PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

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Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

Survey Coming

In our continuing effort to ensure that our firm delivers the caliber and scope of service you need and expect, we will be conducting a brief online client survey this summer. Our survey will arrive with a header that clearly states that it is from Scherer Smith & Kenny LLP in order to differentiate from spam e-mails you might otherwise receive. To continue improving our services we need your feedback, so please take a few minutes to respond. Look for it soon!

Our Super Lawyers

Rich Hill, Of Counsel, has been selected as a Northern California Super Lawyer and Gabe Levine, Associate Attorney, as a Northern California Super Lawyer Rising Star by Super Lawyer magazine, a Thomson Reuters publication that reaches more than 13 million readers. No more than 2.5 percent of the state's attorneys are selected as Rising Stars (those attorneys under 40 years old, practicing less than 10 years), and no more than 5 percent of the state's attorneys are selected as Super Lawyers. Those selected for the lists are outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. This is the second year in a row that Gabe has been selected as a Rising Star, and the third year in a row that Rich has been selected as a Super Lawyer. Gabe and Rich both practice in the areas of employment law and business litigation. Gabe also advises common interest development boards, and Rich's practice also includes trusts and estates litigation. Rich can be reached at *rph@sfcounsel.com* and Gabe can be reached at *gsl@sfcounsel.com*.

Smoke Need Not Always Leave You Burned

In law, as in life, the only constant is change. As society evolves, the law's evolution typically trails and takes time to catch up. This lag creates a lot of legal conflict. Perhaps nowhere is this conflict more evident than in managing common interest developments ("CIDs"), a major area of Scherer Smith & Kenny LLP's practice, and a specialty of mine. CIDs can generally be defined as multi-unit developments, in which each unit is owned by the CID's members. CIDs include community apartment and condominium projects, homeowners associations, and stock cooperatives.

A recent, dramatic example of this conflict is the hot-button topic of smokers and the impact of their secondhand smoke on non-smokers. The dangers of smoking and secondhand smoke have been widely known for years, but until relatively recently smokers could light up nearly anywhere. But slowly, in patchwork fashion, the law is recognizing smoking's dangers, banning smoking in limited circumstances, and hemming in smokers.

California now prohibits smoking in restaurants, bars, and workplaces. In very isolated circumstances a few cities have banned, or are contemplating banning, smoking in multi-unit residential dwellings. More recently, the California Court of Appeals case,

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Partner Notes

Denis Sullivan Kenny

Welcome to the third edition of *Perspectives*. I am the litigation partner of the firm. About 60 percent of my practice is in the labor and employment field, where I represent both employers and employees. The remaining 40 percent of my practice consists of a wide array of litigation ranging from intellectual property to real estate to personal injury and many areas in between. I joined Brandon and Bill as a partner in 2001. I, like they, started my legal career with a big firm, where I handled a variety of litigation matters.

Early in my career, I was thrown into the fire and discovered I thrived in an environment where I was allowed to learn on the job. In my first six months of practice, I took my first deposition representing PG&E in the lawsuit made famous by the "Erin Brockovich" movie. My claim to fame was being called an expletive by

Birke v. Oakwood Worldwide, et al. 169 Cal. App. 4th 1540 (2009), raised for the first time the *possibility* that smoking in CID common areas *might* support a claim for public nuisance.

These piecemeal, area-specific laws and weak rulings, however, do little to guide our CID clients when confronted with a non-smoker member's claim that his neighbor's smoking habit is a dangerous and illegal activity that he wants banned within the CID.

Recently, some clients have requested guidance in exactly that situation. Sometimes the issue has to do with smoking in areas common to all members, such as hallways, lobbies, and around pools, and in others the complaint deals with smoking within private residences.

So what determines whether CIDs must restrict smoking? Like most issues involving CIDs, the answer boils down to the Board of Directors' ("Board") fiduciary responsibilities and the language in its governing documents ("CC&Rs"). And it also depends upon whether the restrictions involve the CID's common areas or a member's own residence.

Boards have a general fiduciary duty to its members to act in good faith and not arbitrarily. As such, Boards must consider carefully any policy they wish to enact with regard to smoking, and once enacted the Board must enforce policies in a uniform manner, and not capriciously or arbitrarily. Further, the authority granted under the CC&Rs determine the scope of what policy can be enacted.

Meeting this obligation becomes very important when the law on the subject, as with smoking, is still unclear - the Board's process can become more important than the decision itself when it is possible to rule on either side of the dispute. Suffice to say, it is a rare circumstance in which all members are happy with a Board decision, but clear reasoning reduces exponentially any liability that the Board may have as a result of its decision.

As a general matter CIDs have primacy over all common areas (and exclusive use common areas, such as balconies and patios), and therefore may enact reasonable restrictions designed for the overall health and benefit of the community. Therefore, in the absence of CC&R provisions to the contrary, Boards may generally restrict smoking in areas that are open to all members. A more difficult question arises when complaints are lodged regarding persons who smoke within their own homes.

CC&Rs generally restrict member activities that "obstruct or interfere with the rights of other members or which would be noxious or harmful to other members." Non-smokers often rely on these provisions to claim that smoking within the smoker's unit creates a public nuisance to the community at large. Often the complaining member will also argue that the Board has failed to carry out its maintenance obligations because secondhand smoke has spread into the building through walls or older ducting. In this circumstance, it is important to note that public policy strongly supports a member's right to carry on personal activities within his unit, which means the Board's authority is much weaker.

In either circumstance, however, we generally provide the following advice for our Boards:

- Carefully read the CC&Rs to determine whether any specific provisions support or oppose the complaining member;
- If possible, balance the rights of all members, both smokers and non-smokers, in adopting a reasonable policy designed to meet the complaint;
- Review the costs involved in meeting the complaining member's demands — is the solution as simple as minor weather-stripping or would it require an entirely new ducting system? Boards are entitled to look to price and expense in determining a reasonable means of meeting demands;
- Make policy development a public process and transparent from the standpoint of the membership;
- Determine before it is enacted how the policy can be uniformly enforced; and
- Where possible, take a mediation position with regard to the dispute rather than an active role in prosecuting it. In other words, in certain cases the complaints may more realistically be characterized as a dispute between members rather than an issue that must involve the entire CID and Board.

In sum, in developing policy and making decisions the Board is under an obligation to act rationally, reasonably, and consistently and balance the unique factors and member

the witness in my first deposition. This was only the first in an ever-growing list of legal "war" stories. I ultimately decided to take the plunge into the public sector to pursue my goal of being a trial attorney. The California Attorney General's Office provided me with the trial opportunities I desired and it was there that I honed my skills in employment law. After several years at the AG's office, my entrepreneurial spirit drove me to return to private practice. I seized an opportunity to join Brandon and Bill in June 2001, an opportunity that occurred almost by happenstance during a chairlift ride with Brandon at Alpine Meadows. A few months and several meetings later, the prospect of a third partner came to fruition on June 16, 2001. Over nine years later Scherer Smith & Kenny LLP is now a six-attorney firm, and Bill, Brandon and I have continued a tradition of annual partner retreats to various ski destinations.

At Scherer Smith & Kenny, some of my most fulfilling practice experiences have involved my representation of personal injury victims on whose behalf our firm has obtained an average recovery of over $750,000. I recently concluded the representation of a family whose elderly mother was killed by a commercial truck driver while crossing the street in downtown Honolulu, Hawaii.

In addition to my practice, family is a huge priority for me. And I do my best to fit a consistent exercise routine into the mix. My motto is "You need to be physically fit to be mentally fit." As a result, I start most of my days before the crack of dawn. You may see me running the streets of San Francisco one of these mornings.

Like my partners and colleagues, I look forward to many more years of devoted service to our clientele and always appreciate your

personalities that comprise their own CID. For more detailed information relating to the establishment of CID policies and Board governance issues, contact Bill Scherer at *wms@sfcounsel.com* or Gabe Levine at *gsl@sfcounsel.com*.

Written by Bill Scherer

Startup Flips Worker-Classification Argument On Its Head

The federal Department of Labor (DOL) and numerous state agencies are making concerted efforts to "crackdown" on the misclassification of workers by employers across the country. Many companies classify workers as "independent contractors," when they are, in the eyes of federal and state agencies and courts, employees. Oftentimes, the workers do not object; in fact, it is sometimes the worker who requests that the relationship be structured in such a fashion.

Unfortunately, with the "crackdown" will come more audits by the Internal Revenue Service (IRS), California's Employment Development Department (EDD), and similar state agencies across the country. And even where a worker has requested that he/she be classified as an independent contractor, if the IRS or EDD determines that the worker is an employee, it is the employer that will be left holding the proverbial bag …which, in such an instance, would be full of back-tax obligations and late withholding penalties.

Given the foregoing, it is not often that you find a company arguing to a court that a worker is an employee rather than a contractor. But that is exactly what JustMed, Inc. did in the case of *JustMed, Inc. v. Byce,* 600 F.3d 1118 (9th Cir. 2010).

The case involved a dispute over whether a small technology startup, JustMed, owned critical source code developed by its former worker, Michael Byce. Source code falls under copyright law, and, unless otherwise set forth in writing, an independent contractor owns the source code he/she develops. An employee, on the other hand, does not own the copyright to "a work prepared … within the scope of his or her employment." That copyright belongs to his/her employer. See 17 U.S.C. §101. This principle is commonly referred to as the work-for-hire doctrine.

After discovering that his equity stake was not what he thought it was, Byce changed the copyright on the source code from the company's name to his, and limited JustMed's access to the code. JustMed did not pay Byce any regular wages or salary, or otherwise treat him as an employee, and no employment agreement was ever signed between them. So, the company did not have the obvious benefit of the work-for-hire doctrine discussed above. Neither did the company have a written instrument assigning rights to use or transferring the copyright.

So, JustMed filed a lawsuit against Byce, making the heart-burn inducing argument that he was the company's employee, not an independent contractor. Doing so exposed JustMed to the aforementioned back-tax liability and penalties, as well as a potential employment lawsuit from Byce. However, despite not treating Byce as an employee, JustMed won on the critical issue – the federal district court found that Byce was the company's employee and that he wrote the code in the course and scope of that employment. Byce appealed, but the federal Ninth Circuit Court of Appeals affirmed the finding.

We note the case both for its anomalous procedural posture – a putative employer arguing that a worker is an employee rather than against such an argument – and because there are important lessons to be learned. First and foremost, workers should be correctly characterized at the beginning of the relationship, and treated accordingly. Had JustMed paid Byce a salary, made the required withholdings, and otherwise treated him as an employee, it is unlikely the company would have had to spend so much money and time to recover its critical source code. Second, and nearly as important, is to adequately document the relationship, and the parties' respective rights. Had JustMed obtained a written assignment/transfer of the copyright, it is even less likely that such time and expense would have been required. As the saying goes, "An ounce of prevention is worth a pound of cure."

If you have any questions regarding the case, worker classification issues, employment laws in general or employment/contractor agreements please contact one of the firm's consideration for referrals to friends, family and colleagues.

employment attorneys, Denis Kenny at *dsk@sfcounsel.com* or Gabe Levine at *gsl@sfcounsel.com*.

Written by Gabe Levine

Areas of Practice

Business, Estates and Trusts; Intellectual Property and Employment Law; Litigation and Dispute Resolution; Nonprofit; Real Estate

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