

News

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Are HOAs at Risk for Secondhand Smoke Lawsuits?

BY JOEL M. KRIGER, ESQ.



Secondhand smoke wafting into common areas and units is creating more and more of a controversy in associations. The problems arise in several different ways. One common problem occurs when the secondhand smoke from one owner's unit finds its way into another unit. Depending on the configuration of the building, significant amounts of secondhand smoke can enter a nonsmoker's unit, causing annoyingly unpleasant odors. Our initial advice to clients in these situations is to inspect all common area penetrations between the two units and seal them appropriately to minimize or avoid the transmission of the smoke. The majority of CC&Rs do contain a general provision against nuisance: the unreasonable interference with the use and enjoyment of another's property. The concept of nuisance can be applied in this situation when the disturbance is severe.

Associations can also receive secondhand smoke complaints from owners using the common area pools, playgrounds and park areas within the community. In the recent case of *Burke v. Oakwood Worldwide* (2009) 169 Cal. App. 4th 1547, parents brought an action against the Oakwood Apartments on behalf of their asthmatic child whom they alleged suffered asthma attacks as a result of her exposure to secondhand smoke in the playground and pool areas of the complex. Oakwood has a longstanding policy prohibiting smoking in all indoor units and indoor common areas, but permits smoking in the outdoor common areas to accommodate tenants and guests who smoke. The child's parents alleged in the lawsuit that Oakwood "allowed, encouraged and approved a toxic, noxious, hazardous, offensive and in fact carcinogenic condition to be present in all of the outdoor common areas of the complex." The parents further alleged that the effect of the secondhand smoke on their child's asthma led to three bouts of pneumonia.

PUBLIC NUISANCE THEORY ADVANCED

The primary legal theory advanced against Oakwood was that it allowed the existence of a public nuisance. A public nuisance is anything that is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property. A public nuisance is one which affects an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted on individuals within the group may be unequal. A private person is allowed to maintain an action for public nuisance if it is especially injurious to them.

The trial court dismissed the parents' complaint but the Court of Appeal reinstated their claim. The Court of Appeal determined that it is for a jury to determine whether Oakwood took reasonable steps to maintain its premises in a reasonably safe condition and whether its failure to impose any type of limitation on smoking in

common areas, including swimming pools and the children's playground, breached that duty.

Because associations are often treated by courts as "landlords of the project," this ruling could apply to them as legal precedent permitting a case to be stated against an association for nuisance or harm created by residents being exposed to secondhand smoke. Please keep in mind that the plaintiffs in this case did not win a judgment by this ruling.

The Court of

Appeal's decision only decided that the complaint was legally sufficient to "state a claim" so that the case could go forward in the judicial process towards a trial by jury. In fact, the Court of Appeal expressed doubt as to whether the plaintiffs' claims would ultimately prevail because it believed plaintiff would have great difficulty in providing the evidence needed to establish liability on the part of the defendant. ■

