

Legal Options for N.C. Multi-Unit Housing Tenants Suffering from Drifting Tobacco Smoke

The close proximity of your neighbors can create problems when you're a tenant in a multi-unit housing complex. One common issue is drifting tobacco smoke. If tobacco smoke drifts into your apartment from a neighboring unit, resulting in illness or discomfort, you may wonder what your options are. While a lawsuit against your neighbor or landlord is an option, you should first exhaust all your other options. Lawsuits are expensive and time consuming, and there's always the possibility that you may not win your case.

Before deciding to sue, discuss the issue with your neighbor and ask if s/he could limit where s/he smokes. You can also try to move into a unit that is unaffected by drifting tobacco smoke. You can also ask your landlord or property manager to designate certain buildings smoke-free or to consider adopting a smoke-free policy for all buildings on the property. If all else fails, you may want to consider moving to a smoke-free property.

If a lawsuit seems to be your only option, this pamphlet outlines several things for you to consider.



Image source: www.njgasp.org

Get The Facts

Before beginning a lawsuit, it's important to outline your goals and expectations. First ask yourself:

What harm have I suffered?

Generally, you should only go to court if you have suffered significant harm. The chances of winning your case are much more likely when you can show that you have been repeatedly and substantially harmed by smoke drifting into your home. Examples might be: visiting a doctor with recurring breathing problems, missing work due to illness caused by the secondhand smoke, or being forced to leave your home because of the drifting smoke.

Who is responsible?

Your neighbor might be directly responsible for your harm because s/he smokes, but your landlord can also be responsible if s/he knows about your exposure to your neighbor's drifting smoke and fails to do anything to stop it. Therefore, you might be able to sue one or the other, or both together.

What are my goals?

If you decide to sue, you will probably be asking for money from the person you're suing (the "defendant") to pay for the

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The information contained in this document does not constitute legal advice. Seek the advice of an attorney or other qualified professional regarding questions you may have about your particular situation.

harm you've suffered ("money damages") or an order from the court that requires the person you're suing to do or stop doing something (an "injunction"). Money damages might help to cover your doctor bills, lost wages, or any moving costs incurred because of your neighbor's drifting smoke. An injunction might force your landlord to move you into a new unit or possibly to enact a smoke-free policy. An injunction might also restrict when and where your neighbor can smoke. Before filing your lawsuit, make sure you weigh the costs of a suit against the possible benefits. Because there aren't many court cases dealing with this issue, your chances of success are uncertain.

Possible Legal Claims

Because every case involving drifting tobacco smoke is unique, not every case will be filed in court in the same way. If you decide to take your case to Small Claims Court, you don't have to hire a lawyer to represent you or understand specific legal theories. More information is

provided on the next page about Small Claims Court. If you decide to hire a lawyer for your case, s/he will evaluate your situation to decide which legal theory fits the best.

At the time this brochure was printed, no published court cases directly applied to the problem of secondhand smoke in multi-unit housing in North Carolina. Therefore, you would be attempting to convince the court that certain broad legal claims could be applied in this new manner.

If you want to sue your neighbor, these broad legal claims might include: **battery, intentional infliction of emotional distress, negligence, nuisance, and trespass.**

If you want to sue your landlord, these claims might include: **nuisance, constructive eviction, violation of the implied warranty of quiet enjoyment, negligence, and violation of the implied warranty of habitability.**

Smoke-Free Multi-Unit Housing Policies

Smoke-free housing policies are legal and increasingly common in North Carolina and across the country. There's no legal right to smoke, and smokers are not a protected class, so designating multi-unit housing as smoke-free is not discriminatory. By adopting smoke-free policies, multi-housing communities can enjoy these benefits:

- Decrease the risk of fire and related loss of life
- Protect residents and employees from secondhand smoke
- Provide healthier environments that make it easier for residents and employees to quit smoking
- Take advantage of consumer demand for non-smoking housing
- Reduce turnover costs
- Reduce the number of complaints and lawsuits brought by tenants related to secondhand smoke exposure
- Promote "green" living

Visit North Carolina's "Smoke-Free Housing Website" to find resources for tenants and managers dealing with secondhand smoke issues in multi-unit housing, as well as links to find smoke-free housing in N.C.: www.smokefreehousingnc.com.

A glossary at the end of this fact sheet provides more detail about the legal claims that might apply to your situation.

Although there may be very little precedent in North Carolina case law that applies to this issue, the abundance of scientific evidence regarding the negative effects of secondhand smoke might help your case. For example, environmental tobacco smoke (ETS), or secondhand smoke, is a human carcinogen that has been shown to cause cancer in humans and is responsible for approximately 3,000 lung cancer deaths each year in the U.S. among nonsmokers.¹ Also, in 2006 the Surgeon General declared that there is no risk-free level of exposure to secondhand smoke.² These findings are only a small portion of the vast amount of research detailing the harmful effects of secondhand smoke.

Should You Sue in Trial Court or Small Claims Court?

If you decide to file a lawsuit, you may choose to file either in Small Claims Court or in regular trial court. These courts differ in several ways.

Small Claims Court

Small Claims Courts settle disputes dealing with property or money worth \$10,000 or less. The trial is quick and informal, and will last about 15-30

¹ "Health Effects of Exposure to Secondhand Smoke." Available at: www.epa.gov/smokefre/healtheffects.html.

² U.S. Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. 2006, p. 11. Available at: www.surgeongeneral.gov/library/reports/secondhandsmoke/fullreport.pdf.

Additional Resources

American Lung Association (ALA): www.lung.org

The "Healthy Air at Home" section of ALA's website has in-depth resources on healthy indoor air, including a section on secondhand smoke. The ALA has worked with experts around the US to create an online curriculum on how to implement smoke-free policies in multi-unit housing properties. See www.lung.org/stop-smoking/about-smoking/smokefree-housing.html.

Americans for Nonsmokers' Rights (ANR): www.no-smoke.org

ANR provides information on topics like clean indoor air ordinances and smoke-free apartments. The "Going Smokefree" section of ANR's website has resources on smoke-free housing.

N.C. Lawyer Referral Service (LRS): www.ncbar.org/public-pro-bono/lawyer-referral-service

If you don't know of an attorney in your area, you can contact the LRS of the North Carolina Bar Association. The LRS keeps a list of attorneys in your area who will provide an initial consultation at a reduced cost.

Legal Aid of N.C. (LANC): www.legalaidnc.org

LANC has produced a booklet as a guide to help individuals handle their own cases in Small Claims Court. See *A Guide to Small Claims Court* at: www.legalaidnc.org/public/learn/publications/small_claims_court/default.aspx#Introduction.

If your income is limited, you may qualify for free legal services from LANC. To find a local office, visit: www.legalaidnc.org/Public/Learn/Locations/default.aspx

U.S. Department of Housing and Urban Development (HUD): portal.hud.gov/hudportal/HUD?src=/smokefreetoolkits1

HUD has created Smoke-Free Housing Toolkits to assist owners and residents of public and assisted multi-family housing who want safer and healthier homes.

minutes. You may choose to represent yourself or be represented by a lawyer. Even though you are not required to have a lawyer, be aware that it may be difficult to argue this type of case without one. You may also be subject to counter-claims if the defendant believes s/he has suffered damages caused by you.

In order to file a Small Claims Court case, you must be able to discuss the facts of your case and prove certain details, like how the defendant caused your damages and how much money the defendant owes you. The judge, called a **magistrate**, can dismiss the suit if you don't prove your case, or order the defendant to pay you the money you're owed, but can't issue an injunction (make the defendant do or stop doing something).

For each lawsuit you file in Small Claims Court, you must pay a filing fee to the clerk of the court, in addition to other fees. If you cannot afford to pay these fees, you may be able to get them waived by filling out a form called "Petition to Sue/Appeal as an Indigent." If you receive food stamps, Temporary Assistance to Needy Families, or Supplemental Social Security, then these fees will automatically be waived. See *A Guide to Small Claims Court* at the Legal Aid of N.C. website for more details.

If you want a quick resolution to your case, you don't want an injunction, or you can't find a lawyer willing to represent you, Small Claims Court might be your best option.

Trial Court

In the North Carolina court system, the trial division includes the Superior and District Courts. A District Court judge would hear your case if your claim involves less than \$10,000. If your claim

involves more than \$10,000, a Superior Court judge would hear your case.

Trial court cases must follow an elaborate system of rules, which is why both sides in trial court almost always hire attorneys to represent them. A judge in trial court has the authority to award both money damages and to issue an injunction ordering the defendant to do or stop doing something.

Trial court might be your best option if you can find a lawyer who believes one or more of the legal theories mentioned above apply to your case, and who is willing to represent you.

Another Alternative: Disability Laws

If you're considered disabled under state or federal law, you may have another legal option available to help deal with your neighbor's drifting tobacco smoke.

By law, landlords and property managers must allow reasonable exceptions to the rules when requested by a tenant with a disability in order to allow the tenant an opportunity to enjoy and use the property as fully as non-disabled tenants. For example, a landlord may be required to provide relief from secondhand smoke to a tenant with a breathing disability.

For more information, see our brochure "Reasonable Accommodations for N.C. Tenants with a Disability Suffering from Drifting Tobacco Smoke."

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Department of Health and Human Services
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Glossary of Legal Claims

This glossary defines the legal claims mentioned in the fact sheet. Each claim is defined and an example of a case involving that claim is given. Because there are no published cases from North Carolina on these issues, the examples are from other states. While these examples are useful in illustrating how you might bring a certain type of claim, a North Carolina court wouldn't be required to come to the same conclusion as the courts in these examples.

Remember, if you decide to file your claim in Small Claims Court, you won't need to learn the names or details of these legal claims. If you decide to file your lawsuit in trial court, your lawyer will decide which claim is best for your specific situation.

Possible Claims Against a Neighbor

Battery:

Intentional contact with another person that causes harm or offense.³ A battery can also include intentionally causing a person to come into contact with a substance.⁴

Example: The Georgia Court of Appeals decided that it would be possible to commit battery by purposefully blowing pipe smoke at another person.⁵ The court wrote, "We are not prepared to accept [the] argument that pipe smoke is a substance so immaterial that it is incapable of being used to batter indirectly. Pipe smoke is visible; it is detectable through the senses and may be ingested or inhaled. It is capable of 'touching' or making contact with one's person in a number of ways."⁶

Intentional Infliction of Emotional Distress (IIED):

Extreme or outrageous conduct that intentionally or recklessly causes a victim severe mental distress.⁷

Example: A Georgia court decided that it is possible for a smoker to intentionally inflict emotional distress by blowing smoke at another person if the facts demonstrate that the "deliberately or recklessly and wantonly directed" conduct was "outrageous and egregious."⁸

Negligence:

Failure to act as a reasonable person would in similar circumstances.⁹

Example: While deciding that it was not in a position to rule conclusively on the matter, a California court appeared sympathetic to a tenant's claim for negligence against his cigar-smoking neighbor. The court wrote that "the dangers of 'secondhand smoke' are not imaginary, and the risks to health of excessive exposure are being increasingly recognized in court."¹⁰

Nuisance:

An unreasonable interference with a tenant's use and enjoyment of their property.¹¹ The intrusion or invasion must also cause substantial injury.¹²

Example: A New York court held that a tenant can bring a private nuisance suit against a neighbor for secondhand smoke intrusions, finding that "the admitted behavior of the defendant herein created [secondhand smoke] which infiltrated plaintiff/claimant's apartment causing an interference with the use and enjoyment of the premises."¹³

Trespass:

A wrongful invasion of the property of another.¹⁴ In North Carolina, a claim of trespass requires the

³ Restatement (Second) of Torts § 18(1) (1965).

⁴ State v. Sudderth, 184 N.C. 753, 756 (1922).

⁵ Richardson v. Hennly, 209 Ga. Ct. App. 868, 873 (1993), rev'd on other grounds, 264 Ga. 355 (1994).

⁶ *Id.*

⁷ Restatement (Second) of Torts § 46 (1965).

⁸ Richardson, 209 Ga. Ct. App. at 873.

⁹ Restatement (Second) of Torts § 283 (1965).

¹⁰ Babbitt v. Superior Court, No. E033448, 2004 WL 1068817, at *2 (Cal. 4th Dist. May 13, 2004).

¹¹ Whiteside Estates, Inc., v. Highlands Cove, L.L.C., 146 N.C. App. 449, 455 (2001).

¹² *Id.* at 456.

¹³ Duntley v. Barr, 805 N.Y.S.2d 503, 505 (2005).

¹⁴ Singleton v. Haywood Elec. Membership Corp., 357 N.C. 623, 627 (2003).

plaintiff to possess the property when the defendant made an unauthorized entry, and that the plaintiff suffers damage.¹⁵

Example: A Florida condominium tenant whose excessive secondhand smoke regularly seeped into neighboring units was found liable for trespass.¹⁶

Possible Claims Against a Landlord

Constructive Eviction:

Occurs when a landlord's acts deprive a tenant of the beneficial use of his unit under the lease, causing the tenant to abandon the property.¹⁷ Thus, "constructive eviction takes place when a landlord's breach of duty under the lease renders the premises untenable."¹⁸

Example: A New York court held that "secondhand smoke is just as insidious and invasive as the more common conditions such as noxious odors, smoke odors, chemical fumes, excessive noise, and water leaks and extreme dust penetration" and that "it is axiomatic that secondhand smoke can be grounds for a constructive eviction."¹⁹

Covenant of Quiet Enjoyment:

In North Carolina, a lease has an implied warranty that a tenant will have "quiet and peaceable possession of the leased premises during the term of the lease,"²⁰ unless otherwise stated.

Example: When a tenant withheld rent from her landlord due to smoke seeping into her apartment from a bar downstairs and her landlord sued, a Boston Housing Court judge found that "the evidence does demonstrate to the Court the tenants' right to quiet enjoyment was interfered with because of the second-hand smoke that was emanating from the nightclub below."²¹

Negligence:

Violation of a landlord's duty to maintain the premises in a fit and habitable condition.²² If a tenant is injured as a result of a landlord's negligence, the landlord can be held liable for that injury.

Example: A California jury found a homeowners association, a management company, and the landlord of a condominium unit negligent for failing to address the issue of a tenant's secondhand smoke exposure.²³

Warranty of Habitability:

In North Carolina, a "landlord impliedly warrants to the tenant that rented or leased residential premises are fit for human habitation."²⁴ Thus, a landlord must "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition."²⁵

Example: A jury in Oregon found a landlord in breach of the warranty of habitability by moving a smoker into a unit below a nonsmoking tenant who was sensitive to secondhand smoke.²⁶

¹⁵ *Id.*

¹⁶ *Merrill v. Bosser*, No. 05-4239 (Fla. Broward County Ct. June 29, 2005).

¹⁷ *Charlotte Eastland Mall, LLC v. Sole Survivor, Inc.*, 166 N.C. App. 659, 663-64 (2004).

¹⁸ *Id.*

¹⁹ *Poyck v. Bryant*, 820 N.Y.S.2d 774, 777 (2006).

²⁰ *K & S Enterprises v. Kennedy Office Supply Co., Inc.*, 135 N.C. App. 260, 267 (1999).

²¹ 50–58 Gainsborough St. Realty Trust v. Haile, No. 98–02279 (Boston Housing Ct. 1998).

²² *Brooks v. Francis*, 57 N.C. App. 556, 559 (1982).

²³ *Chauncey v. Bella Palermo Homeowners' Association*, No. 30-2011-00461681 (Orange County Superior Ct. 2013).

²⁴ *Taylor v. Batts*, No. COA09-196, 2010 WL 10395, at *1 (N.C. App. Jan. 5, 2010).

²⁵ N.C. Gen. Stat. Ann. § 42-42 (2012).

²⁶ *Fox Point Apt. v. Kippes*, No. 92-6924 (Or. Dist. Ct. Lackamas County 1992).