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Francis J. Nolan

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## COMMENTARIES

### PASSIVE SMOKING LITIGATION IN AUSTRALIA AND AMERICA: HOW AN EMPLOYEE'S HEALTH HAZARD MAY BECOME AN EMPLOYER'S WEALTH HAZARD

For hundreds of years, nonsmokers have complained bitterly about being forced to inhale the tobacco smoke of others.<sup>1</sup> Until the last twenty years, however, the physiological effects of secondhand smoke were not well documented. Recent scientific evidence suggests that the chronic inhalation of "passive" smoke, referred to by the acronym ETS, for environmental tobacco smoke, may be linked to everything from irritation of the eyes and exacerbation of asthma and other lung diseases to increased cancer risks.<sup>2</sup> The new information regarding the health risks of passive smoking parallels the development of the scientific link between voluntary smoking and cancer, a link which is now being used by smokers to attack the tobacco industry with unprecedented success.<sup>3</sup>

The tobacco industry is, however, not the prime target for the ETS plaintiff. At risk is the passive smoker's employer, which faces liability for allowing the health hazard to exist and persist in the workplace environment. The pattern for ETS litigation has already emerged in Australia, where in May 1992 a jury ordered the New South Wales Department of Health to pay \$85,000 to an employee who claimed workplace smoke had exacerbated her asthma and caused her to develop emphysema.<sup>4</sup> The events preceding the verdict, as well as the corporate panic immediately following, may fore-

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1. See, e.g., KING JAMES I, A COUNTERBLASTE TO TOBACCO (1604) (calling smoking a custom loathsome to the eye, hateful to the nose, harmful to the brain, and dangerous to the lung).

2. See *infra* notes 18-38 and accompanying text, for discussion of health hazards of passive smoking.

3. See *infra* notes 40-60 and accompanying text, for discussion of recent smoking litigation in the U.S.

4. *Scholem v. New S. Wales Dep't of Health*, No. 40830/86 (D.N.S. Wales, May 27, 1992). A transcript of the Court's summation is on file in the office of *The Journal of Contemporary Health Law and Policy*.

shadow similar developments in this country in the not-so-distant future.<sup>5</sup>

This Comment examines the convergence of scientific data and changing public policy in the context of passive smoking litigation both in Australia and in the United States, and how workplace safety laws and regulations will be affected. Part I focuses on the increasingly convincing scientific data regarding passive smoking. Part II considers American court trends regarding smoking litigation, with particular emphasis on the recent decision of the Supreme Court in *Cipollone v. Liggett Group, Inc.*, and how future ETS cases may be affected by the courts' increasing willingness to accept as conclusive the scientific evidence linking smoking and disease. Part III analyzes the aforementioned Australian ETS case, *Scholem v. New South Wales Department of Health*, and its immediate ramifications on that country's workplace smoking guidelines. Part IV concentrates on the workplace safety laws and anti-smoking laws that are both reflective of changing public mores and relevant to future ETS litigation. The conclusion suggests that ETS litigation will not represent a major source of liability for employers because the threat of lawsuits and the overwhelming costs of health insurance will accelerate the proactive adoption of smoke-free workplace policies in the United States both by legislatures and by employers.

## I. COMPILING THE DATA: MAKING A CASE FOR SMOKE-FREE WORKPLACES

### A. *The Health Hazards of Smoking*

The correlation between smoking and a number of illnesses has been drawn with increasing clarity since the 1950s, when the Surgeon General's office organized a joint task force with the American Heart Association, the National Cancer Institute and the National Heart Institute to investigate the effects of smoking.<sup>6</sup> In 1964, the Surgeon General produced the first in a series of reports summarizing the consequences of smoking.<sup>7</sup> Since that time, various studies have asserted that smoking contributes to heart, lung, coronary, and gastrointestinal diseases; emphysema and bronchitis; and cancer of the mouth, esophagus, larynx, pharynx, lungs, kidneys, bladder,

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5. See *infra* notes 125-144 and accompanying text, for discussion on the Australian decision and its ramifications on legislation and future litigation in that country.

6. See UNITED STATES DEP'T OF HEALTH & HUMAN SVCS., THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL 11-13 (1988) [hereinafter 1988 SURGEON GENERAL'S REPORT].

7. UNITED STATES DEP'T OF HEALTH & HUMAN SVCS., SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964) [hereinafter 1964 SURGEON GENERAL'S REPORT].

and pancreas.<sup>8</sup> In light of the Surgeon General's report, Congress passed legislation in 1965 regulating cigarette advertising and mandating that every package of cigarettes sold in the United States bear the following label: "Warning: Cigarette Smoking May Be Hazardous To Your Health."<sup>9</sup> This warning language was strengthened in 1969<sup>10</sup> and enlarged in 1984,<sup>11</sup> at which time Congress approved four rotating texts for use in advertising as well as on all packs of cigarettes.<sup>12</sup>

Despite the scientific evidence—to date, over 50,000 studies have been published detailing the hazards of smoking<sup>13</sup>—and the intensive warning campaign waged by Congress, smoking continued to claim hundreds of thousands of victims annually. In 1986, the Surgeon General stated that cigarette smoking "contributes to at least 160,000 deaths each year—equivalent to a packed jumbo-jetliner crashing every twelve hours."<sup>14</sup> Two years later, the Surgeon General revised this estimate to 300,000 deaths per year.<sup>15</sup> As of 1985, the number of cigarettes smoked in this country was approximately 600 billion.<sup>16</sup> Although the percentage of Americans who smoke has declined in the last decade, roughly 50 million people continued

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8. See Douglas N. Jacobson, *After Cipollone v. Liggett Group, Inc.: How Wide Will the Floodgates of Cigarette Litigation Open?*, 38 AM. U. L. REV. 1021, 1027-28 n.42 (1989) (listing relevant Surgeon General's Reports).

9. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, § 4, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1341 (1988)).

10. The new language read, Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 87 (1969) (codified as amended at 15 U.S.C. § 1331(a)(1) (1988)).

11. Comprehensive Smoking Education Act of 1984, Pub. L. No. 98-474, § 4(a), 98 Stat. 2201 (1984) (codified at 15 U.S.C. § 1333(a) (1988)).

12. The four rotating texts, each preceded by SURGEON GENERAL'S WARNING, are as follows:

Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy;

Quitting Smoking Now Greatly Reduces Serious Risks To Your Health;

Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight; and Cigarette Smoke Contains Carbon Monoxide. *Id.*

13. *Advertising of Tobacco Products: Hearings Before the Subcommittee on Health and the Environment of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 2 (1986) (statement of Rep. Waxman).

14. UNITED STATES DEP'T OF HEALTH & HUMAN SVCS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING—A REPORT OF THE SURGEON GENERAL 57 (1986) [hereinafter 1986 SURGEON GENERAL'S REPORT] (emphasis omitted).

15. 1988 SURGEON GENERAL'S REPORT, *supra* note 6, at vi.

16. COMMITTEE ON PASSIVE SMOKING OF THE NATIONAL RESEARCH COUNCIL, *Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects* 17 (1986) [hereinafter NATIONAL RESEARCH COUNCIL].

to smoke in 1992.<sup>17</sup>

### B. *The Health Hazards of Passive Smoking*

The act of smoking naturally involves not only the person inhaling directly from the cigarette but also those who share an airspace with the voluntary smoker. The burning tobacco and paper are either inhaled by the smoker as "mainstream" smoke or released directly into the environment as "sidestream" smoke.<sup>18</sup> The passive smoker inhales both types of smoke—sidestream and exhaled mainstream—together, a combination known as environmental tobacco smoke ("ETS").<sup>19</sup> In the last decade, scientists have begun amassing data correlating ETS intake with health disorders in much the same fashion as they did with direct smoking research. The organs most directly affected by ETS exposure are the eyes, nose, throat, and lungs.<sup>20</sup> Hypersensitive individuals, such as those with asthma or allergies, may experience headaches, nausea, wheezing, and coughing.<sup>21</sup>

Although studies have sought to establish links between ETS exposure and lung disorders, cancers, and cardiovascular disease, the data regarding these links were criticized by scientists as based on flawed or biased methodology.<sup>22</sup> Much of the difficulty in establishing the link is due to the nature of the studies: researchers proceed from the assumption that ETS ingestion is approximately equivalent to a low-level dose of mainstream smoke, an as-

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17. Jay Mathews, *Packaging Unfiltered Nostalgia: Liggett Seeks to Revive Chesterfield With a Puff of the Past*, WASH. POST, Nov. 25, 1992, at D1.

18. NATIONAL RESEARCH COUNCIL, *supra* note 16, at 14.

19. The exact contents of ETS remain largely undefined for several reasons: first, tobacco smoke contains roughly 3,800 chemical compounds, many of which undergo chemical and physical changes upon reaction with the air; second, the properties of ETS change as the smoke lingers in the air; third, concentration varies according to the quality of ventilation and purification equipment; and fourth, ETS content is also affected by the inhalation of the smoker, as some elements of the mainstream smoke are absorbed into the smoker's respiratory tract and are not expired into the atmosphere. *Id.* The extent to which these variables render studies ineffective is a point of disagreement among scientists. See, e.g., Delbert J. Eatough et al., *The Chemical Characterization of Environmental Tobacco Smoke*, in PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM AT MCGILL UNIVERSITY, ENVIRONMENTAL TOBACCO SMOKE 3 (Donald J. Ecobishon & Joseph M. Wu, eds. 1990) (hereinafter McGill Symposium). *But cf.* NATIONAL RESEARCH COUNCIL, *supra* note 16, at 44-47.

20. 1986 SURGEON GENERAL'S REPORT, *supra* note 14, at 112 (cited in Kathryn M. Doolan & Robert A. Indeglia, Jr., *A Call For Action: the Burning Issue of Smoke in the Workplace*, 5 J. CONTEMP. HEALTH L. & POL'Y 221, 222 (1989) [hereinafter *A Call For Action*]).

21. NATIONAL RESEARCH COUNCIL, *supra* note 16, at 213-16.

22. See, e.g., Peter N. Lee, *Passive Smoking and Lung Cancer Association: A Result of Bias?*, 6 HUM. TOXICOLOGY 517-24 (1987); McGill Symposium, *supra* note 19, at 62-63. The symposium itself is subject to questions of bias, however; its major sponsor was the tobacco industry.

sumption which now appears to be inaccurate.<sup>23</sup> Further, questionnaires used to formulate the background data for these studies may be falsified by active or recovering smokers ashamed to admit their habits, thereby creating the illusion that the health impact of passive smoke is more severe than it is in reality.<sup>24</sup> Nevertheless, as the number of studies linking ETS exposure to health hazards increases, and the methodological flaws are removed, the evidence becomes more difficult to refute.<sup>25</sup> This pattern follows the earlier accumulation of scientific information regarding the health risks of direct inhalation but has proceeded at a much faster rate.

Most disturbing is the impact of ETS exposure on children.<sup>26</sup> Parental smoking has been cited as a cause of chronic ear infections and effusions, which require surgery in some cases and may also lead to hearing loss.<sup>27</sup> Bronchitis, pneumonia, and other lower-respiratory-tract illnesses occur more frequently during the first year of life of children when at least one parent smokes.<sup>28</sup> A 1974-1979 Harvard University study of over ten thousand children between six and thirteen years old found a distinct increase in the risk of all respiratory illnesses and symptoms.<sup>29</sup> Passive smoking may also contribute to the development of asthma in children.<sup>30</sup> Fetal lung development or birth weight may even be inhibited by maternal ETS exposure.<sup>31</sup>

Between 1990 and 1993, the Environmental Protection Agency (EPA) developed a report on the health effects of passive smoking.<sup>32</sup> The report concluded that ETS is responsible for approximately 2,500 to 3,500 lung cancer

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23. See ROY J. SHEPARD, *THE RISKS OF PASSIVE SMOKING* 15-17 (1982) (reviewing then-current techniques for measuring smoking patterns); NATIONAL RESEARCH COUNCIL, *supra* note 16, at 4-7 (discussing need for different testing methods because of difficulty in analysis of ETS content and effect).

24. Maxwell W. Layard, *Environmental Tobacco Smoke and Cancer: The Epidemiologic Evidence*, in McGill Symposium, *supra* note 19, at 104.

25. See Dimitrios Trichopoulos et al., *Active and Passive Smoking and Pathological Indicators of Lung Cancer Risk in an Autopsy Study*, 268 JAMA 1697, 1700 (1992) (removing bias by interviewing next of kin for autopsy study).

26. At the McGill Symposium sponsored by the tobacco industry, one researcher called the link between ETS exposure and childhood respiratory diseases provocative. Raphael J. Witorsch, *Parental Smoking and Respiratory Health and Pulmonary Function in Children: A Review of the Literature*, in McGill Symposium, *supra* note 19, at 220.

27. 1986 SURGEON GENERAL'S REPORT, *supra* note 14, at 58-59.

28. NATIONAL RESEARCH COUNCIL, *supra* note 16, at 200.

29. J.H. Ware et al., *Passive Smoking, Gas Cooking, and Respiratory Health of Children Living in Six Cities*, 122 AM. REV. RESPIRATORY DISEASE 366, 369 (1984).

30. 1986 SURGEON GENERAL'S REPORT, *supra* note 14, at 58.

31. Julie E. Lippert, *Prenatal Injuries From Passive Tobacco Smoke: Establishing a Cause of Action for Negligence*, 78 KY. L.J. 865, 873 (1989-90).

32. Tom Kenworthy, *EPA Advisers Call Smoke a Hazard to Health of Children*, WASH. POST, Oct. 28, 1992, at A23.

deaths per year among nonsmokers, including both former smokers and those who have never smoked.<sup>33</sup> ETS is also attributed to 300,000 lower respiratory tract infections in children annually.<sup>34</sup> The report concludes that the EPA should regulate ETS as a Class A carcinogen, "known human carcinogens," just as it classifies arsenic and asbestos.<sup>35</sup> Scientific Advisory Boards twice approved the draft, which was originally scheduled for release near the end of 1992.<sup>36</sup> On January 7, 1993, the EPA released its report in final form.<sup>37</sup>

In sum, the evidence that ETS exposure contributes to or is responsible for health risks to nonsmokers is mounting in much the same way as the evidence against direct smoke inhalation did decades ago. The link to lung cancer has been accepted by the United States government, and the evidence of the effect of parental smoke on children is particularly stark.<sup>38</sup> Further scientific studies will undoubtedly explore other health risks, particularly various cancers, while removing the methodological biases in order to strengthen the evidence already in hand. Clearly, the harm to passive smokers is not limited to a lingering odor or temporary eye irritation.

## II. THE EVOLUTION OF SMOKING LITIGATION IN AMERICA: IS *CIPOLLONE* A SIGN OF THINGS TO COME FOR ETS LITIGANTS?

To date, the vast majority of cases involving smoking injuries has been brought by smokers themselves, seeking redress against the tobacco industry for manufacturing dangerous products while hindering the scientific identification of health risks involved.<sup>39</sup> Although future ETS litigants will be concerned with their employers rather than the tobacco industry for the most part, the development of smoking litigation is relevant insofar as it indicates several trends in judicial treatment of the subject of smoking-related injuries.

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33. *Id.*

34. *Id.*

35. See Alan B. Horowitz, *Terminating the Passive Paradox: a Proposal for Federal Regulation of Environmental Tobacco Smoke*, 41 AM. U. L. REV. 183, 185 n.8 (1991).

36. The report was first approved by an independent science advisory board (SAB) on April 18, 1991. *EPA Board Says Tobacco Smoke a Hazard that Should Be Regulated in the Workplace*, 20 O.S.H. Rep. (BNA) No. 46, at 1620 (Apr. 26, 1991). A second SAB review resulted in unanimous approval of the report on October 27, 1992. *EPA Advisory Board Approves Report Linking Secondhand Smoke to Lung Cancer*, Daily Labor Rep. (BNA) No. 209, at A-6 (Oct. 28, 1992), available in LEXIS, BNA Library, DLABRT file.

37. Paul Raeburn, *EPA Report Calls Cigarette Smoke 'Substantial' Risk for Nonsmokers*, WASH. POST, Jan. 8, 1993, at A3; Nick Tate, *EPA to Link Passive Smoke, Cancer*, BOSTON HERALD, Jan. 5, 1993, at 1.

38. See *supra* notes 26-31, 34 and accompanying text.

39. See *infra* notes 41-82 and accompanying text.

### A. Early Smoking Litigation Proves Hazardous for Plaintiffs

Lawsuits against the tobacco industry are by no means a recent innovation. Since the 1950s, smokers have attacked the cigarette manufacturers under a variety of legal theories.<sup>40</sup> Prior to the 1980s, however, smoking litigation was fairly infrequent and uniformly unsuccessful.<sup>41</sup> The ten reported smoking cases prior to the 1980s reflect the futility of the exercise: four were discontinued by actions of the plaintiff;<sup>42</sup> in three others, the tobacco company was granted summary judgment;<sup>43</sup> and the three cases that involved jury verdicts were all in favor of the defendants.<sup>44</sup> Plaintiffs lacked money, time, public support, and scientific evidence to support their claims, while the tobacco industry recognized the Pandora's Box it faced and was willing to spend as much money as necessary to prevent a finding of liability.<sup>45</sup>

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40. See *infra* notes 42-46 and accompanying text.

41. See Leila B. Boulton, *Tobacco Under Fire: Developments in Judicial Responses to Cigarette Smoking Injuries*, 36 CATH. U. L. REV. 643, 644 n.3 (1987) (noting that [t]he tobacco industry has never lost or settled a product liability case.).

42. *Padovani v. Bruchhausen*, 293 F.2d 546 (2d Cir. 1961) (negligence and breach of warranty); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961) (same); *Fine v. Philip Morris, Inc.*, 239 F. Supp. 361 (S.D.N.Y. 1964) (negligence, breach of warranty, misrepresentation, various other statutory violations); *Mitchell v. American Tobacco Co.*, 183 F. Supp. 406 (M.D. Pa. 1960) (negligence and failure to warn).

43. *Hudson v. R.J. Reynolds Tobacco Co.*, 427 F.2d 541 (5th Cir. 1970); *Cooper v. R.J. Reynolds Tobacco Co.*, 234 F.2d 170 (1st Cir. 1956); *Albright v. R.J. Reynolds Tobacco Co.*, 350 F. Supp. 341 (W.D. Pa. 1972), *aff'd*, 485 F.2d 678 (3d Cir. 1973), *cert. denied*, 416 U.S. 951 (1974).

44. *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964); *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir.), *question certified on reh'g*, 154 So. 2d 169 (Fla.), *rev'd*, 325 F.2d 673 (5th Cir. 1962), *rev'd*, 391 F.2d 97 (5th Cir. 1968), *rev'd per curiam*, 409 F.2d 1166 (5th Cir. 1969) (en banc), *cert. denied*, 397 U.S. 911 (1970).

45. One case illustrates the frustrating battle facing early smoking plaintiffs. In *Green v. American Tobacco Co.*, the plaintiff, Edward Green, sued the American Tobacco Company in 1957 for negligence and breach of implied warranty on the grounds that the defendant's Lucky Strike cigarettes caused him to develop lung cancer. 304 F.2d 70 (5th Cir. 1962). The case was heard by two separate juries over the course of thirteen years. The first jury found that the plaintiff's cancer was caused by smoking Lucky Strikes, but found that the defendant was not liable because the harm was unforeseeable. After the issue of foreseeability was certified to the state Supreme Court, 154 So. 2d 169 (Fla. 1962), and clarified consistent with the jury decision, the Fifth Circuit eventually remanded the case to decide the limited issue of whether the cigarettes were fit for human consumption. 325 F.2d 673 (5th Cir. 1962). The second jury again held for the defendant. On appeal, the Fifth Circuit reversed and held that the plaintiff might have a case in strict liability against the manufacturer for its implication that the cigarettes were fit for consumption. 391 F.2d 97 (5th Cir. 1968). Finally, the Fifth Circuit reheard the appeal *en banc*, and reversed its own decision, reinstating the verdict for the defendant. 409 F.2d 1166 (5th Cir. 1969) (en banc). The Supreme Court denied *certiorari* in 1970. 397 U.S. 911 (1970). The case, which spanned thirteen years, outlasted its own creator: Edward Green, the original plaintiff, died in 1958.



In the 1980s, smoking plaintiffs renewed their assault on the tobacco industry. Unlike the earlier litigants, who often failed to show sufficient scientific evidence of causation to survive a motion for summary judgment,<sup>46</sup> the new plaintiffs arrived armed with close to two decades worth of statistics supporting their claims.<sup>47</sup> Heightened public awareness resulting in part from congressionally-mandated warning labels on cigarette packs<sup>48</sup> had shifted public opinion against the tobacco companies.<sup>49</sup> Finally, a new playing field had emerged with the acceptance of strict products liability that made the plaintiff's task considerably easier.<sup>50</sup> Strict liability reflected the public policy of allocating the cost for injuries from defective products to those most capable of preparing for, absorbing, and distributing such costs.

The second-generation smoking plaintiffs used the scientific information to allege negligence and breach of warranty, arguing that tobacco companies failed to warn smokers adequately of the dangers resulting from smoking. Further, several suits claimed that the tobacco companies knew of the health risks well before the publication of the seminal Surgeon General's Report in 1964<sup>51</sup> and conspired to keep the information from the smoking public.<sup>52</sup> Finally, plaintiffs argued that even if the mandatory labels used by the cigarette manufacturers constituted sufficient warning, the advertising strategies of the companies were intentionally designed to confuse and to mislead the smoker into disregarding the warning labels through misrepresentations about the safety of the product.<sup>53</sup> As was the case with the first wave of smoking litigation, the tobacco companies spared no expense to defend

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46. *Hudson*, 427 F.2d at 541; *Cooper*, 234 F.2d at 170; *Albright*, 350 F. Supp. at 341.

47. In the past twenty years, the number of scientific studies documenting the health risks of smoking has increased tenfold. See Jacobson, *supra* note 8, at 1041.

48. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, § 4, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1341 (1988)).

49. See Note, *Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809, 813-14 (1986) (estimating that ninety percent of all Americans are aware cigarette smoking is hazardous to health).

50. Under strict products liability theory, the necessity of proving negligence or fault was eliminated; instead, the plaintiff merely needed to show that the manufacturer sold its product in a dangerous or defective condition. Following the Restatement definition, which has been used as a model by most states in their adoption of strict liability, the tobacco industry would be held liable even if it had exercised all possible care in the making and selling of the product, and even if the user lacked contractual privity with the seller. RESTATEMENT (SECOND) OF TORTS § 402A (1965); see also William Prosser, *The Assault on the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1112 (1960); Jacobson, *supra* note 8, at 1036.

51. See *supra* note 7.

52. See, e.g., *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664 (D.N.J.), *aff'd in part and rev'd in part*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 474 U.S. 1043 (1987).

53. *Id.*

themselves against the charges.<sup>54</sup> Because of the complexity of the matters involved, the smoking liability cases again proved time-consuming as the industry challenged each minor victory for the plaintiffs.<sup>55</sup>

Ironically, until recently the strongest defense for the tobacco industry was the Federal Cigarette Labeling and Advertising Act.<sup>56</sup> The industry argued that their compliance with the requirements of the Act, which barred further state activity in the area of cigarette health warnings and advertising, preempted state common law claims.<sup>57</sup> The federal and state courts were split on the question of preemption, with the majority of courts holding that the Act preempts claims based on state law as of 1966<sup>58</sup> and other courts holding that the Act does not preempt state law claims.<sup>59</sup> The protracted nature of smoking litigation delayed final resolution of the issue for years. The Supreme Court, however, in reviewing *Cipollone v. Liggett Group, Inc.*<sup>60</sup> finally reached a decision that not only affects future smoking cases, but also highlights the advantages for potential litigation based on ETS exposure.

### B. *Cipollone v. Liggett Group, Inc.*

Rose Cipollone and her husband filed suit in 1983 against Liggett Group, Inc., Philip Morris, Inc., and Loews Corporation, the parent company of Lorillard, Inc.<sup>61</sup> Mrs. Cipollone smoked since 1942 and developed lung can-

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54. As reported in *Time*, tobacco companies spent between \$600 million and \$3 billion defending themselves. Stephen Koeppe, *Tobacco's First Loss*, *TIME*, June 27, 1988, at 50.

55. For example, *Cipollone* has taken almost a decade to resolve, and as of the most recent Supreme Court ruling in that case, there were 50-60 cases still pending. Douglas MacLeod, *Supreme Court Reverses Tobacco Liability Rulings; Some Tort Claims Filed by Smokers Not Preempted*, *BUS. INS.*, June 29, 1992, at 1. That number had reached 150 at one point, but the ruling from the Third Circuit in *Cipollone*—overturned by the Supreme Court—apparently discouraged most litigants from continuing their odysseys. *Id.*

56. See Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, § 4, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1341 (1988)).

57. See, e.g., *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2614 (1992).

58. *Pennington v. Vistron Corp.*, 876 F.2d 414, 421 (5th Cir. 1989); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 234-35 (6th Cir. 1988); *Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 626 (1st Cir. 1987).

59. *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 661 (Minn. 1989); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1251 (N.J. 1990).

60. *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664 (D.N.J. 1986), *aff'd in part and rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *rev'd in part and aff'd in part*, 112 S. Ct. 2608 (1992).

61. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 183 (3d Cir. 1986), *rev'g* 593 F. Supp. 1146 (D.N.J. 1984). Each of the named defendants manufactured one or more of the brands smoked at various times by Mrs. Cipollone: Liggett Group marketed Chesterfield and L & M brands, Philip Morris produced Parliament, and Lorillard was the manufacturer of True. *Cipollone*, 649 F. Supp. at 664-65.

cer as a result.<sup>62</sup> The Cipollones asserted that the defendants negligently or intentionally failed to warn of the hazards of smoking and advertised so as to neutralize the warnings on the cigarette packages.<sup>63</sup> The plaintiffs also argued that the tobacco companies conspired to hide the evidence compiled by scientists regarding the health consequences of smoking.<sup>64</sup> The actions were based on negligence, breach of warranty, intentional tort, and strict liability.<sup>65</sup>

Consistent with their overall strategy against recent smoking plaintiffs, the tobacco companies argued that the 1965 Federal Cigarette Labeling and Advertising Act (the 1965 Act) preempted all state common law tort claims arising after that date.<sup>66</sup> In a series of rulings which reflected the split among jurisdictions at that time, the United States District Court for the District of New Jersey held that the Act did not preempt state common law claims,<sup>67</sup> but the Third Circuit reversed the decision on appeal.<sup>68</sup> The circuit court held that although the 1965 Act did not expressly preempt state common law actions, an implicit preemption existed that barred claims "that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes."<sup>69</sup> The District Court complied with the ruling on remand, although Judge Sarokin "vehemently disagreed" with the decision.<sup>70</sup> The District Court, however, did allow the plaintiff to continue on three counts: first, that the companies negligently researched and tested their products; second, that the companies conspired to suppress data regarding smoking hazards; and third, that the defendants could have provided a less dangerous cigarette under strict liability risk analysis.<sup>71</sup> All claims arising before 1966 were also continued.<sup>72</sup>

By the time the case reached the jury, only Liggett's failure to warn and breach of warranty were at issue, along with the misrepresentation and conspiracy claims against each of the three defendants.<sup>73</sup> The jury found for the

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62. *Cipollone*, 789 F.2d at 184.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 183.

67. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146 (D.N.J. 1984).

68. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986).

69. *Id.* at 187 (footnote omitted).

70. *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664, 667 (D.N.J. 1986).

71. *Id.* at 668-75.

72. The continuation of pre-1966 claims was agreed upon by the parties. *Id.* at 668.

73. The court directed a verdict for the defendants on all other charges based in part on a failure to prove causation and in part on a failure to demonstrate a duty (for pre-1966 charges). *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1493-1500 (D.N.J. 1988).

defendants on the latter two claims,<sup>74</sup> but found that Liggett breached both its duty to warn and its express warranty prior to 1966.<sup>75</sup> Mrs. Cipollone was found to have voluntarily assumed a known danger by smoking, however, and the jury attributed 80% of the responsibility to her.<sup>76</sup> Therefore, under New Jersey's comparative negligence statute, Mrs. Cipollone was denied recovery.<sup>77</sup> Mr. Cipollone was awarded \$400,000 on the breach of warranty claim.<sup>78</sup>

On appeal, the Third Circuit reversed the award due to flaws in the jury instructions, but upheld the District Court's decision regarding the implicit preemption of Cipollone's advertising and warning claims.<sup>79</sup> The Supreme Court granted *certiorari* and, in a seven-to-two decision, held that the 1965 Act did not preempt any state law actions for damages, including those relating to advertising and warnings.<sup>80</sup> The Court noted, however, that the 1969 Public Health Cigarette Smoking Act, which renewed the 1965 Act and strengthened several of its provisions, did preempt claims arising after 1969 based on fraudulent misrepresentation and failure to warn through advertising.<sup>81</sup> The Court reversed in part and remanded for further proceedings.<sup>82</sup>

The practical effect of the Supreme Court's ruling was to expose the tobacco industry to massive potential liability. The decision illustrates the Court's unwillingness to remove all judicial options from a plaintiff who has been injured by smoking. The Court rejected the tobacco industry's argument that Congress intended to bar all health-based obligations that cigarette manufacturers might have regarding warnings and advertising.<sup>83</sup> For the potential ETS plaintiff, this ruling underscores a changing judicial attitude with regard to damages claims for injury from smoking. The courts have made it easier for a plaintiff to recover by removing an obstacle from the path of litigation. The decision allows ETS plaintiffs to start from a much better position in their attempts to recover for their own injuries, par-

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74. *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208, 210 (D.N.J. 1988).

75. *Id.*

76. *Id.*

77. New Jersey's comparative negligence statute precludes recovery if the plaintiff was more negligent than the defendant. N.J. STAT. ANN. § 2A:15-5.1 (West 1987).

78. The jury returned a verdict for the plaintiffs for Liggett's breach of an express warranty, but specified that only Mr. Cipollone sustained damages. *Cipollone*, 693 F. Supp. at 210. The award was a compromise reached among the jurors to avoid a hung jury. Jacobson, *supra* note 8, at 1055-56.

79. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 547-48 (3d Cir. 1990).

80. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

81. *Id.* at 2621-22 (failure to warn), 2623-24 (fraudulent misrepresentations).

82. *Id.* at 2625.

83. *Id.* at 2618-19.

ticularly since the assumption of risk defense does not apply as it did to bar Mrs. Cipollone's recovery. In the absence of acceptance of ETS's carcinogenic nature by the Occupational Health and Safety Agency (OSHA), the lack of sufficient evidence may pose a problem for courts reticent to award monetary damages; however, the EPA's recent report classifying ETS as a class A carcinogen will serve as strong support from a governmental source.

Actions taken by passive smoking litigants prior to the Supreme Court's decision in *Cipollone* have sought injunctive relief with limited success.<sup>84</sup> Like the early smoking plaintiffs, the ETS plaintiffs met with unsympathetic public sentiment and judicial skepticism.<sup>85</sup>

### C. Assessing Passive Smoking Litigation to Date

Nonsmokers seeking judicial relief have attempted to assert a constitutional right to breathe clean air, particularly in the workplace. The most important of the early cases, *Gasper v. Louisiana Stadium & Exposition District*,<sup>86</sup> involved a 1976 class action suit to enjoin the owners of the Louisiana Superdome from allowing tobacco smoking during events in the stadium. The plaintiffs argued that the smoke impaired the exercise of their right to receive others' thoughts and ideas because enjoyment of a public function could not be had without the accompanying smoke.<sup>87</sup> The plaintiffs also argued that the state was violating the Fifth and Fourteenth Amendments by depriving them, without due process, of the right to breathe clean air freely, a right they claimed was protected as life, liberty, and property.<sup>88</sup> The District Court dismissed all the constitutional claims.<sup>89</sup> On appeal, the Fifth Circuit affirmed,<sup>90</sup> comparing the plaintiff's attempt to ban smoking in the Superdome to Prohibition and suggesting that alcohol was "something fully as physically harmful as tobacco smoke, if not more so."<sup>91</sup> Such a comparison reflects both judicial skepticism and public animosity toward nonsmokers' assertion of health risks.

The *Gasper* case has been followed on several occasions by other courts

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84. See *infra* notes 86-116 and accompanying text.

85. See, e.g., *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716, 722 (E.D. La. 1976), *aff'd*, 577 F.2d 897, 899 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 537 (S.D. Tex. 1972); *GASP v. Mecklenburg County*, 256 S.E.2d 477, 479 (N.C. Ct. App. 1979).

86. 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

87. *Gasper*, 418 F. Supp. at 718.

88. *Id.*

89. *Id.* at 722.

90. *Gasper v. Louisiana Stadium & Exposition Dist.*, 577 F.2d 897 (5th Cir. 1978).

91. *Id.* at 899.

dismissing claims brought under the rubric of constitutional rights.<sup>92</sup> In each case, the court refused to recognize that tobacco smoke might infringe on any constitutional right. Recent cases involving incarcerated nonsmoking plaintiffs, however, have implicated the Eighth Amendment prohibition against cruel and unusual punishment with varying degrees of success.<sup>93</sup>

The Supreme Court recently granted *certiorari* to decide whether a decision by prison officials not to segregate nonsmoking inmates represents inhumane punishment.<sup>94</sup> The case below, *McKinney v. Anderson*,<sup>95</sup> involved a state prisoner in Nevada who complained that exposure to ETS caused him nosebleeds, headaches, and chest pains.<sup>96</sup> McKinney sought damages as well as injunctive relief.<sup>97</sup>

The case was heard before a magistrate, who granted a directed verdict for the defendant.<sup>98</sup> The magistrate reasoned that McKinney either had a right to a smoke-free environment, or a right to medical attention for serious medical needs.<sup>99</sup> Reversing in part,<sup>100</sup> the Ninth Circuit held that ETS reached a level of unconstitutional punishment when the levels of concentration posed an unreasonable risk of harm to the inmate's health.<sup>101</sup> The court paid particularly close attention to the EPA draft report on ETS, as well as to the nature of incarceration, which poses an especially severe problem of ETS exposure for prisoners.<sup>102</sup> Finally, it noted that public opinion reflected "a need to protect non-smokers from involuntary exposure to ETS."<sup>103</sup> The court remanded the case for proceedings to determine whether the exposure was an unreasonable risk to the inmate's health.<sup>104</sup>

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92. See, e.g., *Kensell v. Oklahoma*, 716 F.2d 1350 (10th Cir. 1983); *Federal Employees for Non-smokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C.), *aff'd*, 598 F.2d 310 (D.C. Cir. 1978), *cert. denied*, 444 U.S. 926 (1979).

93. *McKinney v. Anderson*, 924 F.2d 1500 (9th Cir. 1991) (citing EPA draft report in reversing directed verdict); *Clemmons v. Bohannon*, 918 F.2d 858 (10th Cir. 1990) (distinguishing *Kensell*, reversing dismissal for failure to state a claim, and remanding for trial); *Avery v. Powell*, 695 F. Supp. 632 (D.N.H. 1988) (refusing to dismiss inmate's claim). *But cf.* *Caldwell v. Quinlan*, 729 F. Supp. 4 (D.D.C.), *aff'd*, 923 F.2d 200 (D.C. Cir. 1990) (facilities for nonsmokers and limited nonsmoker housing sufficient for Eighth Amendment purposes); *Gorman v. Moody*, 710 F. Supp. 1256, 1259 (N.D. Ind. 1989) (citing standards of decency in dismissing claim).

94. *Helling v. McKinney*, 112 S. Ct. 3024 (1992).

95. *McKinney v. Anderson*, 924 F.2d 1500 (9th Cir. 1991).

96. *Id.* at 1502.

97. *Id.*

98. *Id.* at 1503.

99. *Id.*

100. *Id.* at 1509-12.

101. *Id.* at 1508.

102. *Id.* at 1506-08.

103. *Id.* at 1509.

104. *Id.* at 1512.

The Supreme Court vacated, remanding to the court the issue of whether a prisoner would be required to show a particular state of mind on the part of the prison officials.<sup>105</sup> Consistent with the request, the Ninth Circuit remanded for further proceedings to determine whether the prison officials showed "deliberate indifference" to the prisoner's problem.<sup>106</sup> The Supreme Court again granted *certiorari* and will now rehear the case to decide whether the Eighth Amendment is implicated by the ETS exposure.<sup>107</sup>

The implications for other ETS litigants are twofold. First, the courts' acceptance of the argument that secondhand smoke may constitute cruel and unusual punishment in certain cases shows a willingness to accept the scientific evidence as proof of the hazardous nature of ETS.<sup>108</sup> Second, the courts are recognizing that public policy is in favor of minimization of smoke inhalation.<sup>109</sup> Both arguments may, to a certain extent, be extrapolated into workplace safety arguments. Although employees may theoretically leave when others smoke, the realities of the job usually compel the individual to inhale a certain amount of smoke unwillingly. The use of constitutional arguments on behalf of passive smokers is clearly weak in light of the above cases, but similar lines of discussion might succeed in establishing actions for damages or injunctive relief at the state level.

Precedent exists for state courts to issue injunctive relief for nonsmokers subjected to ETS. In *Shimp v. New Jersey Bell Tel. Co.*,<sup>110</sup> a case with particular relevance to future ETS exposure actions against employers, plaintiff sought to enjoin smoking in her immediate workplace area.<sup>111</sup> She alleged a failure of the defendant to provide the safe working environment that under New Jersey common law is an affirmative duty of the employer.<sup>112</sup> Plaintiff established that she suffered from a severe allergic reaction to the smoke.<sup>113</sup> The court, reviewing the scientific evidence before it, concluded that ciga-

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105. *Helling v. McKinney*, 112 S. Ct. 291 (1991), *vacating and remanding McKinney v. Anderson*, 924 F.2d 1500 (9th Cir. 1991).

106. *McKinney v. Anderson*, 959 F.2d 853, 854 (1992).

107. *Helling v. McKinney*, 112 S. Ct. 3024 (1992). This issue is also being litigated in other circuits; for example, the Tenth Circuit has also found that ETS exposure presents a legitimate Eighth Amendment claim. *Clemmons v. Bohannon*, 918 F.2d 858, 865 (10th Cir. 1990). In contrast, a federal inmate lost an almost identical argument in the D.C. Circuit Court. *Caldwell v. Quinlan*, 923 F.2d 200 (D.C. Cir. 1990).

108. *See, e.g., McKinney*, 924 F.2d at 1508; *Clemmons*, 918 F.2d at 865.

109. *See, e.g., McKinney*, 924 F.2d at 1508; *Clemmons*, 918 F.2d at 865. *But see Caldwell*, 729 F. Supp. at 6.

110. 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976).

111. *Id.* at 409.

112. *Id.* at 410.

113. Plaintiff's symptoms included nose, eyes, and throat irritation; nosebleeds; headaches; nausea; and vomiting. The court apparently accepted the suggestion that the plaintiff was allergic to the smoke. *Id.*

rette smoke was toxic to passive smokers and was not a necessary byproduct of the company's business activities.<sup>114</sup> Although the court explicitly restricted the smoking areas within the building, it also concluded that a smoking employee should have a "reasonably accessible area" in which to smoke.<sup>115</sup> As a result, the defendant was enjoined from permitting smoking anywhere outside the nonwork cafeteria.<sup>116</sup>

The *Shimp* court showed remarkable prescience in accepting the scientific evidence as proof of the harmful nature of ETS exposure. Future courts would do well to follow similar rationales in determining the proper resolution of workplace smoking problems. The restriction of smokers to a confined, separate area satisfies both the need for a smoke-free workplace and the addiction of smoking employees. Such a solution appears to be a reasonable balance between the needs of the different employees.

### III. *SCHOLEM V. NEW SOUTH WALES DEPARTMENT OF HEALTH:* AUSTRALIAN PLAINTIFFS "PASSIVE" NO LONGER

#### A. *Justice Morling and the Scientific Shortcut*

The first breakthrough in passive smoking litigation came in February 1991, when the Federal Court of Australia ruled that overwhelming scientific evidence supports the contention that passive smoking is a cause of lung cancer, asthma, and other respiratory diseases.<sup>117</sup> The ruling resulted from a case brought against the tobacco industry by a consumer group that objected to a tobacco advertisement stating that "there is little evidence and nothing which proves scientifically that cigarette smoke causes disease in non-smokers."<sup>118</sup> The Australian Federation of Consumer Organisations (AFCO), plaintiffs in the case against the Tobacco Institute of Australia (TIA), sought an injunction against further use of the advertisement, arguing that the text was misleading and inaccurate.<sup>119</sup> Justice Trevor Morling

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114. The court was so convinced of the toxicity of cigarette smoke that it took judicial notice of the fact. *Id.* at 411, 413-15.

115. *Id.* at 416.

116. *Id.* The court also appeared greatly offended at the fact that the company had given its human employee short shrift, but prohibited smoking around telephone equipment on the grounds that the machinery is extremely sensitive. In the court's words, Human beings are also very sensitive. . . . Unlike a piece of machinery, the damage to a human is all too often irreparable. *Id.*

117. *Australian Court Rules Passive Smoking Causes Lung Cancer*, UPI, Feb. 8, 1991, available in LEXIS, Nexis Library, UPI File [hereinafter *UPI Article*].

118. Gloria Negri, *Australian Court Ruling Called Impetus for Mass. Antismoking Lobby*, BOSTON GLOBE, July 25, 1991, at 20 (citing R. Everingham & S. Woodward eds., TOBACCO LITIGATION: AFCO V. TIA, THE CASE AGAINST PASSIVE SMOKING (1991)).

119. *UPI Article*, *supra* note 117, at 1.



of the Federal Court agreed, and in a lengthy analysis of the current scientific data regarding passive smoking, concluded that “[s]mokers are likely to be misled or deceived in believing that their smoking does not prejudice the health of non-smokers, particularly small children,” and drew a conclusion that cigarette smoke causes lung cancer in passive smokers “from the totality of the available data and by valid reasoning from it.”<sup>120</sup> Morling granted the injunction and ordered the TIA to pay the plaintiffs’ court costs, which totalled roughly \$1 million.<sup>121</sup>

The finding galvanized the federal and local governments in Australia, which immediately set about reviewing their laws against smoking, with the anti-smoking lobbies, which sought to reinforce their newfound momentum.<sup>122</sup> As noted by the New South Wales Health Minister, Morling’s finding opened up employers to wide-ranging and unforeseen liability for health risks to nonsmokers.<sup>123</sup> The tobacco industry appealed the decision to the Full Bench of the Federal Court, but before that panel could act upon the appeal, a second seminal case appeared in the New South Wales District Court and further demonstrated the willingness of the courts to draw conclusions from the scientific evidence already present. The case, *Scholem v. New South Wales Department of Health*,<sup>124</sup> raises several issues that might also come into play in future ETS cases brought in American courts.

### B. Scholem v. New South Wales Department of Health

In *Scholem*, the plaintiff Liesel Scholem sued her former employer, the Department of Health, for exacerbating her asthmatic condition and causing her to develop emphysema.<sup>125</sup> During the ten years she worked for the Department as a psychiatrist, Scholem was exposed to cigarette smoke constantly without adequate ventilation.<sup>126</sup> As a result, according to Scholem, her preexisting asthma condition was irritated to such an extent that the condition worsened and became chronic.<sup>127</sup> A number of her former colleagues testified that Scholem often complained of the smoke to her cowork-

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120. *Id.*

121. Negri, *supra* note 118, at 20. Of course, the plaintiff’s court costs—equivalent to \$1 million American—comes on top of the industry’s own expenses, which were estimated at between \$5 and \$7 million American. *Id.*; see also Brook Turner & Mark Lawson, *Australia: Both Sides Claim a Win in Smoking Case*, AUSTL. FIN. REV., Dec. 18, 1992, at 7.

122. *UPI Article*, *supra* note 117, at 1.

123. *Id.*

124. *Scholem v. New S. Wales Dep’t of Health*, No. 40830/86 (D.N.S. Wales, May 27, 1992) (unreported; on file with *The Journal of Contemporary Health Law and Policy*).

125. Record at 24, *Scholem* (No. 40830/86).

126. *Id.* at 24, 46-47.

127. *Id.* at 67-68.

ers, but did not always leave the room when someone began smoking.<sup>128</sup> Scholem, in response, contended that she lacked authority to tell her co-workers and clients to stop smoking, and that the number of smokers in the department at any given time made it impossible for her to escape the smoke.<sup>129</sup> She suffered through the ETS exposure for ten years until the department finally enacted strict limitations on smoking in the workplace.<sup>130</sup>

Scholem sued the Department of Health on three grounds, two statutory and one arising at common law.<sup>131</sup> The basis for the statutory argument was the Factories, Shops and Industries Act of 1964, that required employers to provide enough ventilation to avoid insufficient or stagnant air and also required the regulation of any fumes resulting from the processes of the "factory."<sup>132</sup> The common law action was based on the department's negligent failure to provide reasonable care for the health of its workers.<sup>133</sup> Both sides relied heavily on the testimony of expert witnesses to establish or refute the connection between the exposure to ETS and the aggravated asthma and emphysema.<sup>134</sup>

The case was heard before a jury of four. In his instructions to the jury, the trial judge emphasized that the scientific proof was only part of the analysis to be made when deciding the causation issue.<sup>135</sup> Following the court's attempt to deemphasize the scientific and technical aspects of the problem, the jury deliberated for four hours before finding the defendant negligent in its failure to regulate or prohibit smoking in the workplace based on the state of knowledge that existed at the time regarding the hazards of inhaling secondary smoke.<sup>136</sup> Scholem was awarded \$85,000 in damages,<sup>137</sup> but the

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128. *Id.* at 56-57.

129. *Id.* at 46.

130. *Id.* at 48.

131. *Id.* at 24-25.

132. Factories, Shops and Industries Act of 1962, §§ 23(4), 41(2) (commenced May 4, 1962; assented April 21, 1962). Section 23(4) requires employers to provide [s]uitable atmospheric conditions . . . to avoid insufficient air supply, stagnant or vitiated air; Section 41(2) is intended to prevent the buildup of fumes that are generated in connection with any process carried on in a factory. *Id.*

133. Record at 24, *Scholem* (No. 40830/86).

134. *Id.* at 32A.

135. Justice Morling instructed the jurors:

As I said, you are not scientists. You are not here to decide for the purposes of publication in some scientific journal what is the cause of Mrs [sic] Scholem's present asthmatic condition. You are here to decide whether exposure to environmental tobacco smoke was a cause of, or a materially contributing factor to, her present asthmatic state.

*Id.* at 28.

136. Gareth Boreham, *Anti-Smoke Award: More May Follow*, MELBOURNE AGE, May 28, 1992, at 1.

symbolic and precedential value of the decision far outweighed the actual cost to the tobacco industry.

### C. *The Aftermath of Scholem*

Implications of the *Scholem* decision for Australian employers and the tobacco industry were numerous. First, the verdict reinforced the earlier Federal Court ruling regarding the link between ETS exposure and health risks. Second, employers faced potentially massive liability in cases involving later exposures, because the state of knowledge is more advanced than it was in the 1970s and early 1980s. Third, although Liesel Scholem received only \$85,000, future litigants may recover much larger sums by filing in courts that do not share the District Court's \$100,000 ceiling.<sup>138</sup>

Australian governmental agencies reacted to the verdict quickly. The New South Wales Health Minister warned all employers that they risked being sued if they allowed smoking in the workplace.<sup>139</sup> Legal counsel to the government in Victoria indicated that mere exposure to passive smoking health risks would suffice to bring an action under that region's Occupational Health and Safety Act.<sup>140</sup> In June, the Federal Airports Commission banned smoking entirely at all international and domestic airports.<sup>141</sup>

The success of the anti-smoking forces has not been uniform. On December 18, 1992, the Full Bench of the Federal Court curtailed the scope and effect of Justice Morling's ruling in *Australian Federation of Consumer Organizations v. TIA (AFCO v. TIA)*.<sup>142</sup> The appellate panel, which vacated the injunction against the tobacco companies, specifically disapproved Justice Morling's attempt to draw conclusions regarding the scientific link between ETS exposure and health risks.<sup>143</sup> Justice Hill, speaking for the panel, indicated that none of the reviewing jurists was capable of drawing such a conclusion on the basis of present information.<sup>144</sup> The appellate decision clearly undercuts the strength of Justice Morling's earlier ruling. The full effect of

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137. *Id.* The judge adjusted the award to reflect workers' compensation payments already received and added interest. The final adjusted amount was \$64,361. *Id.*

138. *Id.* See also Tina Diaz, *Court Puts Smokers Out in the Cold*, SYDNEY MORNING HERALD, May 28, 1992, at 1.

139. UPI Article, *supra* note 117, at 1.

140. See *Smoking Hazard to More than Health*, MELBOURNE AGE, May 29, 1992, at 12 [hereinafter *Smoking Hazard*].

141. *Smoking Banned at Australian Airports*, AGENCE FRANCE PRESSE, June 30, 1992, available in LEXIS, Nexis Library, OMNI File.

142. See Turner & Lawson, *supra* note 121, at 7.

143. *Id.*

144. In Justice Hill's words,

[A]t the end of the day, the question of the relationship between environmental tobacco smoke and disease is a matter for scientists trained in the area, it is not a

the court's reversal, however, remains to be seen. *Scholem* will probably serve much the same function as did the *AFCO* ruling, although the target has shifted from the tobacco industry to public and private employers.

*D. Could It Happen Here? Why Employers Should Fear Scholem*

From an American standpoint, the decision in *Scholem* is a harbinger of things to come if greater efforts are not made to provide a safe working environment. The common-law negligence action upon which the jury found the Department of Health liable is substantially identical from a legal standpoint to its counterpart in this country.<sup>145</sup> Moreover, anti-smoking groups here have already indicated a willingness to proceed with similar actions, buoyed by Ms. Scholem's success.<sup>146</sup> Several cases have already been commenced, although none has proceeded to the final stages to date.<sup>147</sup> As the scientific information increases, companies will be hard pressed to deny awareness of the potential danger inherent in ETS exposure. The most damaging aspect of the *Scholem* case, from the standpoint of the employer, is the fact that the verdict alerts aspiring plaintiffs to the existence of a new and broader category of defendants who are much less likely to afford or desire a protracted legal struggle over the nebulous idea of duty to provide a smoke-free environment. As will be seen below, employers are already beginning to recognize that the "right to smoke" may be far more trouble and expense than it is worth, even without the presence of myriad ETS negligence lawsuits.<sup>148</sup>

#### IV. WORKPLACE SAFETY LAWS: THE LEGISLATIVE SOLUTION

##### *A. Occupational Legislation in America and Australia*

Both Australia and the United States have enacted extensive legislation designed to regulate the safety of workers and workplaces. In Australia, each region has passed its own occupational health and safety legislation, with the strictest found in Victoria and New South Wales.<sup>149</sup> In Victoria,

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matter for a court of law which is ill-equipped to determine it and to make the skilled judgments upon which such a question depends.

*Id.*

145. For a discussion of the elements of the Australian negligence action, see Record at 25-32A, *Scholem* (No. 40830/86).

146. See Negri, *supra* note 118, at 20 (At least two suits alleging harm from passive smoking are pending in Massachusetts courts.); Mark Hansen, *Second-Hand Smoke Suit*, A.B.A. J., Feb. 1992, at 26 (flight attendants filing suit in Florida; other suits being contemplated).

147. See Hansen, *supra* note 146, at 26.

148. See *infra* notes 149-175 and accompanying text.

149. Occupational Health and Safety Act of 1985, No. 10190 (commenced Oct. 1, 1985, assented July 30, 1985) (Vict.); Workplace Health and Safety Act of 1989, No. 63 of 1989

for instance, employers may be at risk of criminal prosecution in the event they are found guilty of allowing ETS pollution.<sup>150</sup> The major threat of future ETS litigation in Australia stems from the legislative requirements that employers provide a working environment that is safe for the employees and without risk to their health.

The United States Occupational Safety and Health Act (OSH Act)<sup>151</sup> requires that each employer provide a workplace area that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."<sup>152</sup> Although the courts have identified the OSH Act as requiring agencies to provide safe and healthful employment environments,<sup>153</sup> the Act does not give employees a private cause of action against federal employers.<sup>154</sup> The primary potential for the OSH Act in America is the ability and duty of the Occupational Health and Safety Agency (OSHA) to identify and regulate workplace hazards.<sup>155</sup> To date, however, OSHA has failed to issue a statement regarding the identification of ETS as a hazard, despite an attempt by a nonsmokers' rights activist group to compel such a standard.<sup>156</sup> At present, OSHA is in the process of issuing a regulatory program regarding ETS as a component of indoor air quality.<sup>157</sup> If the agency designates ETS as a target for regulation, it may set standards for maximum concentration of cigarette smoke in the workplace under the OSH Act.<sup>158</sup>

The Australian treatment of ETS under its various regional workplace health and safety acts is stricter and broader than under their federal counterpart in the United States. For Australian anti-smoking crusaders, the OHS acts are a cornerstone of workplace ETS litigation. In contrast, American ETS plaintiffs most likely cannot rely on the OSH Act unless the appropriate agency promulgates standards regulating ETS concentration. OSHA

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(commenced June 10, 1989 and in part July 1, 1989; assented May 12, 1989) (Queensl.); Occupational Health, Safety and Welfare Act of 1986 (commenced Apr. 16 and in part Nov. 30, 1987; assented Dec. 24, 1986) (So. Austl.); Occupational Health, Safety and Welfare Act of 1984, No. 101 of 1984 (commenced Apr. 4, 1985, assented Dec. 19, 1984) (W. Austl.); Industrial Safety, Health and Welfare Act of 1977 (commenced Jan. 1, 1979, assented Sept. 21, 1977) (Tas.).

150. *Smoking Hazard*, *supra* note 140, at 12.

151. 29 U.S.C. § 651 (1988).

152. 29 U.S.C. § 654 (1988).

153. *See, e.g.*, *Federal Employees for Non-Smokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978), *aff'd*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979).

154. 446 F. Supp. at 183.

155. *See* 29 U.S.C. § 655 (1988 & Supp. II 1990).

156. *Action on Smoking & Health v. Occupational Safety & Health Admin.*, No. 91-1037, 1992 U.S. App. LEXIS 14,861 (D.C. Cir. Jan. 29, 1992) (denying writ of mandamus to compel OSHA action).

157. *See* 57 Fed. Reg. 16,957 (1992) (to be codified at 29 C.F.R. ch. XVII).

158. 29 U.S.C. § 655 (1988 & Supp. II 1990).

is unlikely to take this specific action and instead will include ETS in a list of components for overall indoor air quality. Plaintiffs in the United States are more likely to receive favorable treatment under federal and state Clean Air Acts.

### *B. Comparing Various Clean Air Acts*

In the United States, under section 112 of the amended federal Clean Air Act, the EPA is empowered to issue national standards for nearly 200 new causal agents of hazardous air pollution.<sup>159</sup> The EPA is required, after specific standards for each listed chemical are established, to determine the level of public health risk remaining based on scientific information and then create an "ample margin of safety" within the parameters of economic constraints and health concerns.<sup>160</sup> According to National Emission Standards published by EPA in 1989, risks of cancer exceeding 1:1,000,000 for groups of exposed people or 1:10,000 for individuals are the ceilings for adequate protection under the Clean Air Act.<sup>161</sup> Section 112, however, has never been applied to indoor air quality, although the Act does not specifically limit consideration to outdoor factors. The EPA's own report identifying ETS as a class A carcinogen will increase pressure on the government to reassess its handling of ETS and its components.

The limitations of the federal Clean Air Act have led state governments to propose their own statutory solution to smoking in public places. Forty-five states, the District of Columbia, the Virgin Islands and Puerto Rico have established some regulation regarding smoking in at least one public area.<sup>162</sup>

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159. 42 U.S.C. § 7412(d) (1988 & Supp. III 1991).

160. 42 U.S.C. § 7412(f) (1988 & Supp. III 1991).

161. 54 Fed. Reg. 38,045 (1989) (codified at 40 C.F.R. pt. 61).

162. ALASKA STAT. §§ 18.35.300305 (1991); ARIZ. REV. STAT. ANN. § 36-601.01 (1986 & Supp. 1992); ARK. CODE ANN. §§ 20-27-701 to -703 (Michie 1991); CAL. HEALTH & SAFETY CODE §§ 25940-25944 (West 1984 & Supp. 1992); COLO. REV. STAT. §§ 25-14-101 to -104 (1989 & Supp. 1992); CONN. GEN. STAT. ANN. § 1-21b (West 1988); DEL. CODE ANN. tit. 11, § 1327 (1987 & Supp. 1992); D.C. CODE ANN. §§ 6-911 to -913 (1989 & Supp. 1992); FLA. STAT. ANN. §§ 386.202-206 (West 1991 & Supp. 1992); GA. CODE ANN. § 16-12-2 (Michie Supp. 1992); HAW. REV. STAT. §§ 328K-2 to -6 (1991 & Supp. 1992); IDAHO CODE § 39-5503 (1985 & Supp. 1992); ILL. REV. STAT. ch. 111 1/2, paras. 8202, 8204, 8206 (Supp. 1992); IND. CODE ANN. §§ 13-1-13-4 to -5 (Burns 1990); IOWA CODE ANN. §§ 98A.1,2 (West 1990 & Supp. 1992); KAN. STAT. ANN. §§ 21-4009 to -4011 (1988); LA. REV. STAT. ANN. § 40:1261 (West 1992); ME. REV. STAT. ANN. tit. 22, §§ 1578-A to 1580-D (West 1992); MD. HEALTH-GEN. CODE ANN. § 24-502 (1990); MASS. GEN. LAWS ANN. ch. 111, §§ 72X, 122, 124 (West 1983 & Supp. 1992); MICH. COMP. LAWS ANN. §§ 333.12601-17 (West 1992); MINN. STAT. ANN. §§ 144.411-415 (West 1991); MO. ANN. STAT. § 71.760 (Vernon 1987); MONT. CODE ANN. §§ 50-40-101 to -205 (1991); NEB. REV. STAT. § 71-5707 to -13 (1991); NEV. REV. STAT. § 202.249 (1991); N.H. REV. STAT. ANN. §§ 155:64-76 (Supp. 1992); N.J. STAT. ANN. § 26:3D-1-54 (West 1991 & Supp. 1992); N.M. STAT. ANN. §§ 24-16-1 to -8 (Michie 1978 &

Several states have enacted their own Indoor Clean Air Acts, which are more comprehensive statutes aimed at curbing ETS and other indoor pollutants in the absence of federal action.<sup>163</sup> It is clear that in the United States, for the time being, ETS plaintiffs are far more likely to receive favorable treatment from state legislation and agencies than from the federal system, which has been shackled by tobacco lobbyists and remains loath to harm the economy of one of the country's largest exporting industries. In addition, business owners can ill afford costly equipment designed to improve ventilation to conform to EPA or OSHA regulations. By banning smoking entirely, such ventilation costs are minimized, and the savings in health care and improved productivity will offset losses incurred by businesses in trying to improve air quality and minimize ETS exposure.<sup>164</sup>

### C. *Social Mores and Economic Considerations*

As mentioned before, in contrast to the early smoking litigants, the ETS plaintiffs enjoy a judicial and social climate that is largely sympathetic to the pursuit of clean air and aware of the harmful effects caused by smoking. No more than thirty percent of the American population smokes today, and the number has declined steadily in recent years.<sup>165</sup> Whereas the question of limiting smoking areas indoors was once perceived as an affront to the per-

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Supp. 1991); N.Y. PUB. HEALTH LAW § 1399n-x (McKinney 1990); N.D. CENT. CODE § 23-12-09 (1991); OHIO REV. CODE ANN. § 3791.031 (Anderson 1992); OKLA. STAT. ANN. tit. 63, §§ 1-1521 to -1527 (West Supp. 1993); OR. REV. STAT. §§ 433.845-850 (1991); PA. STAT. ANN. tit. 35, § 1230.1 (Purdon Supp. 1992); P.R. LAWS ANN. tit. 33, § 1365 (1983); R.I. GEN. LAWS § 23-20.7-3 (Michie 1992); S.C. CODE ANN. § 44-95-20 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 22-36-2 (1988); TENN. CODE ANN. § 4-4-121 (1991); TEX. PENAL CODE ANN. § 48.01 (West 1992 & Supp. 1993); UTAH CODE ANN. § 76-10-106 (1990 & Supp. 1992); VT. STAT. ANN. tit. 20, § 2752 (1987); VA. CODE ANN. §§ 15.1-291.1 to -.7 (Michie Supp. 1992); V.I. CODE ANN. tit. 23, § 891-5 (1970 & Supp. 1992); WASH. REV. CODE ANN. § 70.160.010-.070 (West 1992); WIS. STAT. ANN. § 101.123 (West 1988 & Supp. 1992).

163. California, Florida, Idaho, Illinois, Indiana, Montana, Nebraska, New Hampshire, New Mexico, Oregon, and Pennsylvania have Indoor Clean Air Acts. See CAL. HEALTH & SAFETY CODE §§ 25940-25947 (West 1984 & Supp. 1992); FLA. STAT. ANN. §§ 386.201-209 (West 1991 & Supp. 1992); IDAHO CODE § 39-5501-5509 (1985 & Supp. 1992); ILL. REV. STAT. ch. 111 1/2, paras. 8201-11 (Supp. 1992); IND. CODE ANN. §§ 13-1-13-4 to -5 (Burns 1990); MONT. CODE ANN. §§ 50-40-101 to -205 (1991); NEB. REV. STAT. § 71-5707 to -13 (1991); N.H. REV. STAT. ANN. §§ 155:64-76 (Supp. 1992); N.M. STAT. ANN. §§ 24-16-1 to -11 (1978 & Supp. 1991); OR. REV. STAT. §§ 433.835-875 (1991); PA. STAT. ANN. tit. 35, § 1230.1-.33 (Michie Supp. 1992). Oklahoma has a Smoking in Public Places Act, and Rhode Island has enacted a Workplace Smoking Pollution Control Act. OKLA. STAT. ANN. tit. 63, §§ 1-1521 to -1527 (West Supp. 1993); R.I. GEN. LAWS § 23-20.7-1 to -7 (1992).

164. See *infra* notes 165-74 and accompanying text.

165. NATIONAL RESEARCH COUNCIL, *supra* note 16, at 20-21.

sonal right to smoke,<sup>166</sup> the public has come to view the issue increasingly as one of the right to breathe clean air free from interference by smokers. This public policy shift makes it easier for employers to justify strict internal anti-smoking measures. The policy is also reflected in both state and federal legislation regarding limitations or prohibitions on public smoking; employers need not fear being singled out for taking Draconian measures in the name of environmental purity. In an era of dawning environmental awareness, employers who take steps to eliminate smoking in their workplaces will enjoy increasing support from the public and the employee population as well.

There is, however, a second, potentially more compelling argument to be made for the cost-conscious employer. Elimination or regulation of indoor smoking will not only bring the company in line with social trends and regulatory guidelines, and minimize the likelihood of litigation, but will also cut down on health costs for the company.<sup>167</sup> For example, the American Cancer Society has estimated that smokers' insurance claims cost their employers \$300 more than those of nonsmoking coworkers. Moreover, smokers record more sick days by thirty to forty percent.<sup>168</sup> Smokers are fifty percent more likely to require a hospital visit as well.<sup>169</sup> With health care costs becoming increasingly unaffordable for small and mid-sized companies, the opportunity to reduce such costs is an attractive alternative to going without insurance.

Employers are already convinced by the statistical discrepancies and in many cases have attempted to eliminate the problem entirely. In addition to smoke-free workplaces, some employers have refused to hire smokers; the Turner Broadcasting Network is a conspicuous example, having adopted such a policy in 1986.<sup>170</sup> The flat ban on employing smokers is receiving heavy criticism from lawyers and legislators and has resulted in several states considering or adopting "smokers' bills of rights," laws designed to ensure that smokers are not discriminated against in the hiring process.<sup>171</sup> A second experiment presently underway at Texas Instruments levies a penalty against any employee who smokes or has a family member who smokes; a monthly surcharge is added to the employee's health insurance policy

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166. See *supra* notes 86-92, 110-16 and accompanying text.

167. See *supra* notes 86-92, 110-16 and accompanying text.

168. Susan Harte, *Business Report: On the Workplace*, ATLANTA J. & CONST., Nov. 18, 1992, at C2.

169. *Id.*

170. Rene Sanchez, *D.C. Set to Approve Law on Hiring Bias Against Smokers*, WASH. POST, Dec. 15, 1992, at B1, B3.

171. *Id.*; see also Dennis J. McGrath, *New Laws Give More Rights to Employers*, MINN. STAR TRIB., May 17, 1992, at 1A (reporting the Minnesota anti-discrimination law; and noting that twenty-seven other states have passed similar legislation).



payment.<sup>172</sup>

A third option being explored by many companies is the so-called "wellness" plan, which provides employees with the means and the incentive to improve their health by choosing a more beneficial lifestyle: the company offers smoking cessation programs, for example, and encourages all employees to attend if the program is needed.<sup>173</sup> In 1991, thirty-two percent of employers offered such wellness programs, almost twice the percentage of employers offering wellness programs in 1989.<sup>174</sup>

The efforts by employers to counteract rising health costs will have the added effect of minimizing liability against *Scholem*-type litigation. Continuing trends in proactive insurance programs and policies designed to phase out smoking in the workplace will continue irrespective of federal involvement, although the process will be accelerated considerably in the event that OSHA promulgates standards for indoor air pollution. While the EPA and OSHA progress slowly toward a more stringent federal approach to the indoor air pollution problem, the willingness of employers to take the initiative in minimizing or banning smoking in the workplace should serve to facilitate further progress by the government agencies.

## V. CONCLUSION

In sum, litigants seeking recovery for injuries from exposure to ETS would do well to heed the problems faced by early smoking plaintiffs. Scientific evidence linking ETS and health hazards is still subject to contradiction and dispute within the scientific community itself, and courts may be loath to hold companies liable for allowing smoking in their buildings absent some compelling information similar to that possessed by the tobacco industry in the early 1960s. The current economic climate also favors a more conservative judicial response to the problem. In Australia, the courts addressing the issue of causation have already shown a lack of consensus at a fundamental level. Similar disagreements are certain to occur when the American courts are presented with the same scientific evidence.

ETS lawsuits may yet be an effective tool in accelerating America's trend toward smoking bans. Public opinion, rising health care costs, and increasingly stringent governmental regulations will catalyze the private sector into implementing their own proactive indoor smoking bans before they are faced

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172. Linda Borg, *Company Sets Premium \$10 Higher on Smokers*, PROV. J.-BULL., Dec. 26, 1991, at A1. The plan has been criticized as an improper attempt to influence employees' activities outside the workplace. *Id.* at A9.

173. Jerry Geisel, *Some Relief on Health Costs*, BUS. INS., Jan. 27, 1992, at 1, 78.

174. *Id.* at 78.

with an explosion of litigation. Conversely, the willingness of the courts to allow recovery for injuries from ETS exposure will be limited to cases of documented hypersensitivity, such as Liesel Scholem's asthmatic condition, until more concrete scientific conclusions can be drawn or until governmental agencies accelerate the process through statements similar to Justice Morling's in Australia. The EPA's categorization of ETS as a class A carcinogen will serve as powerful support for ETS plaintiffs and will prod employers and OSHA into responsive action. Just as passive smoking litigation catalyzed Australian employers into immediate action, economic considerations and increasing federal acceptance of the causation element will catalyze employers in the United States to enact their own in-house smoking policies and avoid future liability for employee illnesses.

*Francis J. Nolan*

