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## 2019 Office Space Survey

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**Plus:**

Condo tenants, association battle over First Amendment rights

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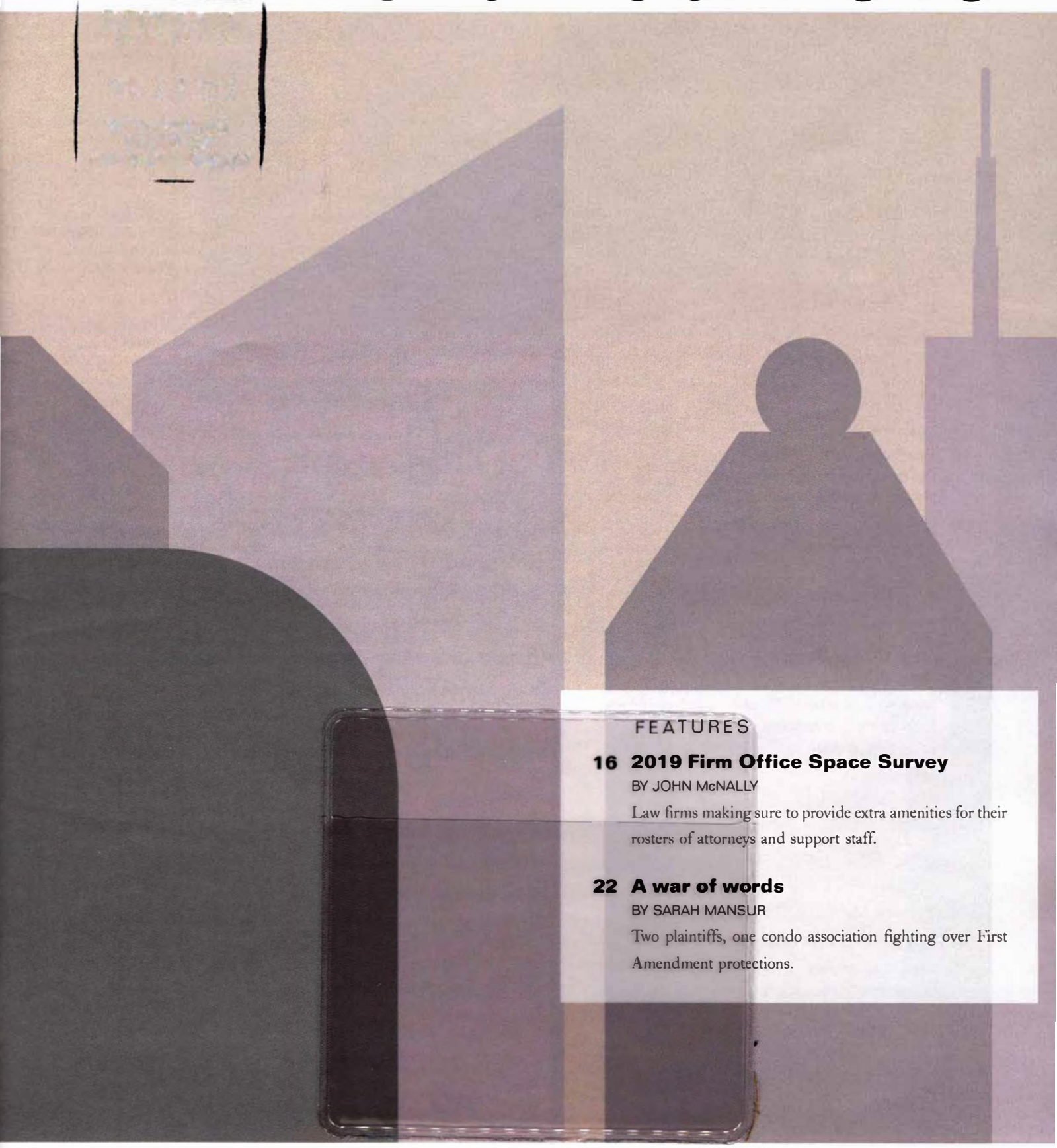

FEATURES

# A War of Words

## TWO PLAINTIFFS FIGHTING WITH SAME CONDO ASSOCIATION OVER FIRST AMENDMENT PROTECTIONS

BY SARAH MANSUR

Michael Boucher, a man who sued his Gold Coast condominium association, admits that he's "aggressive with everyone." Boucher doesn't consider the word "s---" as profanity, according to a 2018 appellate court opinion.

In late August 2013, Boucher was involved in two incidents with condo association employees that formed the basis of two complaints — and $500 in fines levied against him by the association.

He paid the fines. Then he sued the association.

Boucher's lawsuit claimed the association's fines penalized him for expressing opinions critical of the association. He argued his critical speech is protected by a provision of the Illinois Condominium Property Act, which governs homeowners' association boards.

Under Section 18.4(h) of the law, association boards cannot implement provisions to muzzle opposing points of view.

The section holds:

"However, no rule or regulation may impair any rights guaranteed by the First Amendment to the Constitution of the United States or Section 4 of Article 1 of the Illinois Constitution including, but not limited to, the free exercise of religion, nor may any rules or regulations conflict with the provisions of this Act or the condominium instruments. No rule or regulation shall prohibit any reasonable accommodation for religious practices, including the attachment of religiously mandated objects to the front-door area of a condominium unit."

East Chestnut maintains the fines were not related to Boucher's criticism of the association's management. Rather, the association claims they were a result of his offensive comments.

In *Boucher v. 111 East Chestnut St. Condominium Association*, 2018 IL App (1st) 162233, a divided panel of the 1st District Appellate Court reversed the lower court in June 2018 and held that Boucher's allegation against the East Chestnut condo board could survive a motion to dismiss.

### DOUBLE TAKE

In March, another 1st District panel ruled on a second case involving the same condo property and cited *Boucher* as precedent.

The second case, *Brian Connolly v. Anthony Milazzo*, 2019 IL App (1st) 171906-U, originated in similar circumstances as Boucher — a unit owner's "obnoxious" behavior prompted the association to issue fines.

The condo association appealed both rulings to the Illinois Supreme Court, but both are on track to go to trial in the next several months.

The cases demonstrates how the law expects community associations to balance free speech rights of unit owners against the associations' duty to protect other people in the association. For now, the appellate court has refused to dismiss First Amendment claims brought by unit owners under Section 18(h) against association boards.

### COMMON ELEMENTS

The first notice to Boucher stated an employee of the East Chestnut Association accused him of shouting profanities and telling her to get off the elevator, when she tried to board with him.

Five days letter, in the second letter, association attorneys scolded Boucher for an incident relayed by another East Chestnut employee. The employee said Boucher swore after he "requested a replacement [key] card," and could not pay with cash for the replacement card ... [His] behavior was described by witnesses as being rude and disrespectful," the majority writes in *Boucher*.

In both notices, attorneys informed Boucher that his behavior violated the association's declaration that prohibits obnoxious or offensive activity in the building common areas.

After a videotaped hearing held by the association board, Boucher was


fined $500. His subsequent lawsuit against the homeowner's association made three claims.

Boucher argued his First Amendment rights were violated. His complaint disputes the condo association's claim that his behavior was abusive and harassing toward any of the association employees. He also alleged the association's denial of his request for the meeting video violated a section of the Condominium Property Act. His third claim alleged the board violated their fiduciary duty by withholding the video.

Cook County Circuit Judge Thomas Allen dismissed the First Amendment claim for failure to state a cause of action. Boucher's argument failed because the association board is not a state actor, Allen ruled.

Allen granted summary judgment on behalf of the defendants on the remaining claims. A majority of the 1st District Appellate Court disagreed.

Then-1st District Appellate Justice P. Scott Neville Jr., who is now an Illinois Supreme Court justice, and Justice Aurelia Pucinski interpreted the statute in the context of the legislative history.

Transcripts from the Senate floor debate, in February 2006, showed a lawmaker, in support of the bill, explain that two condo associations prohibited Jewish residents from putting a mezuzah [on their door posts]."

Neville, on behalf of the majority, found "the circuit court's interpretation of Section 18.4(h) ensures that the section would not apply in the situations specified in the legislative history."

He noted that, under this interpretation, an association could forbid Jewish residents from any religious expression because the private condominium association would not count as a state actor.

"We must not interpret statutes in a manner that makes them meaningless," he wrote.

Then-Justice Mary Anne Mason, on the other hand, found Boucher's First Amendment claim "specious."

"Boucher's amended complaint contained no factual allegations supporting the conclusion that the August 2013 notices were prompted by or bore any relationship to Boucher's alleged complaints two months earlier about issues such as short-term rentals of units, pool sanitation or the imposition of 'arbitrary' fines on unit owners," Mason wrote.

"Especially in light of Boucher's long history of offensive and insulting conduct and the failure of previous warnings to dissuade his bullying behavior, the business judgment rule shields the board's action from further examination."

The majority revived Boucher's First Amendment claim, finding it could survive the association's motion to dismiss because he adequately stated a violation of the Condominium Property Act.

The Illinois Supreme Court declined to take up the association's petition for leave to appeal.

## CONNOLLY'S CONFRONTATIONS CONDEMNED

This was not the first round of litigation between Michael Connolly and the homeowners' association at 111 E. Chestnut where Connolly owned a unit. But this particular legal fight revolved around his First Amendment rights under Section 18.4(h) of the Condominium Property Act.

As with Boucher, the board's attorneys put Connolly on notice after multiple reported incidents of "erratic and intimidating behavior." In one of the incidents, Connolly told a boy that he was "violating building rules by bringing his bicycle into the main elevator and demanded to know the boy's name and unit number."

Another time, he angrily confronted a resident who walked her dog through the front door of the building.

Additionally, the condo board alleged Connolly told residents to turn down their music at the building's pool, then disconnected their iPod. In another incident, he told residents food wasn't allowed in the pool area and may have photographed them without their consent.

The condo board accused Connolly of violating the section of the association's declaration that reads: "No obnoxious or offensive activity shall be carried on in any [u]nit or in the [c]ommon [e]lements."

**Cook County Circuit Judge Thomas Allen dismissed the First Amendment claim for failure to state a cause of action. Boucher's argument failed because the association board is not a state actor, Allen ruled.**

In October 2013, the board held a hearing on the violations and it imposed a $250 penalty for each violation, for a fine totaling $1,000. Like Boucher, Connolly paid the fees and took the association to court. Among the claims in his complaint, he alleged the fines violated Section 18.4(h) of the Condominium Property Act.

Norman J. Lerum

A panel cited *Boucher* in finding that Connolly had sufficiently pleaded a violation of the act.

The panel also noted they disagreed "with the trial court's conclusion that the violations notice could not form the basis for a claim based on [S]ection 18.4(h) of the [a]ct, because that notice 'concerned Connolly's actions, not his protected speech.' Three of the four incidents, as they are described in the violations notice, undoubtedly involved speech."

"Clearly, the statements or questions attributed to plaintiff could be deemed rude or socially inappropriate. Nonetheless, it is well settled that First Amendment protection encompasses speech that may be considered socially unacceptable or offensive."

In his special concurrence, Justice Mathias W. Delort quoted precedent from a U.S. District Court ruling that found "Section 18.4(h) forbids a board from 'impair[ing] any rights guaranteed by the First Amendment,' not from violating the [a]mendment itself," Goldberg v. 400 E. Ohio Condo minium Association, (1998).

As they did following the *Boucher* decision, attorneys for East Chestnut appealed to the Illinois Supreme Court. The state high court denied the association's petition for leave to appeal in September.

### ABUSIVE SPEECH OR RETALIATION?

Norman J. Lerum, who represents Connolly and Boucher, said the association is trying to falsely paint his clients as abusers. He said the behavior described in the notices to Boucher were exaggerated and overblown.

Lerum said Boucher, a former president of the 111 East Chestnut Street Association, disagreed with the current board about several management practices and about the performance of certain management employees. Boucher's complaint states that his criticism involved "issues relating to condominiums being rented like hotel rooms over a weekend, sanitation of the building swimming pool, security practices put in place by the management company," among other criticisms.

"The board was using these two instances as a pretense to retaliate against Boucher for his legitimate criticisms of the board," said Lerum, a sole practitioner at the Lerum Law Firm.

He said Connolly was also critical of the board and was retaliated against as a result. Without freedom of speech, corruption and bad management at an association can go unchecked, Lerum said.

"I think that's what at stake here," he said.

Lerum argues the Condominium Property Act is controlling, based on Illinois Supreme Court precedent in *Spanish Court Two Condominium Association v. Carlson*, 2014 IL 115342.

In that case, the unit owner stopped paying her homeowner assessments because her unit was destroyed by water damage. The water damage was a result of the association's failure to repair a toilet in her unit.

**"I'm happy that unit owners at least have some tool to try to protect them from having associations ride roughshod over them and their rights," Ralph J. Schumann**

The high court ruled she must still pay her dues because, under the Condominium Property Act, a unit owner's duty to pay assessments is not contingent on the association's repair or maintenance of its units.

Diane Silverburg

The relationship between a unit owner and a condominium statute is controlled by statute, not by a private contract, Lerum said.

"First Amendment rights cannot be given away by contract, or a declaration," he said. "The statute takes precedent over the declaration and if there is a provision inconsistent with the statute."

Diane Silverberg, an attorney for the East Chestnut association, said in an email she disagrees with this interpretation of Section 18.4(h) in *Boucher* and *Connolly* because "the [s]ection speaks only to First Amendment protections in the context of enforcement of rules and regulations — and not as to enforcement of declaration provisions, as was the case in both the *Boucher* and *Connolly* case."

The distinction is significant, she wrote, because unit owners agree to be bound contractually by the provisions of the declaration when they purchase a unit in a condominium association.

"Here, it was the [d]eclaration's proscription against 'obnoxious or offensive activity … which may be or become an annoyance or nuisance to the other [u]nit [o]wners or occupants or which disrupts any other [u]nit [o]wner's reasonable use and enjoyment of the [p]roperty' that the [b]oard properly sought to enforce," wrote Silverberg, a principal at Kovitz Shifrin Nesbit.

Ralph J. Schumann

Silverberg thinks Delort's special concurrence is instructive.

"As Presiding Justice Delort of the [1]st District Appellate Court observed in his special concurrence in the *Connolly* case, '[t]he First Amendment to the United States Constitution protects state actors,' but 'does not protect individuals' rights against private entities such as condominium boards.' (Editor's Note: Emphasis added). Delort further noted that Section 4 of Article 1 of the Illinois Constitution similarly so holds," Silverberg wrote in an email.

**PROCEDURAL RULINGS VERSUS IMPLICATIONS FOR FREE SPEECH**

Adam T. Kahn, associate at Levenfeld Pearlstein who focuses on condo association law, said there's certainly a tension between unit owner freedom of speech and the greater need to run the community at large.

Kahn said this type of costly litigation presents a problem for association boards that are trying to discourage disruptive behavior by unit owners.

"These cases make it more difficult for condominium boards to curb harassment of management and others and stop cantankerous and belligerent unit owners from running amuck in the association," he said.

Kahn said if the board levies fines, they risk being sued. But, he added, if

the board takes no action, it could still face a lawsuit from other unit owners or employees who are impacted by the disruptive behavior.

"Really, it's a Catch-22," he said.

However, the appellate court has not made a substantive ruling or decided on the merits in either *Connolly* or *Boucher*, said Ralph J. Schumann, past president of the Illinois Real Estate Lawyers Association and a sole practitioner at the Law Offices of Ralph J. Schumann.

The rulings simply concluded that the First Amendment claims were improperly dismissed, he said. Schumann said he thinks Section 18.4(h) carves out a necessary protection for unit owners.

"I'm happy that unit owners at least have some tool to try to protect themselves from having associations ride roughshod over them and their rights," he said.

He said he wouldn't take seriously any suggestion that these rulings allow unit owners to engage in clearly offensive speech or behavior. Schumann said these rulings essentially address procedural questions.

These cases are appealed on narrow questions, procedural questions, such as whether summary judgment was proper or whether there was an abuse of discretion by the trial judge or whether dismissal of a count in a complaint was proper, he said.

"They are not necessarily some grand pronouncement," he said. "Although its dangerous to extrapolate beyond the specific procedural contexts of *Boucher* and *Connolly* it would be fair to view these decisions as small steps in the direction of providing additional protections or options for Illinois condo unit owners." CL

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