

## **Associations May be Required to Take Action to Control Second Hand Smoke**

Melinda Birke, a minor residing at the Oakwood Apartments with her family, filed a lawsuit against Oakwood claiming it failed to control second hand smoke in the “outdoor common areas.” The lawsuit recited all of the hazards commonly associated with second hand smoke, and claimed the second hand smoke aggravated the minor’s asthma and allergies. The lawsuit initially alleged a public nuisance (i.e. affects the general public), but the plaintiff later amended the complaint to include a claim for a private nuisance (i.e. affects only the one person).

The Court of Appeal’s function in this case (Birke v. Oakwood Worldwide) was only to determine whether the plaintiff had a viable lawsuit to pursue. The case had not yet been to trial, so there was no judgment to review. Oakwood argued that second hand smoke is not a basis for a nuisance. The court disagreed.

The Court reviewed all of the elements of a claim for nuisance, and found that a nuisance could be based upon second hand smoke under the facts of this case. This finding did not determine who would win the lawsuit, but merely meant that the plaintiff could proceed on her case and eventually have the case decided by a judge or jury. In other words, a person may use second hand smoke as a basis for a claim of nuisance. Whether or not there is an actual nuisance will depend on the particular facts of the case, and how a judge or jury perceives and interprets those facts.

A number of years ago, the California Supreme Court concluded that a homeowners association is treated like a “landlord” in terms of its responsibilities to protect its residents in the common area. What this means for Associations, is that Associations may now become the targets of nuisance claims when it permits second hand smoke in the common area.

The threat presented by second hand smoke does not mean the Association must always prohibit second hand smoke. Lesser restrictions may suffice, such as smoking and no smoking areas, or smoking and no smoking times. What is important is to react to complaints, and to at least consider taking action to: (1) protect the health and safety of the residents, and (2) protect the Association from liability.

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