choice but to charge every unit owner for the costs of fire damage not covered by the Association's insurance caused by this single person. A Board which relies on the “gross negligence” provision of the new Act may be inviting risky and expensive litigation over the propriety of its decision.

Since the concept of “gross negligence” is so vague and convoluted, and since “wilful” damage is so unusual and difficult to prove, the best advice to Boards that would consider holding unit owners responsible for the harm they cause is to prepare and publicize a comprehensive set of maintenance standards – and to have them in place before the Act goes into effect on July 1, 2010. In fact, the intention of the new Act was to encourage Boards to do so. The needs of every community will vary, but just a few sample rules to consider for adoption (and strict enforcement) might include:

*Adam J. Cohen is an attorney with the Law Firm of Pullman & Comley, LLC headquartered in Bridgeport, Connecticut. As the Chair of its Community Law Section, he represents and gives seminars to condominiums, tax districts, and other communities in matters ranging from revenue collection strategies to commercial disputes. He is also the author of regular newsletters with circulations throughout Connecticut called Special District Update and Condominium Update.*

## Legislative Update

- Unit interior temperature can never be permitted to fall below 60 degrees.
- No open flames, grills, smoking materials, space heaters, or other fire hazards can be left unattended or allowed to damage any structure.
- Washing machine hoses must be steel braided and turned off when the unit is vacant.
- Dryer vents, lint filters, exhaust pipes, ducts, and chimneys must be cleaned regularly.
- No running water spigots may be left unattended or allowed to cause overflows.
- All leaky pipes, valves, and toilets must be promptly repaired.
- Mold or any damage, sounds, or other evidence of running or seeping water must be reported immediately.
- Hot water heaters and other mechanical equipment must be replaced within a fixed number of years.
- Unit owner is liable for any harm caused by repairs and installations not performed by licensed professionals.
- All driveways and walkways must be well-maintained and cleared of obstructions, debris, garbage, snow, and ice.

Communities which do not adopt maintenance standards like these may themselves end up paying the price – by forcing innocent owners to share the costs of repairs and deductibles for which only one person is to blame. You can learn more strategies for adapting your community to the new CIOA amendments at CAI's Conference and Expo on Saturday March 13, 2010. Go to [www.caict.org](http://www.caict.org) for more information. ■

### NOTES:

1. C.G.S. § 47-257(e).2 P.A. 09-225 § 31(e).3 Saunders v. Firtel, 293 Conn. 515, 530-31 (2009)
2. P.A. 09-225 § 31(e).
3. Saunders v. Firtel, 293 Conn. 515, 530-31 (2009).
4. P.A. 09-225 § 33(a)(4) and § 41(a)(16).
5. Matthiessen v. Vanech, 266 Conn. 822, 833 n.10 (2003).

The 2010 Session of the Connecticut General Assembly commenced on February 3. This is a “short” session year. We expect that a good deal of time and effort will be spent on resolving the current state budget crisis.

Our Legislative Action Committee has been working diligently for the past few months to devise a plan and priorities for the 2010 Session. They have also decided to retain a new lobbying firm: Shepker & Associates, LLC/The O’Leary Group. We hope to create opportunities to have our members meet with their elected representatives in their regions so they representatives can hear firsthand the issues that are facing community associations.

### The legislative priorities are as follows:

- Proposed allowing animal control officers to go onto community association property to handle nuisance animal situations;
- Opposition to the likely proposed “Freedom to Dry” bill;
- Opposition to the creation of a Condo Ombudsman;
- Proposal of a municipal services reimbursement program.

We will also seek to closely monitor the impact of the revisions to the Common Interest Ownership Act (CIOA) to help us determine what types of amendments may need to be made to Public Act 225.

The success of any of our efforts will depend upon YOU! We will need your voices, minds and hearts to help advocate for the issues that are most important to our community associations.

If you haven’t already done so, please go to our website: [www.caict.org](http://www.caict.org) to sign up for legislative alerts. ■