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"No SMOKING PLEASE." A PROPOSAL FOR RECOGNITION OF NON-SMOKERS' RIGHTS THROUGH TORT LAW

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"The rights of smokers to smoke ends where their behavior affects the health and well being of others."[1]

"[T]he choice to smoke should not interfere with the non-smoker's choice for an environment free of tobacco smoke."[2]

"Many people are willing to take on risk, even enormous risk, themselves. But very few are willing to tolerate even a small risk imposed on them."[3]

I. Introduction

The question of whether tobacco smoke is harmful to smokers was answered over twenty years ago when then Surgeon General C. Everett Koop declared that smoking caused lung cancer, heart disease, and other respiratory illnesses.[4] As a result of this report, many scientists began to question whether the levels of exposure to environmental tobacco smoke received by non-smokers could also be harmful.[5]

Studies have shown that risk of disease due to the inhalation

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[1] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING XII (1986) [hereinafter INVOLUNTARY SMOKING]. The report represents the work of more than 60 distinguished physicians and scientists, both in this country and abroad.

[2] Letter from Sec. Bowen, Health and Human Services, to President of the Senate George Bush (Dec. 15, 1986) (on file with the *New York Law School Journal of Human Rights*) [hereinafter Bowen Letter].

[3] Joan O'C. Hamilton et al., *"No Smoking" Sweeps America*, BUS. WK., July 27, 1987, at 40 (quoting Michael J. Martin, U. of Calif. epidemiologist).

[4] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, THE HEALTH CONSEQUENCES OF SMOKING (1964) [hereinafter HEALTH CONSEQUENCES].

[5] INVOLUNTARY SMOKING, *supra* note 1, at VII.

of tobacco smoke is not limited to the individual who is smoking, but extends to those nearby who inhale tobacco smoke emitted into the air.[6] Studies have also shown that mere physical separation of smokers and non-smokers within the same airspace "may reduce, but cannot eliminate nonsmoker exposure to environmental tobacco smoke."[7] It is no longer sufficient that forty states and the District of Columbia have enacted some form of legislation to restrict smoking in public.[8] While such legislation has been aimed at protecting non-smokers, more must be done.

This Note will first describe and discuss the harmful effects that inhaling smoke has on non-smokers. It will then examine why more must be done to recognize non-smokers' rights. Lastly, this Note analyzes *Broin v. Phillip Morris Companies, Inc.*, the first class action suit against tobacco companies involving flight attendants' exposure to second-hand smoke.[9] This Note uses the *Broin* case to argue for further recognition of non-smokers' rights and the dangers of environmental tobacco smoke. The focus is primarily on how non-smoker cases should be handled by the courts, utilizing the flight attendant case as an example. Ultimately, this Note advocates for more action to be taken against tobacco companies and additional regulations to be implemented so that non-smokers are truly protected from the inhalation of tobacco smoke.

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[6] *Id.* at IX. A panel of scientific advisers to the Environmental Protection Agency approved a report on October 28, 1992, which concluded that second-hand smoke is a known human carcinogen and that involuntary exposure to tobacco smoke is a significant health hazard to children. Tom Kenworthy, *EPA Advisers Call Smoke a Hazard to the Health of Children*, WASH. POST, Oct. 28, 1992, at A23.

[7] Bowen Letter, *supra* note 2.

[8] *Id.* Federal safety officials were recently ordered to develop a plan for dealing with the problem of tobacco smoke in the workplace. Frank Swoboda, *OSHA Is Told to Proceed on Smoking Rules*, WASH. POST, Jan. 15, 1993, at F3. After reports concluded that tobacco smoke causes cancer in non-smokers, the Labor Department's Occupational Safety and Health Administration (OSHA) was instructed to begin the rule-making process for developing anti-smoking regulations. *Id.*

[9] Plaintiff's Complaint at 11, Broin v. Phillip Morris Co., Inc., No. 91-49738 CA (22) (Fla. Cir. Ct. filed Jan 17, 1992) (on file with the *New York Law School Journal of Human Rights*). The author would like to thank Stanley Rosenblatt for his assistance with the *Broin* case. See *infra* notes 88-105 and accompanying text for details about the *Broin* case.

II. What is Environmental Tobacco Smoke and How Does it Affect Non-smokers?

A. Environmental Tobacco Smoke Defined

In 1989, the Environmental Protection Agency issued a report focusing on the dangers of second-hand smoke.[10] The report stated:

> Environmental Tobacco Smoke (ETS) is one of the most widespread and harmful indoor air pollutants. ETS comes from secondhand smoke exhaled by smokers and sidestream smoke emitted from the burning end of cigarettes, cigars, and pipes. . . . Breathing in ETS is also known as 'involuntary,' or 'passive,' smoking. . . . In the United States, 50 million smokers annually smoke approximately 600 billion cigarettes, 4 billion cigars, and the equivalent of 11 billion pipesful of tobacco. Since people spend approximately 90 percent of their time indoors, this means that about 467,000 tons of tobacco are burned indoors each year. Over a 16-hour day, the average smoker smokes about two cigarettes per hour, and takes about ten minutes per cigarette. Thus, it takes only a few smokers in a given space to release a more-or-less steady stream of ETS into the indoor air.[11]

There are two types of smoke that may be inhaled by the non-smoker. Mainstream smoke is the smoke drawn through the tobacco into the smoker's mouth and exhaled by the smoker.[12] Sidestream smoke is the smoke emitted directly into the air by either end of the

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[10] ENVIRONMENTAL PROTECTION AGENCY, INDOOR AIR FACTS NO. 5, ENVIRONMENTAL TOBACCO SMOKE (1989) [hereinafter EPA FACTS].

[11] *Id.* at 1.

[12] INVOLUNTARY SMOKING, *supra* note 1, at X; Osborne M. Reynolds, Jr., *Extinguishing Brushfires: Legal Limits on the Smoking of Tobacco*, 53 U. CIN. L. REV. 435, 437 (1984).

burning cigarette.[13] ETS results from the combination of sidestream smoke and the fraction of exhaled smoke not retained by the smoker.[14] Both mainstream smoke and sidestream smoke act as a carcinogen in the air.[15] However, in contrast with mainstream smoke, sidestream smoke contains greater amounts of dangerous components per milligram of tobacco burned.[16] It has even been suggested that because of the lack of filtering, sidestream smoke is more likely to be bothersome to others,[17] and more dangerous to the non-smoker.[18]

B. The Effect of ETS on Non-smokers

"The right of the smoker to smoke stops at the point where his or her smoking increases the disease risk in those occupying the same environment."[19]

While most people believe that tobacco smoke is only irritating to non-smokers, the effects extend far beyond mere irritation and annoyance. The most common and obvious result of tobacco smoke exposure is tissue irritation.[20] The eyes seem to be especially sensitive to irritation, and the nose, throat, and airway may

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[13] Reynolds, *supra* note 12, at 436.

[14] INVOLUNTARY SMOKING, *supra* note 1, at 7.

[15] INVOLUNTARY SMOKING, *supra* note 1, at X. Thirty years of prior research have conclusively established cigarette smoke as a carcinogen. *Id.*

[16] INVOLUNTARY SMOKING, *supra* note 1, at 7-8. Such components include ammonia, benzene, carbon monoxide, nicotine, and the carcinogens 2-napthylamine, 4-aminobiphenyl, N-nitrosamine, benz[a]nthracene, and benzo-pyrene. *Id.* There are a total of 43 carcinogenic compounds in tobacco smoke. EPA FACTS, *supra* note 10, at 1.

[17] Reynolds, *supra* note 12, at 436 (citing ALVAN BRODY & BETTY BRODY, THE LEGAL RIGHTS OF NONSMOKERS 21 (1977)).

[18] *See* INVOLUNTARY SMOKING, *supra* note 1, at 8 (suggesting that sidestream smoke may be more carcinogenic).

[19] Cristine Russell, *U.S. Urges New Restrictions to Safeguard Nonsmokers; Separation in Same Room Held Insufficient*, WASH. POST, Dec. 17, 1986, at A1 (quoting Surgeon General Koop).

[20] INVOLUNTARY SMOKING, *supra* note 1, at 11.

also be affected by smoke exposure.[21] But exposure to smoking has proven to involve serious risks of disease. While the smoker gradually becomes impervious to the odor of tobacco smoke as the inner lining of his or her nose deteriorates, the people bothered by the smoke may suffer emotional responses, including feelings that their well-being is seriously threatened.[22] Moreover, numerous studies have revealed that non-smokers absorb ETS compounds in their body fluids.[23]

In 1986, the Surgeon General introduced the first Public Health Service smoking report to focus exclusively on non-smokers' health risks.[24] Physicians from the American Cancer Society, the American Heart Association, and the American Lung Association commented that the report's conclusions about the risks of passive smoking were as significant as those in the landmark 1964 report[25] in which the Surgeon General first declared cigarettes a cause of lung cancer.[26] The 1986 report led to three important conclusions:

> 1) Involuntary smoking is a cause of disease, including lung cancer, in healthy non-smokers. 2) The children of parents who smoke compared with the children of non-smoking parents have an increased

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[21] U.S. DEP'T. OF HEALTH AND HUMAN SERVICES, CURRENT INTELLIGENCE BULLETIN 54: ENVIRONMENTAL TOBACCO SMOKE IN THE WORKPLACE 1 (June 1991); INVOLUNTARY SMOKING, *supra* note 1, at 11.

[22] Reynolds, *supra* note 12, at 438; Alan S. Kaufman, *Where There's Smoke There's Ire: The Search For Legal Paths for Tobacco-Free Air*, 3 COLUM. J. ENVTL. L. 62, 68 (1977).

[23] EPA FACTS, *supra* note 10, at 2.

> Nicotine, a chemical unique to tobacco, has been found to be a widespread air contaminant in buildings where smoking occurs. Nicotine breaks down into cotinine as it passes through the body. Cotinine can be detected and measured in the saliva, blood, and urine of nonsmokers, indicating they have absorbed tobacco smoke from the air.

Id.

[24] *See* INVOLUNTARY SMOKING, *supra* note 1, at VII.

[25] HEALTH CONSEQUENCES, *supra* note 4.

[26] Russell, *supra* note 19, at A1.

> frequency of respiratory infections, increased respiratory symptoms, and slightly smaller rates of increase in lung function as the lung matures. 3) Simple separation of smokers and non-smokers within the same airspace may reduce, but does not eliminate, the exposure of non-smokers to ETS.[27]

More specifically, the report noted that "a substantial number of lung cancer deaths in non-smokers can be attributed to involuntary smoking."[28] It has been estimated by the National Research Council that the risk of lung cancer for non-smoking spouses of smokers is approximately thirty percent higher than that for non-smokers in non-smoking environments.[29] In 1986, 23,000 non-smokers in the United States died from lung cancer; a substantial number of those were attributed by the Surgeon General to passive smoke.[30] Furthermore, the lungs are not the only body part seriously affected by ETS.

> The Interagency Task Force on Environmental Cancer, Heart, and Lung Disease Workshop on ETS concluded that the effects of ETS on the heart may be of even greater concern than its cancer causing effects on the lungs. ETS aggravates the condition of people with heart disease, and several studies have linked involuntary smoking with heart disease.[31]

Recently, a 1989 report issued by the Surgeon General reiterated the findings of the earlier report and concluded that second-

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[27] INVOLUNTARY SMOKING, *supra* note 1, at 7. Surgeon General Koop stated that "it is imperative that parents eliminate tobacco smoke exposure from their child's environment." Russell, *supra* note 19, at A1.

[28] EPA FACTS, *supra* note 10, at 1; *see also* INVOLUNTARY SMOKING, *supra* note 1, at 7 (both sources define Environmental Tobacco Smoke, a mixture of irritating gases and carcinogenic particles, as a known cause of lung cancer in healthy non-smokers).

[29] EPA FACTS, *supra* note 10, at 2; *see also* FRANK B. CROSS, ENVIRONMENTALLY INDUCED CANCER AND THE LAW 20 (1989) (stating that a spouse of a smoker has twice the risk of lung cancer as a spouse of a non-smoker).

[30] EPA FACTS, *supra* note 10, at 2.

[31] EPA FACTS, *supra* note 10, at 2.

hand smoke is a health hazard to non-smokers.[32] In October 1992, an advisory panel established by the Environmental Protection Agency finished a two-year review of ETS.[33] The panel issued a report that concluded that ETS is a "'Class A' human carcinogen -- a group that includes a handful of substances such as asbestos, arsenic and benzene."[34] Hence, as the dangers of tobacco smoke to smokers and to the non-smokers around them become clearer, the question arises as to why nothing is done to protect non-smokers.

III. Why Hasn't More Been Done to Resolve the Harm Inflicted by ETS?

A. The History and Strength of Tobacco Companies and Their Affect on the United States Economy

While "no smoking" may fast be becoming the status quo,[35] over fifty million Americans still smoke cigarettes.[36] One may question how tobacco can continue to be a legal product after the discovery of all of its harmful effects. As one commentator has noted, "[a]ny other such product already on the market would be ordered to be made safe or taken off the market."[37]

The reasons why tobacco is still a legal product are vast, complicated, and go far back to the beginning of American history. Tobacco has been rooted in culture and economy for almost 450 years.[38]

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[32] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, SMOKING, TOBACCO, AND HEALTH, A FACT BOOK 19 (1989) [hereinafter A FACT BOOK].

[33] Tom Kenworthy, *Secondhand Smoke Peril Affirmed; EPA Move to Endorse Report on Cigarettes May Affect Workplace*, WASH. POST, Jan. 6, 1993, at A1.

[34] *Id.* The advisory panel estimated that ETS "annually causes the lung cancer deaths of approximately 3000 U.S. adults." *Id.*

[35] Hamilton, *supra* note 3, at 40.

[36] EPA FACTS, *supra* note 10, at 1.

[37] Kenneth L. Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 104 (1990).

[38] Hamilton, *supra* note 3, at 40.

> Christopher Columbus became the first European smoker shortly after he was greeted by the Indians of San Salvador . . . . Keeping newly addicted Europeans supplied made Maryland, Virginia, and the Carolinas the most powerful and prosperous New World colonies during the 17th and 18th centuries -- so much so that officials had to order the eager colonists to grow food crops. . . . Things really got rolling when, in 1911, R.J. Reynolds Industries produced the first blended cigarette, Camels. Competitors quickly followed with Lucky Strikes and Chesterfields. Soon cigarette smoking became ubiquitous -- chic, modern, celebrated. There was the Marlboro Man, the redcap calling for Philip Morris. Slogans such as "so round, so firm, so fully packed" became part of the American idiom. Several generations revered puffing stars from Groucho Marx to Humphrey Bogart and James Dean.[39]

The popularity of smoking has been in decline since 1964.[40] Yet, while the 1964 Surgeon General Report declaring that smoking was dangerous to smokers began the decline of consumption by smokers,[41] the tobacco industry in the United States is still very strong, profitable, and deeply ingrained in the tradition of American culture.[42]

"To accomplish the ultimate public health goal of reducing, and ultimately eliminating tobacco use in the United States, an understanding of the complex interrelationship among the economic, social, political, and medical aspects of tobacco use is necessary."[43]

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[39] Hamilton, *supra* note 3, at 40.

[40] *See* David B. Ezra, Note, *Smoker Battery: An Antidote to Second Hand Smoke*, 63 S. CAL. L. REV. 1061, 1061-62 (1990) (42% of American adults smoked in 1967, as compared to 32% in 1987 (citing Joan O'C. Hamilton et al., *"No Smoking" Sweeps America*, BUS. WK., July 27, 1987, at 40)).

[41] Hamilton, *supra* note 3, at 40.

[42] A FACT BOOK, *supra* note 32, at 19.

[43] A FACT BOOK, *supra* note 32, at 19; *see also* Russell, *supra* note 19, at A1 (in 1986 Surgeon General Koop led a national effort to achieve a smoke-free society by the year 2000).

While recognizing the health dangers of tobacco smoke, the Secretary of Agriculture continues to support the cigarette industry through numerous programs of the Department of Agriculture.[44] Strong industry lobbyists in Washington have worked to exempt tobacco products from the Food Drug and Cosmetic Act,[45] the Consumer Product and Safety Act,[46] and the Toxic Substances Control Act[47] which regulate almost all other products.[48] In addition, the industry lobby worked to exempt tobacco processors from any requirement to register their ingredients or to submit their products to standard safety tests.[49]

The only feasible reason for such conflicting actions can be that there is just no alternative in the American culture for tobacco.

> Just as tobacco acceptance and use is firmly rooted in history, product acceptance and use is also entrenched in the addiction of its consumers. These operational considerations in combination with the political and financial clout of the tobacco industry foreclose the realistic possibility of success in achieving and maintaining the outlawing of tobacco . . . .[50]

The courts and the government acknowledge that since cigarettes are the most profitable of American products, and are so ingrained in American society, it is very difficult to completely withdraw these products from the American markets.[51] Such justifications enable tobacco companies to continue to cause further deaths in society, both to their direct smoking customers and to the bystanders that are unfortunate enough to inhale second-hand smoke.

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[44] A FACT BOOK, *supra* note 32, at 35.

[45] 21 U.S.C. §§ 301-94 (1988 & Supp. III 1991).

[46] 15 U.S.C. §§ 2051-84 (1988 & Supp. III 1991).

[47] 15 U.S.C. §§ 2601-71 (1988 & Supp. III 1991).

[48] Hamilton, *supra* note 3, at 40.

[49] Hamilton, *supra* note 3, at 40.

[50] Polin, *supra* note 37, at 104-05 (citations omitted); *see also Plain Talk is Touted for Helping Smokers*, UPI, May 20, 1988, *available in* LEXIS, Nexis Library, UPI File (two studies indicate that tobacco is as addictive as cocaine and heroin).

[51] A FACT BOOK, *supra* note 32, at 21.

B. The Courts, Relying on the Federal Cigarette and Labeling Act, Have Sparingly Found for Smoker Claims Against Tobacco Companies

Smokers who purchased cigarette products directly from the manufacturers have not fared well in lawsuits against tobacco companies.[52] Therefore, one may question how non-smokers' rights can legally be pursued, recognized, and enforced when they are not even direct consumers of the manufacturers. *Cipollone v. Liggett Group, Inc.*[53] was the "first of more than 300 such cases since 1954 in which a tobacco company has lost even a single claim or paid a penny in damages."[54]

The Federal Cigarette Labeling and Advertising Act[55] was initiated as a response to a growing awareness of the health threat

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[52] *See* Cipollone v. Liggett Group, Inc., 112 S. Ct. 2068 (1992) (holding that the Federal Cigarette Labeling and Advertising Act pre-empts state-law claims based on the inadequacy of warnings in cigarette advertising); Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989) (holding that the Labeling Act pre-empts those claims that challenge the adequacy of the warning on packages after 1965). The pending appeal in *Cipollone* was recently dropped due to financial hardship on the plaintiff. Charles Strum, *Legal Costs Doom Suit Against Tobacco Industry*, N.Y. TIMES, Nov. 8, 1992, § 4, at 4.

[53] 893 F.2d 541 (3rd Cir. 1990), *modified*, 112 S. Ct. 2068 (1992). The *Cipollone* case is discussed *infra* notes 63-70 and accompanying text. *See also* Ezra, *supra* note 40, at 1072-73 (although the plaintiff was awarded $400,000, the verdict was widely viewed as being favorable to defendant-tobacco firms in the tobacco industry because the smoker's comparative fault measured at 80%).

[54] Donald Janson, *Cigarette Maker Assessed Damages in Smoker's Death*, N.Y. TIMES, June 14, 1988, at A1. *See also* JOHN A. JENKINS, THE LITIGATORS 114 (1989). While the tobacco companies have spent no money in damages, they have spent millions of dollars in litigation costs. They knew that even one defeat in cases they had pending would produce a flood of litigation. Therefore, they worked together on all litigation regardless of which company was named as a defendant. They published their own private newsletter on the litigation, spent millions of dollars defending even trivial cases – at least $100 million dollars a year overall – and $15 million on one 1986 trial where the plaintiff's budget was only $100,000. *Id.* at 115-16. The tobacco companies also pursued a strategy of intimidation, by stonewalling depositions, denying any knowledge of the numerous studies proving a link between smoking and cancer, and conducting extremely intimate depositions on the plaintiffs so that many would just give up their suits. *Id.* at 116.

[55] 15 U.S.C. §§ 1331-41 (1988) [hereinafter Labeling Act].

incurred by cigarette smoke.[56] However, in initiating the Act, Congress was also concerned with the national economy.[57] "The Labeling Act reflects a delicate . . . balance between two important goals: warning the public of the hazards of cigarette smoking, and protecting the national economy."[58] The court in *Pennington v. Vistron Co.* agreed with the tobacco companies' argument that the "Congressional purpose of protecting the national economy as reflected in the Labeling Act must preempt any tort suit alleging injury from smoking after January 1, 1966."[59] The court stated that in establishing the Act, Congress had already weighed the risks and utility of cigarette smoking and determined that cigarettes may be legally sold when they are properly labelled according to the Labeling

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[56] 15 U.S.C. § 1333 (1988). The Labeling Act's required warnings allow cigarette makers to choose one of the following for display on cigarette packaging:

> SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy.
>
> SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
>
> SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.
>
> SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

Id.

[57] Pennington v. Vistron Co., 876 F.2d 414, 417 (5th Cir. 1989). When the Act was adopted, tobacco ranked third among agricultural exports, fifth among cash crops, and provided a living for 750,000 families. 111 CONG. REC. 13,898, 13,914, 13,915 (1965) (remarks of Senator Ervin and Senator Bass).

[58] *Pennington*, 876 F.2d at 421 (citing Palmer v. Liggett Group, Inc., 825 F.2d 620, 626 (1st Cir. 1987)); *see also* Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3rd Cir. 1986) ("the Act represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy.").

[59] *Pennington*, 876 F.2d at 421. Mrs. Pennington contended that her husband contracted esophagus cancer as a result of his exposure to cigarettes in the workplace. *Id.* at 414. Mr. Pennington allegedly smoked cigarettes as of 1954, and he was exposed to other carcinogens at his job. *Id.*

Act.[60] The court reasoned that if tort claims on the dangerous effects of cigarettes were allowed, large jury verdicts would ruin the tobacco industry.[61] The court refused to issue a decision that would undermine Congressional intent to allow cigarettes to be sold.[62] Thus, the input of the tobacco companies into the national economy seems to take precedence over the American public's health.

Recently, the Third Circuit held in *Cipollone v. Liggett Group Inc.*[63] that the jury should have been instructed that Rose Cipollone's post-1965 smoking bore only on the apportionment of damages, but not on her comparative fault for her own injuries.[64] The Cipollones filed the suit on August 1, 1983, after Rose Cipollone was diagnosed with lung cancer.[65] The suit was brought for monetary losses and suffering resulting from Rose Cipollone's lung cancer.[66] The complaint alleged that the lung cancer resulted from Rose Cipollone's smoking of cigarettes manufactured by the named defendants.[67]

After Rose Cipollone's death in October 1984, Mr. Cipollone continued the lawsuit as Mrs. Cipollone's executor, and on his own behalf.[68] Even though the jury originally awarded Cipollone

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[60] *Id.* at 421.

[61] *Id.* *But see* JENKINS, *supra* note 54, at 129.

> The only reason people say that tobacco companies shouldn't have to pay is because so many people have died from smoking that they'd have to pay billions of dollars in damages. There's something wrong with that logic! They're saying, If you kill a lot of people, you're immune. If you kill only a few, then you should pay.

Id.

[62] *Pennington*, 876 F.2d at 421.

[63] 893 F.2d 541 (3rd Cir. 1990), *modified*, 112 S. Ct. 2068 (1992). The Supreme Court held that § 5 of the 1965 Federal Cigarette Labelling Act did not pre-empt state law damage actions, but only explicit federal or state laws mandating labelling on cigarettes. *Cipollone*, 112 S. Ct. at 2619. Additionally, the Court held that § 5(b) of the Act pre-empts failure to warn and fraudulent misrepresentation claims, but not those based on express warranty or conspiracy. *Id.* at 2625. The case was remanded to decide the claims which were not pre-empted by the 1965 Act. *Id.*

[64] *Cipollone*, 893 F.2d at 547.

[65] *Id.* at 552.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 550-51.

$400,000 in damages from the Liggett Group Inc. based on their failure to warn of health risks before warnings were required on cigarette packs in 1966, the court found that the Labeling Act still acted as a bar to post-1965 claims.[69] Although the court dismissed the plaintiff's post-1965 failure to warn, express warranty, and intentional tort claims against the defendants Liggett, Lorilard, and Philip Morris Co, the Supreme Court reinstated the express warranty and intentional tort claims and held that these claims were not pre-empted.[70]

Since courts generally rule against smokers based on the pre-emptive nature of the Labeling Act, it could be assumed that courts would be even more unwilling to find for non-smoker claims against tobacco companies. However, the rationale courts utilize in disallowing smokers' claims is exactly what could encourage the courts to allow the success of non-smokers' cases. Since non-smokers are not duly warned by the warnings on the cigarette packaging mandated by the Labeling Act, courts should find in favor of non-smokers when they sue tobacco companies. The courts should consider current findings reporting the harm inflicted on non-smokers

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[69] *Id.* at 546-47. The Federal Cigarette Labeling and Advertising Act states, in relevant part:

> It is the policy of the Congress, and the purpose of this chapter to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health whereby –
>
> 1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> 2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. §1331 (1988).

[70] Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2619-2624 (1992).

by the inhalation of ETS,[71] recognize that non-smokers are not warned, and allow them to recover against the tobacco industry.

C. Judicial Treatment of Non-Smokers' Rights

The judiciary has yet to acknowledge non-smokers' rights beyond the right to physical separation of smokers and non-smokers.[72] In *McCracken v. Sloan,*[73] a postal employee sued a fellow employee for smoking cigars in his presence.[74] The court held that it was neither an assault nor a battery for a person to be subjected either to the apprehension of smelling cigar smoke or the actual inhalation of the smoke.[75] Moreover, the court disregarded the plaintiff's claim by saying "[t]his is an apprehension of a touching and a touching which must be endured in a crowded world."[76]

In *Gasper v. Louisiana Stadium and Exposition District,*[77] a group of non-smokers alleged that smoking in the Louisiana Superdome caused physical harm and discomfort to non-smokers in the audience and interfered with their enjoyment of events, thus violating their constitutional rights under the First, Fifth, Ninth, and

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[71] *See, e.g.*, INVOLUNTARY SMOKING, *supra* note 1, at 11-12; *see also supra* notes 20-34 and accompanying text.

[72] *See* Shimp v. New Jersey Bell Tel. Co., 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976) (holding that the defendant must provide safe working conditions for plaintiff by restricting the smoking of employees). One commentator has called the *Shimp* decision "probably the single most significant stride in the nonsmoker movement" because the court not only recognized the dangers of tobacco smoke to non-smokers with allergies, but the dangers to non-smokers generally as well. Reynolds, *supra* note 12, at 464.

[73] 252 S.E.2d 250 (N.C. Ct. App. 1979).

[74] *Id.* at 252. The plaintiff had an allergy to smoke, of which his fellow employee was aware. However, this did not stop the defendant from smoking near McCracken. One witness testified that he heard the defendant say to the plaintiff, "Bill, I know you claim to have an allergy to tobacco smoke and you have presented statements from your doctor stating this, but there is no law against smoking, so I'm going to smoke." *Id.* at 250.

[75] *Id.* at 252.

[76] *Id. See also* Ezra, *supra* note 40, at 1094 (noting that the court disregarded doctor's testimony that the plaintiff suffered physical illness and respiratory problems around tobacco smoke).

[77] 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

Fourteenth Amendments.[78] The district court held that a complaint against allowing tobacco smoking in the Superdome during events failed to state a claim upon which relief could be granted under the Civil Rights Act of 1871.[79]

The court, in dismissing the action, held that the plaintiffs failed to meet the requirements of an action brought under 42 U.S.C. Section 1983.[80] Contrary to the plaintiff's claims that allowing smoking in the Superdome discourages individuals from exercising their First Amendment right to attend events, the court stated that permitting smoking in the Superdome does not create a chilling effect on the First Amendment.[81] Moreover, the court dismissed the plaintiff's claim that they had a right to smoke-free air under the Ninth Amendment.[82] The court found that the right to breathe smoke-free air is not of the same constitutional dimensions of those involved in *Griswold v. Connecticut*,[83] and thus, is not protected under the Ninth Amendment.[84] The Court of Appeals for the Fifth Circuit affirmed and held that there is no constitutional right to prohibit others from smoking in a public place.[85]

It has been determined that ETS can only be removed from the air by removing the source: tobacco smoke.[86] "Separating smokers and non-smokers in the same room may reduce, but will not eliminate, non-smokers' exposure to tobacco smoke."[87] Thus, the courts must begin to take non-smoker rights more seriously and acknowledge new ways to satisfy their claims.

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[78] *Gasper*, 418 F. Supp. at 717.

[79] *Id.* at 716, 723.

[80] *Id.* at 716-17.

[81] *Id.* at 718.

[82] *Id.* at 722.

[83] 381 U.S. 479 (1965).

[84] Gasper v. Louisiana Stadium and Exposition District, 418 F. Supp. 716, 722 (E.D. La. 1976).

[85] Gasper v. Louisiana Stadium and Exposition District, 577 F.2d 897, 898 (5th Cir. 1978).

[86] EPA FACTS, *supra* note 10, at 2.

[87] EPA FACTS, *supra* note 10, at 2.

IV. Broin v. Phillip Morris Companies, Inc. The First Class Action Non-smoker Suit Against the Tobacco Companies

A. Background

The American public is now faced with the first class action suit against tobacco companies involving exposure to ETS.[88] In October 1991, seven current and former flight attendants filed a class action suit against tobacco companies declaring that they had contracted cancer, heart disease, and respiratory illnesses because they had been exposed to smoke from passengers' cigarettes.[89] The plaintiffs stated that they did not smoke and claimed that they had all contracted their ailments during their years as flight attendants before Congress outlawed smoking on all flights in the forty-eight contiguous states.[90] The plaintiffs named as defendants the Philip Morris Companies, the R.J.R. Nabisco Holdings Corporation, the Lorillard subsidiary of the Loews Corporation, American Brands, the Liggett unit of Brooke Group Ltd., and Dosal Tobacco, with more

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[88] Plaintiff's Complaint at 11, Broin v. Phillip Morris Co., Inc., No. 91-49738 CA (22) (Fla. Cir. Ct. filed Jan 17, 1992) (on file with the *New York Law School Journal of Human Rights*).

[89] *See* Plaintiff's Complaint at 14, Broin v. Philip Morris Co., Inc., No. 91-49738 (Fla. Cir. Ct. filed Jan. 17, 1992); *Flight Attendants Sue Tobacco Firms -- Seven Say Smoke On Planes Made Them Ill*, CHI. TRIB., Nov. 1, 1991, at 3. Thirty flight attendants, and their representatives, have been named as parties to the class action in the amended complaint filed on Jan. 27, 1992. Plaintiff's Complaint at 11-14, *Broin* (No. 91-49738). Each of the named representatives and members of the class have sustained serious injuries from their exposure to second-hand smoke in one or more of the following ways: cancer of the lung, larynx, oral cavity, esophagus, bladder, kidney, pancreas, stomach, or cervix, chronic bronchitis, emphysema, coronary heart disease and cardiovascular disease, endometritis, cerebrovascular disease, intra-uterine growth retardation, infertility, complications in pregnancy, infant mortality, peptic ulcer disease, aggravation of asthmatic conditions and allergies, respiratory ailments, lung diseases, and a reasonable fear of contracting one or more of these diseases. *Id.* at 16-17.

[90] Plaintiff's Complaint at 14, *Broin* (No. 91-49738). Effective April 23, 1988, smoking was banned on all domestic flights scheduled for two hours or less. Department of Transportation and Related Agencies Appropriation Act, 49 U.S.C. § 1374 (1988 & Supp. II 1990). In early 1990 the ban was extended to all domestic flights, except those to or from Alaska and Hawaii scheduled for more than six hours. 49 U.S.C. app. § 1374(d) (Supp. II 1990).

companies to be added later.[91] The ailments now affecting the flight attendants range from a hypersensitivity to smoke to lung cancer.[92]

The *Broin* case alleges that the named representatives and members of its class have been exposed to the toxins and carcinogens in cigarette smoke for considerable periods of time while working as flight attendants, and that they were unaware of such dangers to which they were exposed.[93] Moreover, the plaintiffs maintain that the defendants have conspired to deprive them of the necessary medical data reflecting the dangers associated with passive smoking.[94] The plaintiffs claim that the defendants have known for years that "cigarettes guarantee death, cancer, heart disease, pain, agony, anguish and grief to millions of Americans."[95] However, the defendants do not seem to care; they have spent billions of dollars to hide and cover up the facts.[96] They have been "engaged in deception on a grand scale," all for the sake of money.[97]

The complaint notes that "[t]he tobacco industry through brilliant deception and artifice convinced the legal system (juries and judges alike) and the public that smokers smoked because they chose to do so."[98] However, the truth is that smokers are chemical addicts

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[91] Plaintiff's Complaint at 1, *Broin* (No. 91-49738).

[92] *Id.*

[93] *Id.* at 19. Named plaintiff Norma Broin never smoked cigarettes, nor has any member of her family. She grew up as a Mormon in Utah, and at age 32 she contracted lung cancer. *Id.* at 18. The plaintiff's complaint states: "Each of the plaintiffs was a healthy non-smoker and exposure to cigarette smoking while working as a flight attendant has changed their lives. They are innocent victims who had no choice; smoke was a constant in their work environment and they had to inhale it." *Id.* at 29.

[94] *Id.* at 19-20.

[95] Plaintiff's Complaint at 26, *Broin* (No. 91-49738).

[96] *Id. See also* JENKINS, *supra* note 54, at 184-85. After the Liggett company confirmed for itself that cigarette smoke produced cancer tumors on the backs of mice, they continued to deny that their product caused cancer. They failed to publish the information for fear that they would lose sales, and for fear that it would "expose them to liability suits for all the years they sold the product knowing that it caused cancer . . . ." *Id.* (quoting Marc Edell, the lawyer for the Cipollones in their suit against the tobacco companies).

[97] Plaintiff's Complaint at 26, *Broin* (No. 91-49738).

[98] *Id.* at 22.

who are unable to stop smoking on their own.[99] Moreover, besides creating millions of nicotine addicts, the tobacco companies have successfully "brainwashed generations of Americans into believing that smoking was glamorous, attractive, adventurous, cool, hip, macho, and sexy -- the key to personal and career success."[100] A teenager would have had to be very strong to say no to cigarettes, as "over 80% of lifelong smokers become hooked as teenagers or even younger."[101] However, non-smokers have been smart enough to "resist the blandishments of the forty million dollar behemoth," yet they are helpless against the smoke of others.[102] Non-smokers have been victimized by the original victims of the multibillion dollar tobacco advertising campaigns.[103]

The *Broin* complaint alleges that the tobacco companies have failed to place any warnings on their cigarette packages or their advertising, so as to advise the public that constant and repeated exposure to cigarette smoke exposes non-smokers to serious health risks.[104] Although the risk of harm to non-smokers from the inhalation of ETS has been a "well kept secret" of the tobacco industry for many years, it "has only come to light recently when otherwise healthy non-smokers have contracted lung cancer and other smoke related illnesses. The non smoking victims of passive smoke have only recently put two and two together."[105]

B. Theories of Liability

There are a number of theories of liability that can be claimed

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[99] *Id.* *See also* Polin, *supra* note 37, at 103 ("Many studies have indicated that tobacco is even more addictive than heroin. The average smoker of 30 cigarettes per day delivers 50,000 to 70,000 doses of the drug to his or her brain; no other drug incurs the same frequency and regularity.").

[100] Plaintiff's Complaint at 22, *Broin* (No. 91-49738). A majority of the movies made between 1930 and 1960 portrayed the leading men and women as smokers. *Id.*

[101] *Id.* at 23.

[102] *Id.*

[103] *Id.* at 26.

[104] *Id.* at 27.

[105] *Id.*

by non-smokers in suits against tobacco companies.[106] Products liability is "an area of the law involving the liability of those who supply goods or products for the use of others purchasers, users and *bystanders*, for losses of various kinds resulting from so-called defects in those products."[107] Strict liability is defined as "liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care."[108]

The plaintiffs in *Broin* claimed that the cigarettes which the tobacco companies manufactured, sold, and distributed were in a defective state because they were unreasonably dangerous to bystanders in the vicinity of cigarette smoke.[109] Moreover, the cigarettes were manufactured defectively and were unreasonably dangerous at the time they left the manufacturers' possession.[110]

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[106] For example, the *Broin* case asserted causes of action in strict liability in tort, breach of implied warranty of merchantability and fitness, negligence, fraud, misrepresentation, and conspiracy to misrepresent and to commit fraud. Plaintiff's Complaint at 29-36, *Broin* (No. 91-49738).

[107] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 95, at 677 (5th ed. 1984) (emphasis added) [hereinafter PROSSER]. *See, e.g.*, Macpherson v. Buick Motor Co., 217 N.Y. 382 (1916) (holding if the nature of a product is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger).

[108] PROSSER, *supra* note 107, § 75, at 534. Strict liability is often referred to as "liability without fault." *Id.* Courts finding strict liability have tended to stress the fact that the defendant is acting for his own purposes, seeking a benefit or profit from such activities, and that he is in a better position to pay for the damages than is the innocent victim. *Id.* at 537.

[109] Plaintiff's Complaint at 30, *Broin* (No. 91-49738). A dangerously defective product is one which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character. Phillips v. Kimwood Machine Co., 525 P.2d 1033, 1036 (Or. 1974). *See* Borel v. Fireboard Paper Products Corp., 493 F.2d 1076, 1088 (5th Cir. 1973); Welch v. Outboard Marine Corp., 481 F.2d 252, 254 (5th Cir. 1973).

[110] Plaintiff's Complaint at 30, *Broin* (No. 91-49738). The complaint also alleges that the cigarettes were unreasonably dangerous because they poisoned non-smokers as well as smokers in the smokers' vicinity. *Id.* This enhances the plaintiff's theory that the tobacco companies are liable for breach of implied warranty of merchantability and fitness. *Id.* at 31. The plaintiff class alleges that the cigarette manufacturers impliedly warranted that the cigarettes were fit for the ordinary purposes for which they were intended, and they breached this warranty by manufacturing cigarettes that exposed innocent bystanders to an unreasonable risk of harm from inhaling ETS in an enclosed

It has often been suggested that people subjected to second-hand smoke could bring about product and strict liability suits, and that tobacco manufacturers would find it difficult to mount a defense based on assumption of the risk.[111] After all, the basis for finding in favor of tobacco companies in smoker product liability suits is that the Labeling Act pre-empted such claims after 1966 and that the smokers assumed the risk of smoking.[112] However, non-smokers have neither assumed such a risk, nor have they been notified of the health risks attendant to being near smokers.[113] Therefore, non-smokers should be able to maintain a cause of action against tobacco companies for endangering their well-being through the promotion and sale of tobacco in their community.[114]

In *Cipollone v. Liggett Group Inc.*, the jury found that Mrs. Cipollone "voluntarily and unreasonably [encountered] a known danger by smoking cigarettes."[115] It is apparent that non-smokers do not *voluntarily* encounter the dangers of cigarette smoke by simply being within the proximity of smokers. Furthermore, the court's reliance on the notice of risks given to smokers via the Labeling Act[116] clearly cannot apply to non-smokers, as they are not the ones who are warned through the contents of a cigarette label. In fact, a failure to warn argument could strengthen the success of a tort-based claim which recognizes non-smokers' claims against tobacco companies. Under the failure to warn theory, a product may be

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area such as a work environment. *Id.* Additionally, as a proximate and direct result of the defendants' breach, non-smokers suffered serious injuries. *Id.*

[111] Ezra, *supra* note 40, at 1072 n.48; *see also* PROSSER, *supra* note 107, § 68, at 487 ("The defense of assumption of risk is in fact quite narrowly confined and restricted by two or three elements or requirements: first, the plaintiff must know that the risk is present, and he must further understand its nature; and second, his choice to incur it must be free and voluntary."); Note, *Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809, 810 n.8 (1986).

[112] *See* Cipollone v. Liggett Group Inc., 112 S. Ct. 2608, 2621-22 (1992).

[113] The plaintiffs in *Broin* also claim that the tobacco companies failed to warn members of the public that passive exposure to ETS caused serious health risks. Plaintiff's Complaint at 30, *Broin* (No. 91-49738).

[114] *See* Larry Kraft, *Smoking in Public Places: Living with a Dying Custom*, 64 N.D. L. REV. 329, 335 n.19 (1988) (innocent third parties may have claims under § 402A of the Restatement (Second) of Torts).

[115] Cipollone v. Liggett Group, Inc., 893 F.2d 541, 554 (3d Cir. 1990).

[116] 15 U.S.C. §§ 1331-41 (1988).

unreasonably dangerous "if the manufacturer fails to adequately warn about a danger related to the way a product is designed."[117] Because the Labeling Act does not require the warning on the cigarette package to include a warning that cigarette smoke poses proven health risks to non-smokers, smokers too are not warned of the risks they are imposing on non-smokers. Thus, the Labeling Act is inadequate in its standards because it fails to require the warnings on cigarette packages to include the documented risks to non-smokers' health which smoking imposes.[118]

The Supreme Court has held that state law claims based on advertising and promotion are pre-empted by the Labeling Act.[119] However, the Labeling Act does not provide sufficient warning to non-smokers of the risks to their health attributable to second-hand smoke. To be successful with a failure to warn claim, a plaintiff must show that the product is unsafe without a warning, the defendant failed to provide a warning, and the failure to warn was the proximate cause of the injury.[120] Moreover, there will be no liability unless the manufacturer failed to take precautions that a reasonable person would have taken in presenting the product to the public.[121] Following this reasoning, there should be liability for the failure to alert consumers to the dangerous risks to non-smokers that are caused by tobacco products.

The unreasonably dangerous theory in torts applies when a product contains an unintended abnormality.[122] There is no doubt that causing cancer to innocent bystanders is an unintended abnormality. Moreover, to be unreasonably dangerous, the product sold must be "dangerous to an extent beyond that which would be contemplated by an ordinary consumer who purchases it, with the ordinary knowledge

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[117] Pennington v. Vistron Corp., 876 F.2d 414, 420 (5th Cir. 1989) (quoting Halphen v. Johns-Manville Sales Corp., 484 So.2d 110, 114-15 (La. 1986); *see also* Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189 (E.D. Tenn. 1985) (holding that for a company to be held liable, a product must be unreasonably dangerous).

[118] *See generally* INVOLUNTARY SMOKING, *supra* note 1, at 7.

[119] Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2621 (1992).

[120] *Id.*

[121] PROSSER, *supra* note 107, § 99, at 697.

[122] Pennington v. Vistron Corp., 876 F.2d 414, 419 (5th Cir. 1989) (citing Halphen v. Johns-Manville Sales Corp., 484 So.2d 110, 113 (La. 1986)).

common to the community as to its characteristics . . . ."[123] A conclusion may be drawn that the ordinary consumer does not intend to produce physical harm or danger to those persons near him or her. With this in mind, it should be noted that deaths are a predictable consequence of doing exactly what cigarettes are intended for: smoking.[124] As one commentator has noted, "[t]obacco is uniquely harmful because it is unsafe when used as intended."[125]

An analogy to alcohol use is helpful for showing just how unreasonably dangerous tobacco is.[126] It has been proven that "the use of alcohol as intended (i.e. when consumed in moderation) may have beneficial effects."[127] One study examined the drinking behavior of 87,526 female nurses and found that "women drinking moderate amounts of alcohol had substantially reduced risks of coronary disease and ischemic stroke . . . ."[128] The study concluded that the "net effect of moderate alcohol intake might therefore be expected to be beneficial."[129] Yet, there are no known benefits of tobacco.[130]

Therefore, by nature, tobacco is an unreasonably dangerous product. The manufacturers should be forced to pay for putting such a product into the stream of commerce. If the American government is not going to hold cigarette manufacturers responsible for abiding by the regulations that other drug companies must adhere to, then the tobacco companies must pay. By utilizing the above tort theories, non-smokers would be granted the right to breathe clean air and not

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[123] Roysdon v. R.J. Reynolds Tobacco, 623 F. Supp. 1189, 1191 (E.D. Tenn. 1985).

[124] Polin, *supra* note 37, at 104 n.33.

[125] *A.B.A. Rejects Tobacco Ad Ban*, A.B.A. J., Apr. 1, 1987, at 32 (quoting Robert McAfee, trustee for the American Medical Association, before the American Bar Association on its debate whether to endorse a resolution favoring a ban of tobacco advertising).

[126] Ezra, *supra* note 40, at 1079 n.84 (there are restrictions on the use of alcohol, i.e. public drunkenness or disorderly conduct, but not on cigarettes).

[127] Polin, *supra* note 37, at 104 n.33. *See* Meir J. Stampfer et al., *A Prospective Study of Moderate Alcohol Consumption and the Risk of Coronary Disease and Stroke in Women*, 319 NEW ENG. J. MED. 267 (1988).

[128] Stampfer, *supra* note 127, at 270.

[129] *Id.* at 272.

[130] The author called the Philip Morris Company to see if they had anything to contribute to this paper; namely any known benefits of tobacco smoke besides economic benefits. The company declined to help or offer any assistance at all. Through all of the research, the author was unable to uncover any benefits of tobacco products.

be harmed by those around them.

In addition to negligence, the *Broin* case also accuses tobacco companies of fraud and misrepresentation and conspiracy to misrepresent and commit fraud.[131] While the manufacturers were aware of specific data linking ETS with cancer and other serious injuries, they "intentionally and recklessly hid the facts from the public."[132] Additionally, the tobacco companies have flooded the American public with the misleading idea that only smokers were at risk from cigarette smoking.[133] They have done this by conspiring to deprive the American public of the data proving the dangers of smoking to non-smokers.[134] Through any or all of these various theories the American court system must begin to recognize non-smokers' rights and find the multi-billion dollar tobacco industry liable for damages caused by second-hand smoke.

V. Proposals to Address the Problem

A. Adopt a Market Share Theory

It is only a matter of time before the courts will be forced to recognize non-smokers' rights through one theory or another. However, it will be hard to determine which company, or companies, is at fault. Instead of attempting to narrow it down to one company, the courts should follow the reasoning of the diethylstilbestrol (DES) cases.[135] The DES cases are a good source to follow, as they were

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[131] Plaintiff's Complaint at 34-36, Broin v. Philip Morris Co., Inc., No. 91-49738 (Fla. Cir. Ct. filed Jan. 17, 1992).

[132] *Id.* at 34.

[133] *Id.* at 35.

[134] *Id.*

[135] Diethylstilbestrol was a drug marketed by about 200 companies as a synthetic estrogen used for the purpose of preventing a miscarriage. A number of lawsuits have been brought by children adversely affected by the use of the drug. *See* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y.), *cert. denied*, 493 U.S. 944 (1989); Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

also cases brought by second parties to a product.[136] Similar to non-smokers, children born to mothers who took DES did not voluntarily incur a risk of harm to themselves. However, the health of both non-smokers and children born to DES mothers were and are in serious jeopardy.

The famous DES cases were brought by "DES daughters," primarily female women, born to mothers who took the DES drug to prevent miscarriages.[137] DES was withdrawn from the market in the late 1970s when it was discovered that children of mothers who took it suffered from cancer, infertility, and birth defects.[138] In these cases it was very difficult for the plaintiffs to establish exactly which company manufactured the DES that their mother ingested. Therefore, courts have held that "[e]ach defendant will be liable for the proportion of the judgement represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries."[139]

This theory of liability would prove most effective in non-smoker cases, as it is as difficult to prove which brand of cigarette the harmful smoke came from as it is to prove exactly which DES company produced a drug from an identical formula. It is reasonable to measure the likelihood that any of the tobacco companies caused a particular non-smoker's injuries by the percentage of cigarettes they sold. Thus, once the courts begin to recognize the claims of non-

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[136] In the DES cases, it is the children of the DES users, not the DES takers themselves, who are bringing suit. Similarly, the non-smokers are second level parties who do not smoke themselves.

[137] *See, e.g.*, Jeanne Wright, *The Uncertain Legacy of DES*, L.A. TIMES, Feb. 9, 1992, at E1.

[138] Ronald Sullivan, *DES Victim to Get $4 Million; Jury Wanted to Give More*, N.Y. TIMES, Oct. 18, 1991, at B1.

[139] *Sindell*, 607 P.2d at 924. The *Sindell* court reasoned that the defendant manufacturers were better able to bear the cost of the injuries resulting from the production of defective products. *Id.* at 936. "The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety. *Id.* The courts did not want the plaintiff to be at fault for failing to provide evidence of causation of one particular manufacturer. *Id.* at 937. For a discussion of the market share theory, see Kurt M. Zitzer & Mark D. Ginsberg, *Illinois Rejects Market Share Liability: A Policy Based Analysis of* Smith v. Eli Lilly & Co., 79 KY. L.J. 617 (1991).

smokers, they should use the theory of market share liability to determine the judgments. This would prevent the failure of plaintiffs' claims merely because the plaintiffs cannot prove which tobacco company is at fault.

B. Mandate a Duty to Warn Non-Smokers

Hopefully, once cigarette companies are found to be liable for harm inflicted upon non-smokers, legislatures will begin to take such issues more seriously. Since numerous reports have established that ETS causes serious illnesses in non-smokers, the Labeling Act must be amended to include warning non-smokers of health risks. Presently, cigarette manufacturers can choose one of four labels to put on their packages.[140] None of these labels, however, addresses the dangers ETS poses to innocent bystanders. Cigarette companies must take responsibility for telling the truth to their consumers and advising them that they are injuring others.[141] If made aware of the damage second-hand smoke causes, reasonable smokers might modify their behavior to avoid this harm.

The Labeling Act's required warnings must ultimately include a mandatory warning similar to the following:

> SURGEON GENERAL'S WARNING: Smoking causes disease and illness not only to the individual who is smoking, but also to those who inhale tobacco smoke that has been emitted into the air.

If such a warning were placed on cigarette packages, perhaps people would think twice before smoking in the presence of others. However, until that day arrives, non-smokers must be able to recover for their injuries inflicted by the tobacco industry.

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[140] *See supra* note 56.

[141] Plaintiff's Complaint at 28, Broin v. Philip Morris Co., Inc., No. 91-49738 (Fla. Cir. Ct. filed Jan. 17, 1992).

V. Conclusion

Former Surgeon General Everett Koop has advocated "a smoke free society by the year 2000."[142] However, until this goal is accomplished, non-smokers must be able to protect themselves from the established dangers of smoking. Tobacco companies and their addicted and dedicated consumers should not have the right to harm innocent bystanders without suffering any legal consequences. Flight attendants, as well as other non-smokers, should not suffer ailments for simply performing their duties in areas where smoking is prevalent.

The dangers of tobacco which affect smokers and non-smokers alike are becoming more obvious each day. Smoking is not looked upon as glamorously as it was in the past, and the tobacco companies are doing whatever they can to keep their consumers addicted. The R.J. Reynolds Tobacco Company has a unique campaign for its Camel cigarettes.[143] The company invites its consumers to relate to "Joe Camel," a cartoon animal with an oversized nose. He dresses up in stereotypical masculine gear, such as hard-hats and tuxedos, which is designed to appeal to the predominantly male Camel customers.[144] However, although Joe Camel has been around since 1974, he has recently come under attack because society does not want smokers portrayed by the media as "smooth characters."[145] Anti-smoking activists have especially singled out this campaign because of its "efficacy in reaching children."[146] Children relate to the Joe Camel caricature as well, if not better, than they do to a Walt Disney character.[147]

Apparently, the issue is no longer limited to irritation and annoyance, but extends to severe illness and death. At the very least, non-smokers must be able to seek legal redress through the judicial

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[142] Russell, *supra* note 19, at A1.

[143] Stuart Elliot, *The Media Business: Advertising; Camel's Success and Controversy*, N.Y. TIMES, Dec. 12, 1991, at D1.

[144] *Id.*

[145] *Id.* "Smooth Character" is the Joe Camel slogan. *Id.*

[146] *Id.*

[147] Jeffrey Scott, *Camel's Camel: Is He Too Cool?: Studies Say Kids Affected But Industry Defends Ads*, THE ATLANTA J. & CONST., Dec. 11, 1991, at A1.

system for the ailments caused by ETS. The courts must begin to recognize non-smokers' rights and guarantee non-smokers relief through litigation. Through products liability, strict liability, or the theory of unreasonably dangerous products, the judicial system must enable innocent non-smokers to be compensated for their harm. The courts can easily determine fault by utilizing a market share theory of liability. The courts should use tort law to recognize the crucial and special needs of non-smokers who suffer at the hands of smokers. Ultimately, legislation must be enacted that protects the health, safety, and welfare of the non-smoking public.

Cindy L. Pressman