

Across the Line

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CALIFORNIA COURT BANS SECONDHAND SMOKE IN COMMON AREA...ONLY IN CALIFORNIA

California is oft said to be on the leading edge. It may be leading to the edge of a cliff...or deep dark hole like our budget crisis, or the Golden State may be on the leading edge of the law. Or all of the above.

In a recent Second District decision, *Birke v. Oakwood Worldwide* (2009)169 Cal App.4th 1540, once again, for better or for worse, California takes the lead.

Secondhand Smoke

Melinda Birke lives with her parents in Woodland Hills, California at the Oakwood Apartments. Oakwood prohibits smoking in all indoor units and indoor common areas but allows smoking in the outdoor common areas like the swimming pool, playground, and barbeque areas. Oakwood's management allows such outside smoking in order to attract an international clientele.

Melinda suffered from asthma, had allergic reactions as a result of the secondhand smoke, and even claimed to have had three bouts of pneumonia after being exposed to the smoke. Her dad asked the apartment manager to cordon-off or restrict the outdoor smoking areas but the request was denied.

Complaint

Melinda's parents sued on her behalf alleging a public nuisance. The trial judge threw out the case on demurer to the initial complaint and an amended complaint. Young Melinda Birke appealed.

The Court of Appeal examined the allegations, including 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 suit claimed that the California Air Resources Board and Surgeon General found that secondhand smoke is "an airborne toxic substance that may cause and/or contribute to death or serious illness...there is no risk-free level of exposure to secondhand smoke...and that nonsmokers have increased risks of heart disease and lung cancer when exposed to secondhand smoke."

Public Nuisance

The Court of Appeal wrote that in order to adequately plead a cause of action for public nuisance based upon secondhand smoke in an apartment's common areas it is necessary to allege the following: (i) the apartment was operated and managed in a way that, by act or omission, created a condition harmful to health, or obstructed the free use of the common areas, so as to interfere with the comfort and enjoyment of life or property; (ii) the condition impacted a substantial number of people concurrently; (iii) an ordinary person would be reasonably annoyed or disturbed by the condition; (iv) the seriousness of the harm outweighs the social utility of the conduct; (v) the condition was

nonconsensual; (vi) the harm suffered was different in kind from the harm suffered by the general public; and (vii) the objectionable conduct was a substantial factor in causing the alleged harm. Civil code sections 3479, 3480 and 3493.

The Court quickly determined that the outside smoking affected all of the guests in the apartment complex who chose to use those areas, i.e. a substantial number of people at the same time. The fact that Oakwood's alleged misconduct consists of omission rather than affirmative action did not preclude nuisance liability.

The Court found that while Oakwood may not have had a duty to ban smoking it may have had an obligation to impose some limitation on smoking in common areas. Melinda Birke had standing to bring a private nuisance claim based on interference with her right to enjoy the rented premises with her parents. Likewise, causation was not a problem.

By providing ashtrays and allowing smoking in the outdoor areas, Oakwood helped create a harmful condition.

Special Injury

With respect to the requirement that the harm suffered in a public nuisance must be different in kind from the harm suffered by the general public, the Court held that at the demurrer stage of the case, it was not prepared to say that the aggravation of Melinda Birke's allergies and chronic asthma were the same type and only different in degree from the harm to the general public of increased risk of developing heart disease and lung cancer.

Interestingly, the Court suggested that were the injuries a private nuisance as well as a public nuisance the special injury requirement is inapplicable. Ultimately, Melinda Birke's claims were found to be sufficient to meet the public nuisance requirements.

Victory for Nonsmokers

The Court partially overturned *Venuto v. Owens-Corning Fiberglass Corp.* (1971) 22 Cal App3rd 116, writing that Oakwood had "an indisputable duty to take reasonable steps to maintain its premises in a reasonably safe condition, (and) its failure to impose any type of limitation on smoking in common areas, including swimming pools and the children's playground that Melinda Birke has a right to use and enjoy, breached that duty." While the Court of Appeal determined that Melinda Birke properly plead a case for public nuisance, it remains to be seen if she can prove up at trial.

Road Map for More Lawsuits

The Court's Opinion provides potential plaintiffs with a roadmap to allege a public nuisance lawsuit for secondhand smoke.

My take is that this type of lawsuit will be expanded to office buildings, shopping centers, sports venues and even resort properties. It may be necessary to have a uniquely affected plaintiff like an asthmatic five-year old. Perhaps Melinda is for hire. California property owners and managers should carefully consider their smoking and secondhand smoke policies. *Birke v. Oakwood Worldwide* is a blueprint to stop secondhand smoke impacts.

This is another of a series of articles on California law - for Nevada lawyers - authored by members of the Truckee, South Lake Tahoe, Incline Village and Reno law firm of Porter Simon.

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