

RESOLUTION 9-03-2002

DIGEST

Continuing Nuisance Liability: Successive Owner

Amends Civil Code section 3483 to limit the liability of a successive owner of real property for damages resulting from a continuing nuisance to damages occurring during the successive owner's period of ownership.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

Reasons:

This resolution amends Civil Code section 3483 to limit the liability of a successive owner of real property for damages resulting from a continuing nuisance to damages occurring during the successive owner's period of ownership. This resolution should be approved in principle because it would bring Civil Code section 3483 into harmony with the general California policy that parties should be liable based on their relative culpability through an analysis of comparative fault. (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804; *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725; and *Tint v. Sanborn* (1989) 211 Cal.App.3d 1225.)

A property owner who fails to abate a nuisance should be liable in damages, but only for the damages incurred while the defendant owned the offending property. (See *Lee v. Takao Bldg. Dev. Co.* (1985) 175 Cal.App.3d 565.) This resolution does not discourage abatement of the continuing nuisance because it only limits liability for damages, not liability for the expense of abatement.

This resolution would also harmonize the statute with the law concerning the statute of limitations for a continuing nuisance, which states that the injury caused by an abatable nuisance occurs at every continuation of the nuisance and that an action alleging a continuing nuisance may be brought at any time before the nuisance has been discontinued or abated, or within the three-year limitations period of Code of Civil Procedure section 338, subdivision (b).

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Civil Code section 3483 to read as follows:

1 § 3483
2 Every successive owner of property who neglects to abate a continuing nuisance not
3 involving hazardous substances as defined in Health & Safety Code sections 25316 and 25317
4 and/or 42 United States Code section 9601(14), upon, or in the use of, such property, created by
5 a former owner, is liable ~~therefor~~ for damages resulting therefrom in the same manner as the one
6 who first created it but only to the extent such damages occur during such successive owner's term
7 of ownership.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

Existing Law: This section has been unchanged since its enactment in 1872, at a time when a continuing nuisance was subject to relatively simple abatement, such as industrial activities creating smoke or noise, maintenance of cesspools and the like.

This Resolution: Would revise Civil Code section 3483 to provide that in instances not involving hazardous substances, owners would be liable for damages only for a continuing nuisance that occur during their term of ownership.

The Problem: With changes in technology, the definition of continuing nuisance has evolved, to include such things as subsidence of slopes, which theoretically can be abated, but only at tremendous cost. Please see *Mangini v. Aerojet General Corporation* (1996) 12 Cal.4th 1087, 1097, where the Supreme Court held that the issue of continuing versus permanent nuisance is to be determined on a case by case basis, based on abatability. A trial court that reads the current Civil Code section 3483 literally could sock an innocent lender with full liability for the cost of abating a non-hazardous waste nuisance created without its knowledge or consent, based on the mere fact that it succeeded to bare legal title through, for example a non-judicial foreclosure.

This resolution would clarify the law to confirm that an owner who did not create the nuisance is only liable for damage occurring as a result of the nuisance during the time of that owner has title to the property, so that one who plays no role in the creation of such a nuisance but who succeeded to bare legal title through, for example, foreclosure, would not be subject to the same liability as one who participated in the creation of the nuisance.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: David R. Moore, MOORE & SKILJAN, 7700 El Camino Real, Suite 207, Carlsbad, CA 92009 (760) 944-7700

RESPONSIBLE FLOOR DELEGATE: David R. Moore

COUNTERARGUMENT

BEVERLY HILLS BAR ASSOCIATION

This resolution proposes, without justification, to insulate lenders who are guilty of poor under-writing and ill-conceived foreclosure practices from the consequences of their acts and omissions.

Unlike the latent releases of hazardous substances (for which innocent foreclosing lenders are protected as a matter of Federal law), the continuing nuisances the proponent describes (such as

subsidence of slopes) are patent and would be disclosed by proper underwriting to the extent they are not revealed by pricing. The lender could protect itself by conducting a judicial foreclosure and obtaining a deficiency judgment against the borrower. Insulating the lender from liability when it fails to take reasonable steps to protect itself is bad public policy and should be rejected.