Legal Lines

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"Non-Smoking by Judicial Decree?"

The California Court of Appeal announced the decision: *Birke v. Oakwood Worldwide*.

The decision states that a tenant could lawfully pursue a "public nuisance" cause of action arising out of an apartment owner's alleged failure to "limit" second hand smoke in outdoor common areas.

The California Court of Appeal decision affects apartment owners as well as manufactured home community owners throughout the state.

The decision does not impose actual liability on the landlord; however, whenever a tenant is allowed to file this type of litigation, the landlord will almost certainly take the most conservative loss prevention approach possible. The reality is that most landlords, and their insurance companies, will take a proactive approach, which could easily mean an absolute ban on smoking within common areas.

With *Birke v. Oakwood Worldwide* decision, it is unknown whether the apartment owner defendant will seek review of the decision by the California Supreme Court. The nature of the ruling is such that a review could be very difficult to obtain unless the California Supreme Court desires to reach out and address the ramifications quickly.

Since most apartment buildings and all manufactured home communities have common areas, it is anticipated that other tenants will file similar actions. The ruling, while perhaps technically defensible, displays a lack of concern for the impact of such a ruling.

Let us hope that this is not the type of "change" that landlords will experience throughout the remainder of 2009.

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