

West Virginia Smoke-Free Housing Project
The Smoke-Free Initiative of West Virginia

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If you rent or own your apartment, condominium or townhouse, you may have the right to prevent your neighbors from subjecting you to environmental tobacco smoke through a common wall or a shared ventilation system. If you are being subjected to environmental tobacco smoke through a common wall or shared ventilation systems, the first step is to try to informally resolve the problem with your neighbor by explaining the problem their smoking is creating for you and perhaps by providing them with some educational materials on the hazards of second-hand smoke. Most smokers are in complete self denial when it comes to the hazard they present to others. Encourage them to restrict their smoking to the outside or to an area where the second-hand smoke will not reach your residence. If more formal action is required, you should first review your lease agreement or homeowners' association regulations. These documents might detail additional options if your neighbor's action is a nuisance. For instance, many lease agreements and homeowners' association regulations include a clause prohibiting residents from doing anything that would interfere with the rights, comforts or conveniences of other residents. Review your lease agreement or homeowners' association regulations to see what additional rights your particular contract provides.

The next step is to formally notify your neighbor, both verbally and in writing, that the environmental tobacco smoke is affecting you. Make your complaint as specific

as possible. If you rent, you also must notify your landlord of this nuisance. If you own, you should notify your homeowners' association. Your notification always should be both verbal and in writing. Certified mail is preferred as it will provide a record of the receipt of your notice.

In addition to your contract rights provided by your lease agreement or homeowners' association regulations, West Virginia common law provides additional protections from nuisances created by your neighbors. Nuisance is generally defined as "a condition, activity, or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property."¹ In West Virginia, nuisance is considered to be a flexible area of the law that is "adaptable to a wide variety of factual situations."² "It has [also] been said that the term 'nuisance' is incapable of an exact and exhaustive definition which will fit all cases, because the controlling facts are seldom alike, and each case stands on its own footing."³ With that in mind, it is important to realize that the facts of your particular housing situation are different than that of another person. Thus, the information contained on this website cannot be substituted for legal advice.

"The term nuisance is generally 'applied to that class of wrongs which arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property and produces such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage.'"⁴ The West Virginia Supreme Court of Appeals has defined a nuisance as anything which annoys or disturbs the free use of one's property, or

¹ Black's Law Dictionary (8th ed. 2004).

² *Booker v. Foose*, 216 W.Va. 727, 613 S.E.2d 94 (2005), (quoting *Sharon Steel Corp. v. City of Fairmont*, 175 W.Va. 479, 334 S.E.2d 616 (1985)).

³ *Harless v. Workman*, 145 W.Va. 266, 144 S.E.2d 548 (1960).

⁴ *Id.*, citing 39 *Am. Jur., Nuisances, Section 2, page 280.*

which renders its ordinary use or physical occupation uncomfortable.⁵ A nuisance is anything that interferes with the rights of a citizen, either in person, property, the enjoyment of his property or his comfort.⁶ A condition is a nuisance when it clearly appears that enjoyment of property is materially lessened, and physical comfort of persons in their homes is materially interfered with thereby.⁷

This definition of nuisance includes acts or conditions that affect either the general public or a limited number of persons. A public nuisance is that which affects an indefinite number of persons while a private nuisance is that which injures one person or a limited number of persons only.

Because environmental tobacco smoke in apartments, condominium complexes or townhouses affects individuals or small groups of people, it is a private nuisance. The West Virginia Supreme Court of Appeals has defined “a private nuisance [as] a substantial and unreasonable interference with the private use and enjoyment of another’s land.”⁸ “This definition of private nuisance includes conduct that is intentional and unreasonable, negligent or reckless, or that results in an abnormally dangerous conditions or activities in an inappropriate place.”⁹ A person’s actions are “intentional” if the person “desires to cause [the] consequences of his act” or if “he believes that the consequences [of his act] are substantially certain to result from it.”¹⁰ In contrast, a person’s actions are “negligent” if he fails to do what a reasonable and prudent person ordinarily would have done under the same or similar circumstances. The terms “intentional” and “negligent”

⁵ *Hendricks v. Stalnaker*, 181 W. Va. 31; 380 S.E.2d 198 (1989).

⁶ *Id.*

⁷ *Id.*

⁸ *Hendricks v. Stalnaker*, 181 W. Va. 31; 380 S.E.2d 198 (1989).

⁹ *Id.*

¹⁰ Restatement of Torts, Second § 8A.

are legal terms that have been interpreted by courts for many years. Thus, whether a person's actions can be characterized as "intentional" or "negligent" requires individualized legal interpretation based upon the specific facts of your situation.

A person whose actions or omissions are characterized as a nuisance under the law can be liable for creating a nuisance only as against those to whom that nuisance "causes significant harm."¹¹ To rise to the level where liability will attach, the nuisance must be "of a kind that would be suffered by a normal person in the community."¹² Thus, a person who has a hypersensitivity to environmental tobacco smoke may not be able to pass the significant harm test unless the nuisance that he is suffering is the kind that would be suffered by a normal person in the community. However, "[i]f normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable, then the invasion is significant."¹³

In order for an interference to be "substantial" or "significant," the interference must involve more than a slight inconvenience or petty annoyance; there must be a real and appreciable invasion of the complaining party's interests. Moreover, an "interference with the private use and enjoyment of another's land is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm."¹⁴

Finally, in order to have successful nuisance claim, a party must have actual damage. The West Virginia Supreme Court has held that fear alone is not a sufficient basis for recovery for a claim of private nuisance.¹⁵ That means you may have to prove you have been damaged by the exposure to second-hand smoke. Make a sketch of the

¹¹ Restatement of Torts, Second § 821F

¹² *Id.*

¹³ *Id.* at comment d.

¹⁴ *Carter v. Monsanto Co.*, 212 W.Va. 732; 575 S.E.2d 342 (2002).

¹⁵ *Id.*

layout of your apartment to demonstrate the common wall and/or shared ventilation system to provide evidence to prove you are exposed to second-hand smoke. Obtain a photograph of your neighbor smoking in a public place or in a setting where you have the right to be present. Keep a diary of the times you notice your apartment is polluted by second-hand smoke and keep copies of any medical and pharmaceutical bills you have incurred as a result of respiratory or other conditions caused or aggravated by second-hand smoke. When you make your complaint use the information you have collected to back your complaint with facts.

Although the West Virginia nuisance laws have been well-defined, the courts of West Virginia have yet to recognize environmental tobacco smoke as a nuisance in relation to private residences in an apartment or townhouse setting. The Surgeon General's recent report condemning second-hand smoke may provide an opportunity for the court to apply the law of nuisance to the problem of second-hand smoke. Therefore, if you are affected by environmental tobacco smoke in your home as a result of shared walls and ventilation systems, you should first attempt to obtain the cooperation of your neighbor(s), your landlord or homeowners' association president. If that action is unsuccessful, review your lease agreement or homeowners' association covenants to determine whether you have any contract rights to prevent your neighbor from smoking in his apartment if it invades your home. Finally, you should consult an attorney to review your lease agreement or homeowners' association guidelines and to assess whether your individual facts lend themselves to pursuing a claim for nuisance in order to protect you from environmental tobacco smoke in your own home.

A County Commission could not impose a regulation against smoking in one's home.

West Virginia Code § 7-1-3kk grants authority to county commissions to enact ordinances, issue orders and take other appropriate and necessary actions for the elimination of hazards to public health and safety and to abate or cause to be abated anything which the commission determines to be a public nuisance. The West Virginia Supreme Court has recognized this authority as it specifically relates to smoking ordinances.¹⁶ In *Foundation for Independent Living*, the Court held that local boards of health have the authority to develop and implement regulations to restrict smoking in enclosed public places. However, in dicta, the Court suggested County Boards of Health do not have to enact such an ordinance for a private residence “We recognize that a truly exclusively private office, like one’s own home, is beyond the scope of such a regulation.”¹⁷ This dicta, while not controlling precedent, suggests a County Board of Health may not have the legal authority to regulate the presence of second-hand smoke in private homes. How the court might rule in the context regulations affecting the ventilation system of a large apartment complex is an open question.

¹⁶ *Foundation for Independent Living, Inc. v. The Cabell-Huntington Board of Health*, 214 W.Va. 818; 591 S.E.2d 744 (2003).

¹⁷ *Id.* at 829, 755.