

Secondhand Smoke – You Be the Judge!

By Dale S. Alberstone

Let me confess at the outset that I detest the smell of cigarette smoke. I don't like to be in a room where someone is smoking and I learned in my early years of dating that I don't even like to kiss someone who is a smoker. (As an aside, I also learned that breath mints do not make the smell of smoke any better.)

On the other hand, I am a strong believer in the right of owners of private enterprises to adopt reasonable rules and regulations relative to the operation of their businesses. In general, my view is that if customers do not like the way a vendor operates his business, then they can shop elsewhere.

Yet, when one mixes secondhand smoke with the operation of a business enterprise, such as an apartment building, I have competing feelings. On the one hand, if I want to allow my tenants to smoke in the outdoor courtyard of my building, then I believe I should not be told by local city government or others that I am required to ban smokers. On the other hand, because of my basic antipathy to smoke, it is difficult for me to be anguished by a city council that prohibits smoking on the premises of a multi-family residential property.

My column this month deals with the issue of when and whether a landlord should be compelled to ban smoking in the outdoor common areas of an apartment complex, including courtyards, walkways, lawns, deckings, etc. More specifically, the issue is not even whether local city officials should have a right to prohibit such smoking, but whether a tenant in the complex should be allowed to seek and obtain a court order which mandates a smoke-free complex in the outdoor common areas.

The Case Against Oakwood Apartments

On January 12, 2009, the California Court of Appeal ruled on that precise issue with respect to the Oakwood Apartments located in Woodland Hills, California. The case is entitled Melinda Birke v. Oakwood Worldwide.

Oakwood had a longstanding policy prohibiting smoking in all indoor units and indoor common areas. However, it permitted smoking in the outdoor common areas to accommodate tenants and guests who smoked. Oakwood declined previous requests of one of its tenants, John Birke, to ban smoking in the outdoor common areas.

In 2006, five-year-old Melinda Birke filed a lawsuit (through her father, John, as the guardian) seeking her to prevent Oakwood from permitting smoking in the outdoor areas of the complex. Essentially, Melinda sought a court order compelling Oakwood to ban all smoking in those areas.

Melinda (with the assistance of her father and attorney) claimed that the smoking was a

nuisance because, among other things, the secondhand smoke which she smelled was harmful to health, indecent and offensive to the senses, and interfered with her comfortable enjoyment of life at the property. She also claimed that the smoke was a public nuisance because it adversely affected all those persons that happened to be on the grounds of the complex when someone outdoors was smoking.

Oakwood, through a legal procedure known as a demurrer, moved to dismiss the litigation.

YOU BE THE JUDGE: Should the case be dismissed or should Melinda be allowed to pursue the litigation in an effort to obtain a court order compelling Oakwood to ban outdoor smoking within its complex?

Please think about that question before reading further.

If you decided that the litigation should be dismissed, the Superior Court agreed with you, as it dismissed the suit on various technical grounds.

If you thought that Melinda should be allowed to pursue her litigation, then you are in agreement with California Court of Appeal which, after the lower court's dismissal of the action, reinstated the case based upon the following reasoning.

The appellate court noted that the public nuisance doctrine is aimed at the protection and redress of community interests and embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the sixteenth century. To qualify as a public nuisance, and thus be restrainable, the interference must be both substantial and unreasonable.

The Court said it is an obvious truth that each individual in a community must put up with a certain amount of annoyance and inconvenience, and must take a certain amount of risk in order that all may get along together.

The Court of Appeal went on to explain that Oakwood, as a landlord, has a duty to maintain its premises in a reasonably safe condition. It then proceeded to rule that, "The issue presented is not whether Oakwood has a duty to ban smoking (an otherwise legal activity in Woodland Hills), but whether, given its 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 which Melinda has a right to use and enjoy, breached that duty."

Commentary

When you think about it, that quoted language from the court's decision is amazing and has potentially astonishing repercussions.

Basically, the court said that it will leave the question to the trial judge (or jury) of whether secondhand smoke in the outdoors of the complex is sufficiently harmful that a court restraining order should be issued. In other words, the complaint of a single tenant

might convince the trial judge to issue an injunction which compels Oakwood to implement a policy preventing outdoor smoking at its complex at all times in the future.

Bear in mind that some other judge (or jury) deciding some other case involving secondhand smoking in the outdoor common areas of an apartment complex may determine that outdoor smoking does not render the premises unsafe, and thereby deny any request for an injunction.

Thus, allowing individual judges or juries to determine whether outdoor secondhand smoke renders a building unsafe, and therefore, such smoking is in violation of the landlord's duty to maintain the premises in a reasonably safe condition, could result in inconsistent rulings from building to building as well as cities to cities throughout California.

In my view, the Court of Appeal focused on the wrong issue. Instead, it should have either (1) (preferably) determined that only the California State Legislature (or at a minimum, a local governmental authority) is allowed to institute a ban on outdoor smoking, or (2) (as a less favored alternative) determined as a general finding applicable to all residential complexes in California, that outdoor smoking does or does not violate the landlord's duty to maintain his premises in a reasonably safe condition. Had the Court adopted alternative number two, it should have focused on whether or not all California landlords have a duty to ban outdoor smoking on their properties, not whether a singled-out landlord, on a case by case basis, breaches the duty to maintain safe premises when allowing such smoking. Since this is a statewide social issue, it is too important to be treated inconsistently by different random judges and juries.

I would not have a problem if we were talking about dense black smoke emitted from an industrial smoke stack which blew into the courtyard area of a nearby apartment building. There, I could envision a proper court order which shuts down the plant until it is able to confine its noxious smoke to its own property.

But, where the smoke is for all intents and purposes confined to the property at which it is created (e.g., an apartment complex), I am troubled over the fact that any one tenant can file a lawsuit seeking to compel, and any one judge or jury can rule on that lawsuit by which it does compel, the owner of the property to implement a no-smoking policy for the outdoor common areas of the complex.

I am also troubled by the potential for inconsistent decisions where many tenants file separate actions throughout the State of California before many different judges with some judges permitting the smoking and others banning it. In my opinion, the decision to allow or prohibit smoking in outdoor common areas of an apartment building should be left to the discretion of each apartment owner. Short of that, I believe that if a law is enacted to allow or disallow such smoking, it should be by the State Legislature, not the Courts.

Almost certainly Oakwood will petition the California Supreme Court to review the

appellate court's decision. If the high court accepts the case, I will let AOA readers know the outcome. Stay tuned.

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Mr. Alberstone has been awarded an AV rating from Mardindale-Hubbell. An AV rating, registered through Reed Elsevier, reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity.

The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

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