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The Smoker Next Door
Secondhand Smoke + Condominiums = Trouble

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Because secondhand smoke is injurious to health, according to most experts and many state and local governments, even low levels of exposure can be considered a problem for many condominium residents. And it may be a nuisance. Many condominium associations are adopting or considering the adoption of restrictions or prohibitions on smoking in the common areas, exclusive use common areas such as balconies and patios, and even units.

Enforcement by the Association Under the Nuisance Provision of the CC&Rs

When faced with a complaint regarding secondhand smoke by an owner or resident at a condominium association, the board (along with management) will need to evaluate the facts to determine if there is a violation of the association's governing documents that requires the association's involvement/enforcement. In most cases, the determination of a violation requires an evaluation of the facts to determine if there is a nuisance.

A typical nuisance provision in a condominium association's CC&Rs will provide as follows:

> No noisy, hazardous, noxious, illegal or offensive activity shall be allowed on or emanating from any unit or from any portion of the properties, nor shall anything be done or kept in any unit or on the common area which may be or may become an annoyance, disturbance, nuisance, or safety hazard to the other residents of the Association or the neighborhood, or which shall unreasonably interfere with the quiet enjoyment of other residents.

California law recognizes two (2) types of nuisances: a private nuisance and a public nuisance. A private nuisance affects one or a few property owners and is generally the type of nuisance claim that community associations bring pursuant to the governing documents. A public nuisance affects an entire community or neighborhood.

A nuisance is anything that is "injurious to health, is 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" (California Civil Code Section 3479).

To constitute a nuisance, the invasion of the owner's interest in the use and enjoyment of his or her property must be substantial and based on significant harm as judged by an objective standard (*San Diego Gas & Electric v. Superior Court*). The legal test for determining whether an owner (or their tenant or other resident) has suffered unreasonable interference with the use and enjoyment of his or her

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property is whether the gravity of the harm outweighs the social utility of the offending conduct.

At a typical condominium association, the affected owner(s) and the association likely both have "standing" to enforce the nuisance provision. The question is whether the plaintiff will be the association or the affected homeowner. Most affected owners expect their association to deal with their problem. At the very minimum, it is the obligation of the association to at least investigate and, depending on the facts, make an effort to gain enforcement of the CC&Rs.

If the association determines that this is an issue that it should enforce (based on the facts, nature of the nuisance and other factors), the association will need to determine whether the claimed invasion of the complaining owner's property rights is substantial. This determination is based on what a "reasonable person" should have to endure within close proximity to others. It is not judged by what the complaining owner considers substantial (as to them, it is always substantial).

Below are summaries to a number of cases that deal with both condominium owners and tenants (because according to the California Supreme Court, associations are often held to the same standard as landlords). Those cases have held that a nuisance can exist where fumes, odors or smoke are reasonably offensive to persons of ordinary sensibilities, even though they do not cause material injury to property or endanger health and safety. So, while an owner does not have to be hypersensitive or allergic to claim a private nuisance, their opinion alone is usually not enough.

In the cases summarized below, the courts have generally sided with the affected homeowner and/or their condominium association. But this does not mean that the courts will grant relief in every case.

In some instances, such as the *Donnelley* case, the court has recognized that a claim of nuisance based on a defective condition would be actionable, but the affected owner has to offer evidence of actual infiltration of smoke.

In others, courts may simply decline to even consider exposure to secondhand smoke a possible nuisance. Note the 2011 case out of New York involving a luxury condominium association in Manhattan. Quoting well-established New York precedent, the court in *Ewen* stated,

> "…persons living in organized communities must suffer some damage, annoyance and inconvenience from each other… if one lives in the city, he must expect to suffer the dirt, smoke, noise, odors and confusion incident to city life."

The court in *Ewen* also stated,

> "Defendant's conduct in smoking in the privacy of their own apartment or condominium unit was not so unreasonable in the circumstances presented as to justify the imposition of the tort liability against them."

Also note the *Lipsman* case out of Massachusetts where the court ruled that:

> "…the annoyance of smoke from three to six cigarettes per day is not substantial and would not affect the ordinary person and that the plaintiff tenant may be particularly to smoke but an injury to one who has specially sensitive characteristics does not constitute a nuisance."

It is important to realize that just because an association resident is complaining about smoke does not necessarily mean that a court is going to rule in their favor. It depends on the facts and circumstances.

When a smoking complaint is received by the association, the association's board and/or management should investigate the claim of smoke and odors and determine if secondhand smoke is infiltrating the unit. The board and management should make their own determination as to whether the smell connected with the cigarette smoke (or pipe, cigar, or marijuana) is unreasonably offensive to a reasonable person. If the board concludes that a person with ordinary sensibilities would be bothered by the smoke or odors, the association may take some sort of action to abate the nuisance. Alternatively, and depending on the situation, the board may want to ask that the affected owners, both the smoker and the unit owner/resident complaining, install negative air or HEPA filters to clean the air to ensure that the smoke and its odors do not proceed outdoors and/or infiltrate into adjacent/neighboring units.

The fact that there is a secondhand smoke complaint does not necessarily mean that the association must rush to court. There are some steps that can be taken and should be seriously considered by the board as a prerequisite to legal action. Under well-established California law, as the dispute is between two units, this could be considered a neighbor-to-neighbor dispute, but that does not mean that the association should just ignore the matter and leave it to the two (2) disputing owners/residents to resolve. The board could make an effort to arrange a meet and confer/IDR meeting (pursuant to Civil Code Section 1363.810 *et seq*.) with the affected owners, notice a hearing with the owner that smokes, consider steps the association could take to seal the common area to eliminate or mitigate the smoke nuisance complaints, or send each of the affected and involved owners a request for

resolution and offer to help facilitate and pay a portion of the cost of a mediation. Finally, the board can consider taking legal action if it feels that it is warranted under the circumstances.

Enforcement by Amending the Governing Documents

The board that is facing smoking complaints may want to consider amending the CC&Rs to specifically address the issues it is facing. Many cities have adopted prohibitions on smoking in public places, and in some cases even on patios or balconies at condominium associations. Many associations have already amended their rules to include rules prohibiting smoking in the common area (as most CC&Rs allow the board to make rules regarding the use of the common area). We are aware that some associations have adopted prohibitions on smoking in the units themselves, but there are no cases regarding the ability of a condominium association to enforce such rules or CC&R amendments or whether a court would uphold them as reasonable. But considering the serious health and safety risk to those that have to deal with the unwanted smoke infiltration and the fact that so many municipalities have adopted no smoking ordinances, we believe that it is likely that a condominium association's no smoking prohibition in the CC&Rs in units and/or the common area would be enforceable.

When amending the CC&Rs, the board should go for a broad prohibition on smoking of any type, which would include not just cigarettes, but also pipes, cigars and marijuana. As for marijuana, an individual that has a medical recommendation to buy and use medical marijuana for a medical condition may be entitled to an accommodation for a disability, but they are still prohibited from creating a nuisance.

However, while it might be easier to create a no smoking rule then it would be to amend the CC&Rs, because most CC&Rs limit the board's rule making authority to matters outside the unit, and because the association will want to make this prohibition as strong as possible, it is recommended that the smoking prohibition not only be included in a rule but be established as an amendment to the CC&Rs.

Restrictions in the recorded CC&Rs are presumed reasonable and can only be overcome when it is shown that the restriction violates some public policy or infringes on an important property right. As the Supreme Court of California held in the *Nahrstedt* decision:

> "Under the holding we adopt today, the reasonableness or unreasonableness of a condominium use restriction that the legislature has made subject to section 1354 is to be determined not by reference to the facts that are specific to the objecting

> homeowner, but by reference to the common interest development as a whole. As we have explained, when, as here, a restriction is contained in the declaration of the common interest development and is recorded with the county recorder, the restriction is presumed to be reasonable and will be enforced uniformly against all residents of the common interest development unless the restriction is arbitrary, imposes burdens on the use of the lands it affects that substantially outweigh the restriction's benefits to the development's residents, or violates a fundamental public policy."

The *Nahrstedt* standard would create a difficult hurdle for any smoker to challenge. CC&R amendments have been deemed (by the California Supreme Court; *Villa De Las Palmas HOA v. Terifaq*) to apply to both current and future owners, and they are presumed reasonable. A rule, on the other hand, is not entitled to the *Nahrstedt* presumption of reasonableness and is more susceptible to challenge by a smoker. To enforce an operational rule, the Association would have to show that the rule is reasonable and should be enforced.

Boards of directors should not ignore complaints regarding smoking. They should investigate and determine if there is a smoking nuisance problem and whether the association should take steps to eliminate the infiltration of smoke. The board should consider adopting a no smoking rule, and also consider amending the CC&Rs to include an anti-smoking provision. The board should also meet with the smoker and determine if there are any steps that can be taken to eliminate the nuisance problem, and it should definitely meet with the complaining homeowner once the association has all of the facts to determine what can reasonably be done to deal with the smoking complaints.

Summary of Case Law Related to Smoking in Condominiums and Apartments

There is not a lot of case law/legal authority dealing with smoke nuisance claims. Many of these lawsuits are settled or, if they have gone to trial, there have not been many reported decisions that we can rely upon as guidance as to how a court may deal with a secondhand smoke nuisance claim.

Below is a brief description of a number of smoke related cases/appellate level court decisions as well as some trial court decisions from around the country. What these cases tell us is that not all courts are going to deal with smoke related complaints in the same way, and the outcome is highly fact specific. These cases also tell us that a court's decision holding a homeowner or the association responsible for secondhand smoke claims may depend on the extent of the smoke (the court may feel that someone who smokes a few cigarettes a day is not really creating a nuisance,

compared to a resident who is a chain smoker going through 2 packs a day), whether it can be established that the smoke is actually infiltrating through gaps in the common area, and other factors.

It is important to note again the ruling in *Ewen,* a recent New York lawsuit, where the court, quoting New York precedent, stated that *"persons living in organized communities must suffer some damage, annoyance and inconvenience from each other… if one lives in the city he must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life.*" The Court found that "**Defendants' conduct in smoking in the privacy of their own apartment was not so unreasonable in the circumstances presented as to justify the imposition of tort liability against them.**"

What these cases tell us is that every case is different and there is no guarantee that a judge is going to agree that the smoke being complained about is a nuisance that the association (or the smoker) must abate.

APPELLATE LEVEL CASES

***Donnelley v. Cohasset Housing Authority,* 16 Mass. L. Rep. 318 (2003) --** Plaintiff lived in a senior housing complex run by defendant, and a smoker moved into the apartment directly below her. Plaintiff complained to the Housing Authority that smoke was infiltrating into her apartment. The Housing Authority sent a maintenance worker to install an exhaust fan and offered other options, but the tenant/plaintiff rejected these solutions. Plaintiff then requested that the floor of her apartment be sealed, and the Housing Authority declined. Someone from the Board of Health recommended that an air purification system be installed and that areas around the baseboards be caulked, but the Housing Authority declined these recommendations as well. Plaintiff then sent notice under the Tort Claims Act, alleging breach of contract, negligence, discrimination, and breach of the right to quiet enjoyment, alleging that the Housing Authority had acted unreasonably in failing to seal to the holes and cracks, failing to inspect obvious defects in the floor, failing to replace the door sweep, and in installing the fan in the neighbor's apartment where plaintiff had no way to turn it on. The Housing Authority had an inspection done and again refused to help Plaintiff with any of the recommendations. Plaintiff filed her lawsuit. Defendant filed a motion for summary judgment. **The breach of covenant of quiet enjoyment claim failed** because the plaintiff did not assert enough evidence that smoke had infiltrated her apartment because of a defective condition, **but the court recognized that a claim based on a defective condition would be actionable.** The breach of contract claim failed because it could not be proven that the landlord breached any of its duties. The negligence claim failed because Plaintiff **did not offer evidence of actual infiltration of smoke and failed to identify the defective condition resulting in**

the infiltration. The discrimination also failed, and the motion for summary judgment was allowed on all counts.

Note: This case points out the problem many condo owners face in pursuing their claims against their neighbor and their association; they cannot prove "actual infiltration" or the condition in the common area that results in the smoke infiltration.

***Babbitt v. DiPuzo,* 2004 Cal. App. Unpub. LEXIS 4679 (2004)** Plaintiff and Defendant were neighbors in a California condominium association. Plaintiff liked to smoke cigars on his patio, but the smoke from his cigars would waft into Defendant's condominium. Defendant complained to Plaintiff about the cigar smoke and allegedly assaulted Plaintiff after making the complaint. Plaintiff then sued Defendant for assault and Defendant filed a cross claim for negligence, nuisance, false arrest, and malicious prosecution. Plaintiff demurred to all claims, but the court sustained all but the trespass claim and it allowed Defendant to amend that claim. Plaintiff appealed. As a defense to the negligence claim, Plaintiff asserted that cigar smoking is a legal activity, and there is no duty to refrain from indulging just because the neighbor doesn't like it. Defendant pointed to the fact that even secondhand smoke is believed to have negative effects on human health and argued that the general rules of duty and negligence applied in his favor. The court sided with Defendant, not necessarily finding that there is a tort for secondhand smoke injuries but also saying that they could not say such exposure would never be actionable. **The court also found that the nuisance claim was sustainable because intrusions by smoke and noxious odors are traditionally appropriate subjects of nuisance actions, and more evidence was necessary in this particular case.** The other claims were unrelated to the smoke and related only to the assault.

***Duntley v. Barr,* 2005 NY Slip Op 25397 (2005) --** Plaintiff brought this action seeking monetary damages caused by Defendant's smoking in the adjoining apartment. The court had to address what recovery was available for damages incurred privately, attributable to secondhand smoke. The court stated that Plaintiff's recovery must lie under the theory that the defendant created a private nuisance for which she is liable, either intentionally or negligently, and the court found that **Plaintiff established the cause of action for private nuisance.**

***Poyck v. Bryant,* 2006 NY Slip Op 26343 (2006)** Plaintiff (tenant) rented a condominium from Defendant (landlord condo owner) for several years. At some point, new neighbors moved onto the same floor, and the new neighbors smoked in the common hallway. Plaintiff complained to the superintendent of the building, and then also to Defendant landlord and his attorney, specifically noting that Plaintiff's wife was recovering from her second cancer surgery and was allergic to tobacco

smoke. Defendant landlord took no action and 30 days later, Plaintiff said he and his wife were vacating the apartment to find a healthier living situation. Defendant landlord sued them to collect rent and late charges, and Plaintiff filed a counterclaim for breach of the warranty of habitability and constructive eviction due to the secondhand smoke. Defendant landlord filed a motion for summary judgment. The court found that Defendant landlord failed to offer any evidence that he took any action to eliminate or alleviate the hazardous condition. **He could have asked the condominium association's board to stop the neighbors from smoking in the hallway and elevator as well as to take preventive care to properly ventilate the unit.** The court found that there were triable issues of fact on the counterclaims, so the motion was denied.

***Frye v. Brown,* 2007 Ky. App. Unpub. LEXIS 7 (2007) --** Plaintiff purchased a condo directly above Defendant Brown, who smoked inside her unit. **Plaintiff claimed that the ventilation system in the condominium was defective,** causing him to be exposed to secondhand smoke from Defendant's unit. Plaintiff sued Defendant and the association on claims that the unit was in such a defective condition that smoke from the Defendant's unit was contaminating his own unit, and he later added claims of trespass, nuisance, and constructive eviction. Plaintiff settled his claims against the Association (payment of money), and Brown then filed a motion for summary judgment, claiming that she had been released by the settlement. The court did not address the substance of the claims because **it found that Brown had been released by the Association's settlement and release agreement.**

***DeNardo v. Corneloup,* 163 P.3d 956 (2007) --** Plaintiff rented an apartment, and Defendant moved into the apartment next door. Defendant smoked cigarettes in his apartment, and Plaintiff complained to him and to the landlord that smoke was leaking into the adjoining apartments. Plaintiff eventually filed suit **against Defendant for battery, negligence and trespass as a result of cigarette smoke invading Plaintiff's property.** He later amended his complaint to add claims against the Landlord for retaliatory eviction, breach of the covenant of quiet enjoyment, **breach of the covenant of habitability, negligence, trespass, battery, and nuisance. The Superior Court dismissed all claims against Defendant and granted summary judgment to the landlord** on all claims **except** breach of the covenant of habitability and negligence, and Plaintiff filed his own motion to dismiss the remaining claims. Plaintiff then appealed, and the appellate court upheld the dismissals.

***Ewen v. Caterina International, Ltd,* 2009 NY Slip Op 52428U (2009) --** Plaintiff owned a condominium adjacent to a condominium owned by Defendant. Plaintiff alleged that Defendant and his guests smoked cigarettes in the unit and that

secondhand smoke was intruding into Plaintiff's unit. Plaintiff claimed that the problem was exacerbated by **construction and design defects** in the building that cause odors, dust and fumes to migrate throughout the structure. Plaintiff **brought an action for nuisance** and negligence, and Defendant filed a motion to dismiss the claims. The condominium association's governing documents were silent on whether smoking was permitted in the individual units. Defendant argued that because the rules and regulations prohibited smoking in certain areas, the absence of a prohibition on smoking inside individual units meant it was permitted. However, Plaintiff based the claims on the provision of the CC&Rs that stated "no unit owner shall make or permit any disturbing or objectionable noises, odors or activity in the Building, or do or permit anything to be done therein, which will interfere with the rights, comforts or conveniences of other Unit Owners or their tenants or occupants." **The court found that there were sufficient facts to support a claim of private nuisance.** The court also found that there were sufficient facts to support a negligence claim because Defendant had a duty not to engage in activity that would interfere with the rights of other unit owners, and his smoking was a nuisance to Plaintiff. The motion to dismiss was denied.

***Birke v. Oakwood Worldwide,* 169 Cal. App. 4th 1540 (2009)** Plaintiff was a 5 year old girl who sued Defendant, the apartment complex where she lived, for public nuisance because smoking was permitted in the outdoor common areas. The trial court dismissed her claims, and she appealed. The appellate court found that to maintain an action for public nuisance based on the presence of secondhand tobacco smoke in the outdoor common areas of the apartment complex, Plaintiff must allege that Defendant and the various related entities that manage and operate the apartment complex in which she resides, by acting or failing to act, created a condition that was harmful to health or obstructed the free use of the common areas of the apartment complex, so as to interfere with the comfortable enjoyment of life or property; the condition affected a substantial number of people at the same time; an ordinary person would be reasonably annoyed or disturbed by the condition; the seriousness of the harm outweighs the social utility of Defendant's conduct; neither Plaintiff nor her parents consented to the conduct; Plaintiff suffered harm that was different from the type of harm suffered by the general public; and Defendant's conduct was a substantial factor in causing Plaintiff's harm. **The court found that Plaintiff had alleged facts sufficient to withstand a demurrer.**

***Boffoli v. Orton,* 2010 Wash. App. LEXIS 807 (2010) (Unpublished) --** Plaintiff filed a complaint for trespass, nuisance, and injunctive relief against his neighbor for "continuously smoking cigarettes on a south-facing deck of their residence on a daily basis, causing smoke to regularly intrude onto his property through air intake vents and windows." It is unclear from the case whether he lived in an apartment/condominium or a single-family home. **The court found for the**

Defendants because Washington law has no cause of action for damage caused by cigarette smoking at a private residence.

***Ewen v. MacCherone*, 32 Misc.3d 12 (2011)** – Plaintiffs were owners and residents of a luxury condominium unit in Manhattan, NY. They commenced action against their neighbors in the adjoining unit as Defendants to recover damages for negligence and private nuisance. Plaintiffs alleged that secondhand smoke from Defendants' excessive smoking was seeping through the walls, and was exacerbated by a building-wide ventilation problem. Plaintiffs did not name the Condominium's Board as a defendant. Defendants' motion to dismiss was denied by the trial court, and Defendants appealed. On appeal, the Court found no statute, condominium rule, or bylaw prohibiting smoking inside the apartment, or obligating Defendants to prevent smoke from drifting into other residences. Quoting well-established New York precedent, the Court stated that *"persons living in organized communities must suffer some damage, annoyance and inconvenience from each other…if one lives in the city he must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life.*" Nussbaum v. Lacopo, 27 NY2d at 315, quoting Campbell v. Seaman, 63 NY 568, 577 (1876). The Court also found that "**Defendants' conduct in smoking in the privacy of their own apartment was not so unreasonable in the circumstances presented as to justify the imposition of tort liability against them.**" Further reinforcing its opinion, the Court opined "the law of private nuisance would be stretched beyond its breaking point if we were to allow a means of recovering damages when a neighbor merely smokes inside his or her own apartment in a multiple dwelling building." The location of the claimants (Manhattan) and jurisdiction of the court (Manhattan; Bronx) is of important note in this case, since they are of a high population density.

Ritter & Ritter, Inc. v. The Churchill Condominium Association. (2008]
Not a secondhand smoke case, but the case did deal with a California condominium association's obligation to deal with repairs that would allow smoke to infiltrate a unit. A homeowner sued their high-rise condominium (conversion) association as a result of the board's failure to repair slab penetrations which had existed in the building from original construction, about 40 years earlier. The slab penetrations were supposed to be fire-proofed at the time of construction, and were not; nevertheless, an occupancy permit was issued by the City. The owner complained that this was a common area fire hazard and that the opening to the parking garage below allowed smoke, exhaust and odors to intrude into the unit. **Amazingly, the Board defended that its decision not to repair (they said this was the owner's responsibility) was protected by the *Lamden* rule of judicial deference.**

The Court of Appeal did not agree and held for the homeowner. **The *Lamden* rule of judicial deference to a Board's maintenance decisions covers only**

"ordinary" maintenance, not "extraordinary" situations such as a construction defect or damage from earthquakes. Further, the *Lamden* defense only covers individual directors, it does not cover the Association itself (meaning that *Lamden* may insulate the directors from personal liability, but at the same time, the Association may still be liable for an improper decision). **If the association has cracks or gaps in the common area that allow smoke to intrude into the unit from the common area, the association should have those cracks or gaps filled.**

LOWER LEVEL CASES

Lipsman v. McPherson **Middlesex, MA Superior Court, 1991** Plaintiff, a nonsmoking tenant in an apartment, sued Defendant, a smoking tenant who lived in the same building. Plaintiff alleged nuisance and negligence because the smoke from defendant's apartment regularly seeped into plaintiff's apartment, causing him annoyance, discomfort and increasing his risk of physical harm due to exposure to secondhand tobacco smoke and of fire. Defendant's motion to dismiss was allowed as to the negligence and risk of fire claims, but a trial was held on the private nuisance claim. **The court entered judgment for the defendant, ruling that the annoyance of smoke from 3-6 cigarettes per day is not substantial and would not affect an ordinary person** and that the plaintiff may be particularly sensitive to smoke, **but an injury to one who has specially sensitive characteristics does not constitute a nuisance.**

50-58 Gainsborough St. Realty Trust v. Haile, et al., **13.4 TPLR 2.302, No. 98-02279, Boston Housing Court (1998)** Defendant, a nonsmoker who lives with her husband in an apartment directly above a smoky bar, was sued by her landlord for failure to pay rent. Defendant had been withholding rent, alleging that the amounts of smoke seeping into her apartment deprived her of the quiet enjoyment of that apartment. The Housing Court ruled that the amount of smoke from the bar below had made the apartment unfit for smokers and nonsmokers alike. The evidence demonstrated to the Court that the **tenant's right to quiet enjoyment** had been interfered with because of the secondhand smoke that was emanating from the nightclub below.

Harwood Capital Corp. v. Carey, **Boston Housing Court Docket No. 05-SP-00187 (2005) -** A landlord **sought to evict** two tenants after receiving complaints from abutting residents about smoking. The tenants worked out of the unit and **smoked 50-60 cigarettes per day. The jury trial returned a verdict in favor of the landlord, finding that the tenants had breached the lease under a clause prohibiting tenants from creating a nuisance** or engaging in activity that substantially interfered with the rights of other building occupants.

Merrill v. Bosser **(County Court of the 17th Judicial Circuit, Broward County, FL 2005) -** Plaintiff and her family purchased a condominium. The defendant, who smoked about one pack of cigarettes per day, owned a condominium unit one floor up and one unit over from the Plaintiff. The smoke from the unit was not a problem for the Plaintiff and her family until the Defendant moved out of the unit and leased it to a tenant who smoked heavily. After the tenant moved in, the health of the Plaintiff and her family deteriorated. Plaintiff claimed that on several occasions they had to leave the apartment and go elsewhere because of the cigarette smoke. After numerous complaints, the condominium association advised the defendant that the tenant had to move out. After the tenant left, the smoke problem stopped. The Plaintiff sued seeking damages under the theories of trespass, nuisance and breach of covenant. The court found Defendant liable, ruling that the unique facts of this case indicated that the **amount of smoke gave rise to a disturbance of possession.** The facts of this case demonstrated an interference with property on numerous occasions that **went beyond mere inconvenience or customary conduct.**

Christiansen v. Heritage Hills #1 Condominium Association, **No. 06CV1256, Jefferson County District Court (Colorado) -** Christensen owned a unit in a condominium. She received complaints about her smoking in her unit but would not agree to smoke outside the building. A nonsmoking neighbor spent thousands of dollars trying to seal her unit to keep the smoke out of her unit. The condominium association passed a declaration amendment banning smoking within the boundaries of the condominium. **Plaintiff smokers sued the Association after the amendment was passed, and the Court found for the Association, ruling that the smoking ban was reasonably investigated, drafted and passed by 75% of the owners after years of trying to address the problem by other means, and the amendment was not arbitrary, capricious, or in bad faith.**

Questions regarding second hand smoke at your California condominium association? Contact David Swedelson via email: dcs@sghoalaw.com. And be sure to visit www.hoalawblog.com and www.lawforhoas.com