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Casino Owners Take Heed: Indoor Smoking is About to Be Extinguished

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**CASINO OWNERS TAKE HEED:
INDOOR SMOKING IS ABOUT TO BE EXTINGUISHED**

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INTRODUCTION

For years, casino workers and anti-smoking coalitions have fought a losing battle to put an end to smoking in casinos.¹ Fortuitously, the COVID-19 pandemic may be the unexpected catalyst to finally turn the tide of the war. As part of the reopening process following the height of the pandemic, more than 200 casinos across the country reopened with smoke-free policies.² Initially, many of these policies were temporary measures implemented as a condition for reopening during the pandemic.³ However, there has been a significant showing of support for permanent smoke-free policies in casinos.⁴

To many, it may come as a surprise that indoor smoking persists in this country. It is rare to find a city or state that has not enacted some prohibition against smoking indoors.⁵ Yet, there is still one place where Americans can bet they will be allowed to smoke indoors: casinos.⁶ The

1. See, e.g., Jeff Edelstein, *Smoking in Casinos May Be Coming to an End Thanks to COVID-19*, US BETS (Mar. 12, 2021), <https://www.usbets.com/smoking-casinos-end-covid/> (reporting a proposed bill to end smoking in casinos has been “floating around” the New Jersey State Legislature since 2007).

2. Christopher Rios, *The Pandemic Has Pushed More than 200 US Casinos to Go ‘Smoke Free’*, CNN (Mar. 2, 2021, 5:44 AM), https://www.cnn.com/world/live-news/coronavirus-pandemic-vaccine-updates-03-02-21/h_a86e70f2fb90e54a7c31f06f6688ba92.

3. Eric Conklin, *Legislation to Ban Smoking in Casinos Reintroduced*, PRESS OF ATL. CITY (Jan. 12, 2022), https://pressofatlanticcity.com/news/local/legislation-to-ban-smoking-in-casinos-reintroduced/article_a90317c0-73e7-11ec-a2dd-6f55bffc1f19.html.

4. *Id.*; see also Edelstein, *supra* note 1 (noting several examples of casinos going smoke-free).

5. See *Overview List – Number of Smokefree and Other Tobacco-Related Laws*, AM. NONSMOKERS’ RTS. FOUND. (Feb. 5, 2022), <http://no-smoke.org/wp-content/uploads/pdf/mediaordlist.pdf> [hereinafter *Overview List*] (listing state-by-state statistics on smoke-free laws).

6. See *State Tobacco Activities Tracking and Evaluation (STATE) System: STATE System Gaming Facilities Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 27, 2022), <https://www.cdc.gov/statesystem/factsheets/gaming/Gaming.html> [hereinafter *STATE Fact Sheet*] (discussing overall statistics of smoking allowed in gaming facilities); Teresa Chang, *Smoking in Las Vegas Casinos: Rules and Regulations in 2021*, ONLINE-CASINOS.COM (Feb. 28, 2021), <https://www.online-casinos.com/guide/can-you-smoke-in-casinos/> (stating Nevada currently allows smoking in casinos).

gaming industry is often exempt from state-enacted “clean indoor air” acts, which prohibit indoor smoking in nearly all other public places.⁷ States pass these acts for the sole purpose of protecting the public from the irrebuttable harmful effects of secondhand smoke. However, casinos allow indoor smoking, blatantly disregarding the health and safety of casino patrons and employees in favor of profits.⁸

Thus, casino workers remain among the few unprotected from secondhand smoke in the workplace. Casino workers subjected to secondhand smoke are at higher risk for illness and premature death.⁹ Compounding the issue, casino workers injured by secondhand smoke exposure have no adequate cause of action or remedy for recovery. In multiple jurisdictions, casino workers cannot claim workers’ compensation benefits because secondhand smoke exposure is not considered an occupational disease.¹⁰ Additionally, tort recovery for secondhand

7. See, e.g., KAN. STAT. ANN. § 21-6110(d)(4) (2021) (exempting “the gaming floor of a lottery gaming facility or racetrack gaming facility” from the Kansas Indoor Clean Air Act); LA. STAT. ANN. § 40:1291.11(B)(8) (2021) (exempting designated smoking areas in gaming establishments from the Louisiana Smokefree Air Act); NEV. REV. STAT. § 202.2483(3)(a) (2021) (exempting areas within casinos from the Nevada Clean Indoor Air Act); N.J. STAT. ANN. § 26:3D-59(e)(1)–(2) (West 2021) (exempting casinos from the New Jersey Smoke-Free Air Act); 35 PA. CONS. STAT. § 637.3(b)(11) (2022) (exempting “25% of the gaming floor at a licensed facility” from the Pennsylvania Clean Indoor Air Act).

8. Chang, *supra* note 6.

9. See *STATE Fact Sheet, supra* note 6; *The Risks of Secondhand Smoke in Casinos*, AM. CANCER SOC’Y CANCER ACTION NETWORK (Aug. 2018), <https://www.fightcancer.org/sites/default/files/The%20risk%20of%20secondhand%20smoke%20in%20casinos%202018.pdf> [hereinafter *Risks of Secondhand Smoke in Casinos*] (discussing statistics and negative health effects caused by secondhand smoke exposure).

10. *Compare Mack v. Cnty. of Rockland*, 525 N.E. 2d 744 (N.Y. 1988) (affirming denial of workers’ compensation benefits because eye condition caused by exposure to cigarette smoke was not an “occupational disease” within the meaning of New York Workers’ Compensation Law section 3(2)), with *Palmer v. Del Webb’s High Sierra*, 838 P.2d 435, 437 (Nev. 1992) (holding “diseases claimed to be caused by environmental tobacco smoke present in the work place are not covered by the Nevada Occupational Disease Act”), and *Heng v. Appeals Off. of the Nev. Dep’t of Admin.*, Nos. CV15-00377, CV16-00336, 2016 Nev. Dist. LEXIS 783, at *7 (D. Nev. May 11, 2016) (finding legislature and prior decisions hold that secondhand smoke exposure is not an occupational disease).

smoke exposure is also largely unavailable;¹¹ thus, casino owners are effectively shielded from liability for casino workers' injuries caused by secondhand smoke.

For decades, scholars have examined the lack of available remedies to employees injured by secondhand smoke exposure.¹² During the twenty-first century, the call for reform motivated an increase in legislation prohibiting smoking indoors and in workplaces.¹³ Such legislation provided remedies for injured employees, including recovery under an employer's common law duty to provide a safe working environment.¹⁴ This progress rendered much of the previous scholars' arguments moot because suggestions to legislate and provide relief were successful. However, as discussed throughout this Comment, the gaming industry has remained exempt from protective indoor smoking legislation and left injured casino workers with little relief. This Comment reviews the findings of previous scholars who noted a general lack of relief available to employees injured by secondhand smoke exposure and specifically discusses injury to employees in the gaming industry who have yet to benefit from anti-smoking legislation.

11. See *Badillo v. Am. Tobacco Co.*, 202 F.R.D. 261, 264 (D. Nev. 2001) (denying Nevada casino dealers' class-action suit for strict liability, negligence, fraud, and misrepresentation alleging injuries by workplace exposure to secondhand smoke); *Bevrotte v. Caesars Ent. Corp.*, No. 11-543, 2012 U.S. Dist. LEXIS 95712, at *9 (E.D. La. July 11, 2012) (dismissing wrongful death suit against casino employer alleging death of plaintiff's son caused by leukemia contracted because of exposure to secondhand smoke at casino workplace); *Kastroll v. Wynn Resorts, Ltd.*, No. 2:09-cv-2034-LDG-VCP, 2013 U.S. Dist. LEXIS 16778, at *9 (D. Nev. Feb. 6, 2013) (granting summary judgment for lack of subject matter jurisdiction against class action suit alleging casino employer breached its duty to provide a reasonably safe workplace to its employees by failing to take reasonable measures to protect employees from secondhand smoke).

12. See Susan Ross, Comment, *Second-Hand Smoke: The Asbestos and Benzene of the Nineties*, 25 ARIZ. ST. L.J. 713, 713 (1993); Kathleen Sablone, Note, *A Spark in the Battle Between Smokers and Nonsmokers: Johannesen v. New York City Department of Housing Preservation & Development*, 36 B.C. L. REV. 1089 (1995); Melissa A. Vallone, Note, *Employer Liability for Workplace Environmental Tobacco Smoke: Get Out of the Fog*, 30 VAL. U. L. REV. 811 (1996).

13. See *Tobacco Control Milestones*, AM. LUNG ASS'N (Jan. 26, 2022), <https://www.lung.org/research/sotc/tobacco-timeline> (chronicling timeline of major events in tobacco regulation).

14. See Sablone, *supra* note 12, at 1098–1101; Vallone, *supra* note 12, at 836–37.

Over the last two years, businesses have taken economically harmful measures to prevent transmission of COVID-19 (such as shuttering businesses and imposing restrictions on travel). Seemingly signaling society's current prioritization of public health over profit.¹⁵ For many, the pandemic was a wake-up call to focus on and improve their health.¹⁶ Thus, conditions are ripe for casino workers to demand an end to indoor smoking in casinos. Legislatures and courts are likely more amenable to protecting casino workers by either repealing casino exemptions in states' clean indoor air acts or recognizing exposure to secondhand smoke as an occupational disease recoverable under workers' compensation laws or tort causes of action. Casino owners would be wise to implement change now as their shield from liability for injuries caused by secondhand smoke may soon come to an end.

This Comment suggests that it is in the best interest of casino owners to (1) implement bans on indoor smoking on their own volition and (2) support legislation eliminating the smoking ban exemption for casinos in all states to create an even "smoke-free playing field" in the gaming industry. Banning indoor smoking would not only help protect casino owners from future potential liability and casino employees from the dangers of secondhand smoke exposure, but casinos will also improve their public relations image and attract more customers as the public has shown strong support for smoke-free indoor environments. Additionally, data suggests that smoking bans may also increase revenue,¹⁷ undermining casino owners' primary arguments for allowing indoor smoking.

Part I of this Comment provides a brief description of the health effects of secondhand smoke, the anti-smoking legislation enacted to date, including the exemptions provided to casinos, and the harm

15. See Kimberly Amadeo, *How COVID-19 Has Affected the U.S. Economy*, THE BALANCE (Dec. 24, 2021), <https://www.thebalance.com/how-covid-19-has-affected-the-us-economy-5092445> (discussing the economic impact of measures taken to prevent transmission of the COVID-19 pandemic).

16. Andrea Klemes, *COVID is a Health Wake-Up Call for Many Americans*, MDVIP (Aug. 12, 2020), <https://www.mdvip.com/about-mdvip/blog/covid-health-wake-call-many-americans> (describing ways Americans have prioritized health since the COVID-19 pandemic began).

17. See, e.g., *BREAKING: Atlantic City Casinos Set Revenue Record While Operating Smokefree in June*, AM. NONSMOKERS' RTS. FOUND. (July 16, 2021), <https://no-smoke.org/atlantic-city-casinos-revenue-record/> [hereinafter *Atlantic City Casinos Set Revenue Record*].

employees are subjected to because of the exemptions. Part II analyzes the lack of available tort and administrative remedies available to casino employees injured by secondhand smoke and how changes spurred by the COVID-19 pandemic may likely impact available remedies, creating liability for casino owners who expose workers to secondhand smoke. Part III provides a rationale for casino owners implementing indoor smoking bans. Part III also explains why casino owners should support legislation eliminating the casino smoking ban exemptions in all states to create an even “smoke-free playing field” in the gaming industry. Finally, this Comment analyzes why indoor smoking is a greater liability than an asset for casinos.

I. BACKGROUND

Long gone are the days when smoking tobacco exuded glamour and sophistication. Drooping cigarettes out of the mouths of classic stars such as James Dean and Humphrey Bogart have been replaced with anti-smoking campaigns’ haunting images of people living with serious long-term health effects from smoking and secondhand smoke exposure.¹⁸ Despite the effectiveness of anti-smoking campaigns and wide-spread education of smoking’s adverse health effects, tobacco use remains the leading cause of preventable death in the United States, with approximately 480,000 deaths each year.¹⁹ For every one smoker who dies, at least thirty more smokers suffer from a serious smoking-related illness.²⁰

18. See generally *Tips from Former Smokers: About the Campaign*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 28, 2022), <https://www.cdc.gov/tobacco/campaign/tips/about/index.html> (detailing the *Tips Campaign* designed to bring public awareness of health consequences caused by smoking and exposure to secondhand smoke).

19. OFF. OF THE SURGEON GEN., U.S. DEP’T OF HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL* 11 (2014), https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf [hereinafter *50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL*].

20. *Smoking & Tobacco Use: Fast Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 17, 2022), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/index.htm.

A. *The Health Effects of Secondhand Smoke*

Voluntary smokers are not the only victims of tobacco use. Since 1964, more than 2.5 million nonsmokers have died from exposure to secondhand smoke.²¹ There are hundreds of toxic and carcinogenic chemicals in secondhand smoke, including formaldehyde, acetaldehyde, butadiene, benzene, and hydrogen cyanide.²² Exposure to secondhand smoke can cause lung cancer, heart disease, and acute respiratory symptoms.²³ The United States Surgeon General's Report on The Health Consequences of Involuntary Exposure to Tobacco Smoke concluded that "there is no risk-free level of exposure to secondhand smoke."²⁴

B. *Anti-Smoking Legislation*

According to the United States Surgeon General, offering separate spaces for smokers and nonsmokers, cleaning the air, and ventilating buildings are insufficient protections against secondhand smoke exposure.²⁵ Smoke-free indoor air environments are the only way to fully protect nonsmokers from the dangers of secondhand smoke.²⁶

Although the negative health effects of smoking were confirmed in the 1960s,²⁷ general acceptance of the health hazards of secondhand smoke did not gain traction within the medical community until the

21. *Smoking & Tobacco Use: Health Effects of Secondhand Smoke*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 27, 2020), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/health_effects/index.htm.

22. OFF. OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL* 30–32, 101 (2006), https://www.ncbi.nlm.nih.gov/books/NBK44324/pdf/Bookshelf_NBK44324.pdf [hereinafter *HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE*].

23. *Id.* at 15.

24. *Id.* at 11; *STATE Fact Sheet*, *supra* note 6.

25. *HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE*, *supra* note 22, at 11.

26. *Id.*

27. *See* Ross, *supra* note 12, at 713.

1970s and 1980s.²⁸ Still, it was not until the United States Environmental Protection Agency (“EPA”) released its landmark 1993 report detailing the risks of secondhand smoke exposure that significant efforts to reduce exposure began.²⁹

By 2013-2014, the EPA reported that secondhand smoke exposure among nonsmokers in the United States had dropped from 80% in the 1990s to 25%.³⁰ This progress can be attributed to numerous smoke-free efforts on federal and state levels.³¹ Specifically, in 1997, an Executive Order prohibited smoking in federal buildings,³² and as of October 2021, twenty-eight states have enacted laws requiring all non-hospitality workplaces, restaurants, and bars to be 100% smoke-free.³³ Despite this progress, casinos are frequently exempted from smoke-free indoor air laws, leaving thousands of casino workers at risk of premature death and disease from secondhand smoke exposure.³⁴

Gambling in the United States is a big business that reaches well beyond the glitz and glamour of the Las Vegas Strip. In 2019, the country’s gaming industry reported record-high revenue at \$43.6 billion and is poised to surpass that record in 2021.³⁵ As of December 2021,

28. See Justin C. Levin, Comment, *Protect Us or Leave Us Alone: The New York State Smoking Ban*, 68 ALB. L. REV. 183, 190 (2004).

29. U.S. ENV’T PROT. AGENCY, REDUCING EXPOSURE TO SECONDHAND SMOKE U.S. PROGRESS SINCE EPA’S 1993 LANDMARK REPORT 1 (2018), https://www.epa.gov/sites/default/files/2018-01/documents/reducing_exposure_to_secondhandsmoke_us_progress_since_epas_1993_landmark_report.pdf.

30. *Id.*

31. *Id.*

32. Exec. Order No. 13058, 3 C.F.R. § 13058 (1998).

33. *Overview List*, *supra* note 5. Of note, throughout the 1990s smoking was incrementally prohibited on all domestic and international flights and officially banned from all United States airplanes in 2000 when President Clinton signed the Wendell H. Ford Aviation Investment and Reform Act for the twenty-first century. Thomas Pallini, *It’s Been 20 Years Since Smoking Was Completely Banned on All US Flights. Here’s How Smoking on Planes Went from Normal to Banned*, INSIDER INC. (Mar. 8, 2020, 5:05 AM), <https://www.businessinsider.com/when-did-smoking-get-banned-on-planes-in-the-us-2020-2>.

34. *STATE Fact Sheet*, *supra* note 6.

35. Will Yakowicz, *U.S. Gambling Revenue to Break \$44 Billion Record in 2021*, FORBES (Aug. 10, 2021, 5:34 PM), <https://www.forbes.com/sites/willyakowicz/2021/08/10/us-gambling-revenue-to-break-44-billion-record-in-2021/?sh=2b922979677b>.

thirty-three states allow legalized gambling in the form of casinos, racinos (racetrack casinos), and bingo halls.³⁶ However, only twelve of those states have enacted laws requiring the gaming facilities be 100% smoke-free.³⁷ The country's two most prolific gambling states, Nevada and New Jersey, exempt casinos from their smoke-free indoor air laws.³⁸ Several other states have implemented similar laws.³⁹ These exemptions, allowing for indoor smoking in casinos, put casino workers at a higher risk for secondhand smoke-related illness than other workers.⁴⁰

In 2009, the National Institute for Occupational Safety and Health (“NIOSH”) studied the risks of secondhand smoke for casino workers in Nevada.⁴¹ NIOSH found that casino workers were exposed to hazardous levels of toxic secondhand smoke at work, including carcinogens that increased in concentration as they progressed through their work shifts.⁴² In a similar study conducted by NIOSH in 1996, Atlantic City casino workers were found to have higher levels of exposure to secondhand smoke toxins when compared to a representative sample of the population who reported exposure to secondhand smoke in non-casino environments.⁴³ In other words, casinos contain higher levels of toxic smoke than other smoking

36. *STATE Fact Sheet*, *supra* note 6 (offering smoke-free gaming facility statistics current through December 31, 2021).

37. *Id.*

38. Nevada Clean Indoor Air Act, NEV. REV. STAT. §§ 202.2483–202.2497 (2021); New Jersey Smoke-Free Air Act, N.J. STAT. ANN. §§ 26:3D-55–66 (West 2021).

39. *See, e.g.*, Kansas Indoor Clean Air Act, KAN. STAT. ANN. §§ 21-6109–21-6116 (2021); Louisiana Smokefree Air Act, LA. STAT. ANN. §§ 40:1291.1–40:1291.24 (2021); Pennsylvania Clean Indoor Air Act, 35 PA. CONS. STAT. §§ 637.1–637.11 (2022).

40. *Risks of Secondhand Smoke in Casinos*, *supra* note 9.

41. NAT'L INST. FOR OCC. SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, ENVIRONMENTAL AND BIOLOGICAL ASSESSMENT OF ENVIRONMENTAL TOBACCO SMOKE EXPOSURE AMONG CASINO DEALERS 5–6 (2009), <https://www.cdc.gov/niosh/hhe/reports/pdfs/2005-0201-3080.pdf>.

42. *Id.*

43. NAT'L INST. FOR OCC. SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, HEALTH HAZARD EVALUATION REPORT 95-0375-2590 BALLY'S PARK PLACE CASINO HOTEL, ATLANTIC CITY, NEW JERSEY 8 (1996), <https://www.cdc.gov/niosh/hhe/reports/pdfs/1995-0375-2590.pdf>.

environments.⁴⁴ Alarminglly, another study examining the air quality in casinos found that exposure to secondhand smoke for Pennsylvania casino workers caused five times as many premature deaths as Pennsylvania mining disasters.⁴⁵

Secondhand smoke and toxic levels of smoke-related pollutants seep into all areas of the casino, including restaurants and retail locations, thereby preventing casino workers any opportunity to isolate themselves from the dangers of smoke during a work shift.⁴⁶ In a study evaluating how smoke-related pollutants travel between designated non-smoking and smoking areas of casinos, it was found nonsmoking restaurants directly adjacent to smoking gaming areas registered an average of 60% of the amount of secondhand smoke toxins as the areas where smoking was allowed.⁴⁷ Simply put, ventilation and separation systems do not work. The only way to protect casino workers from secondhand smoke is to ban smoking in all casino areas.

44. *Id.*

45. James L. Repace, *Secondhand Smoke in Pennsylvania Casinos: A Study of Nonsmokers' Exposure, Dose, and Risk*, 99 AM. J. PUB. HEALTH 1478, 1484 (2009).

46. *STATE Fact Sheet, supra* note 6; *Risks of Secondhand Smoke in Casinos, supra* note 9.

47. James L. Repace et al., *Fine Particle Air Pollution and Secondhand Smoke Exposures and Risks Inside 66 U.S. Casinos*, 111 ENV'T RSCH. 473, 480 (2011), <https://doi.org/10.1016/j.envres.2011.02.007>; *Risks of Secondhand Smoke in Casinos, supra* note 9.

II. ANALYSIS OF THE CURRENT AND FUTURE REMEDIES LANDSCAPE FOR CASINO EMPLOYEES INJURED BY SECONDHAND SMOKE EXPOSURE

Casino workers are left with no effective remedy to recover from injuries caused by secondhand smoke in the workplace. Casino workers regularly attempt to assert workers' compensation claims; however, these claims often fail because secondhand smoke is not an occupational disease.⁴⁸ Tort claims also suffer a similar fate.⁴⁹

This section first provides an analysis of the current pitfalls of administrative and tort remedies available to casino workers injured by secondhand smoke exposure and then explores how the COVID-19 pandemic is likely a catalyst to improve the success of such actions in the future.

A. Current Insufficient Administrative Remedies

The basic operating principle of workers' compensation acts is that employees who contract an occupational disease or suffer a personal injury by accident arising out of or during employment are

48. See *Mack v. Cnty. of Rockland*, 525 N.E. 2d 744 (N.Y. 1988) (affirming denial of workers' compensation benefits because eye condition caused by exposure to cigarette smoke was not an "occupational disease" within the meaning of New York Workers' Compensation Law section 3(2)); *Palmer v. Del Webb's High Sierra*, 838 P.2d 435, 437 (Nev. 1992) (holding "diseases claimed to be caused by environmental tobacco smoke present in the workplace are not covered by the Nevada Occupational Disease Act"); *Heng v. Appeals Off. of Nev. Dep't of Admin.*, Nos. CV15-00377, CV16-00336, 2016 Nev. Dist. LEXIS 783, at *7 (D. Nev. May 11, 2016) (finding legislature and prior decisions hold that secondhand smoke exposure is not an occupational disease).

49. See *Badillo v. Am. Tobacco Co.*, 202 F.R.D. 261, 264 (D. Nev. 2001) (denying Nevada casino dealers' class-action suit for strict liability, negligence, fraud, and misrepresentation alleging injuries by workplace exposure to secondhand smoke); *Bevrotte v. Caesars Ent. Corp.*, No. 11-543, 2012 U.S. Dist. LEXIS 95712, at *9 (E.D. La. July 11, 2012) (dismissing wrongful death suit against casino employer for death of plaintiff's son caused by leukemia contracted because of exposure to secondhand smoke at casino workplace); *Kastroll v. Wynn Resorts, Ltd.*, No. 2:09-cv-2034-LDG-VCP, 2013 U.S. Dist. LEXIS 16778, at *9 (D. Nev. Feb. 6, 2013) (granting summary judgment for lack of subject matter jurisdiction against class action suit alleging casino employer breached its duty to provide a reasonably safe workplace to its employees by failing to take reasonable measures to protect employees from secondhand smoke).

automatically entitled to certain benefits.⁵⁰ Negligence and fault are not considered in workers' compensation claims.⁵¹ Employees who suffer illness caused by secondhand smoke exposure in the workplace have attempted to recover for injuries under the "occupational disease" prong of workers' compensation acts without much success.⁵²

In *Mack v. County of Rockland*, the Court of Appeals of New York affirmed the workers' compensation board's denial of a workers' compensation claim brought by a plaintiff who claimed that exposure to cigarette smoke in her office exacerbated her eye disorder.⁵³ The court reasoned that illness caused by exposure to secondhand smoke did not constitute an occupational disease, and therefore, plaintiff was not entitled to relief through a workers' compensation claim.⁵⁴

Similarly, in *Palmer v. Del Webb's High Sierra*, the Supreme Court of Nevada reversed the grant of a casino employee's workers' compensation benefits finding that secondhand smoke exposure did not qualify as an occupational disease under the state's workers' compensation law.⁵⁵ The plaintiff, James Palmer, worked as a pit boss in a casino, where smoking patrons continually surrounded him.⁵⁶ He developed lung disease and was told by several doctors not to return to work if he would remain exposed to tobacco smoke.⁵⁷ The primary issue before the court was whether injury caused by secondhand smoke exposure was a compensable occupational disease.⁵⁸

The court found that tobacco smoke was not a hazard incidental to the nature of employment in a casino.⁵⁹ The court reasoned that there was not a sufficient relationship between Mr. Palmer's employment and his illness to qualify as an occupational disease because secondhand smoke "is a hazard to which workers . . . [are] 'equally exposed outside

50. 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.01 (Matthew Bender, Rev. Ed. 2021) [hereinafter LARSON'S WORKERS' COMP. LAW].

51. *Id.*

52. *See Palmer*, 838 P.2d at 435; *Mack*, 525 N.E. 2d at 744.

53. *Mack*, 525 N.E. 2d at 744.

54. *Id.*

55. *Palmer*, 838 P.2d at 437.

56. *Id.*

57. *Id.* at 438.

58. *Id.* at 435.

59. *Id.*

of the employment.”⁶⁰ Accordingly, the court held that injury caused by exposure to secondhand smoke in the workplace is not an occupational disease and is, therefore, not a compensable workers’ compensation claim.⁶¹

In 2016, a Nevada casino dealer’s widow attempted to challenge the *Palmer* decision in light of the passing of the Nevada Indoor Clean Air Act in 2006.⁶² Similar to *Palmer*, the plaintiff, Elliott Heng, filed a claim for workers’ compensation contending his lung cancer was caused by secondhand smoke exposure at his casino workplace.⁶³ His claim was denied and affirmed by the administrative appeals divisions.⁶⁴ He then filed a petition for judicial review as to whether the Nevada Indoor Clean Air Act altered the impact of the *Palmer* decision.⁶⁵ Sadly, Mr. Heng died from advanced lung cancer shortly after, but his widow continued the claim on his behalf.⁶⁶

The court found nothing in the Nevada Indoor Clean Air Act to construe as amending the workers’ compensation laws to provide benefits to workers for secondhand smoke.⁶⁷ The court stated that

the *Palmer* decision has been in place for over 20 years, the [l]egislature has made the policy decision that secondhand smoke exposure is not an occupational disease It is not the function of the Court to alter policy established by the legislature or second guess its decision making.⁶⁸

Accordingly, until courts acknowledge injuries caused by secondhand smoke exposure as an occupational disease, employees will not be able to assert workers’ compensation claims for their injuries successfully.

60. *Id.*

61. *Id.* at 437.

62. *Heng v. Appeals Off. of the Nev. Dep’t of Admin.*, Nos. CV15-00377, CV16-00336, 2016 Nev. Dist. LEXIS 783, at *1–2 (D. Nev. May 11, 2016).

63. *Id.* at *1.

64. *Id.* at *2.

65. *Id.*

66. *Id.*

67. *Id.* at *4–5.

68. *Id.* at *7 (emphasis in original).

B. Current Insufficient Tort Remedies

For years, casino workers have sought tort relief for their injuries suffered by exposure to secondhand smoke without success. No matter how creative the suit or causes of action pled, courts have refused relief to injured plaintiffs. This section provides a sampling of cases that illustrate the frustrations of injured casino workers who file lawsuits for tort causes of action.

In 2001, a group of Nevada casino dealers filed a class-action suit for strict liability, negligence, fraud, and misrepresentation against numerous tobacco companies alleging injuries by exposure to secondhand smoke in the workplace.⁶⁹ Additionally, the plaintiffs sought medical monitoring to detect diseases contracted after years of exposure to secondhand smoke on the job.⁷⁰

The federal district court petitioned the Supreme Court of Nevada for an opinion regarding whether medical monitoring is a viable cause of action or viable remedy under Nevada law.⁷¹ While concluding that a medical monitoring remedy may be available, the Supreme Court of Nevada held that Nevada common law does not recognize a medical monitoring cause of action.⁷² Consequently, the plaintiffs' cause of action for medical monitoring failed.⁷³ A few months later, the district court denied class certification finding the proposed class failed to satisfy the predominance requirement, as individual issues of causation, comparative fault, assumption of the risk, statute of limitations, and damages predominated over common questions.⁷⁴ Shortly thereafter, the parties stipulated to a dismissal.⁷⁵ Therefore, an opinion as to whether the plaintiffs' individual claims would have been successful remain unanswered. However, the court's dictum discussion of the difficulties in pinpointing plaintiffs' injuries to secondhand smoke caused within the casino environment seem to suggest the claims would

69. *Badillo v. Am. Tobacco Co.*, 202 F.R.D. 261, 262 (D. Nev. 2001).

70. *Id.*

71. *Badillo v. Am. Brands*, 16 P.3d 435, 437 (Nev. 2001).

72. *Id.*

73. *Badillo*, 16 P.3d at 441.

74. *Badillo*, 202 F.R.D. at 264.

75. Order on Stipulation & Order for Dismissal Without Prejudice, *Badillo v. Am. Tobacco Co.*, No. 98-CV-01764 (D. Nev. Oct. 2, 2001), ECF No. 232.

have failed due to an inability to establish a causal link between the plaintiffs' injuries and their casino workplace.⁷⁶

In 2009, an ambitiously broad class action suit was filed against Wynn Las Vegas (“Wynn”) by all former, current, and future nonsmoking employees of Wynn who were, are, or in the future will be exposed to unsafe levels of secondhand smoke.⁷⁷ The plaintiffs alleged that Wynn breached its common law duty to provide a reasonably safe workplace to its employees by failing to take sufficient measures to protect its employees from secondhand smoke.⁷⁸ Skirting the pertinent issue, the court dismissed the suit for lack of subject matter jurisdiction based on the “home-state controversy” exception.⁷⁹ Under that exception, a district court would not have subject matter jurisdiction over a class action in which (1) two-thirds or more of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action is originally filed; and (2) the primary defendants are citizens of the state in which the action was originally filed.⁸⁰ Because the vast majority of plaintiffs were citizens of Nevada and the only defendant, Wynn, was also a Nevada corporation with its principal place of business in Nevada, the court found the home-state controversy exception applied.⁸¹

As the action was dismissed on procedural grounds, the court did not reach an opinion on whether Wynn breached its duty to provide a reasonably safe workplace to its employees by failing to take reasonable measures to protect its employees from secondhand smoke. However, the likelihood of success is questionable as the Nevada Clean Indoor Air Act *specifically allows for smoking* in casinos.⁸² Indeed, Wynn argued that it could not be found liable to its employees because casinos are specifically exempted from the Act.⁸³

76. *Badillo*, 202 F.R.D. at 264–65.

77. *Kastroll v. Wynn Resorts, Ltd.*, No. 2:09-cv-2034-LDG-VCP, 2013 U.S. Dist. LEXIS 16778, at *1–2 (D. Nev. Feb. 6, 2013).

78. *Id.*

79. *Id.* at *9–11.

80. *Id.* at *4–5.

81. *Id.* at *5–6.

82. NEV. REV. STAT. § 202.2483 (2021).

83. Defendant’s Reply in Support of Its Motion to Dismiss, or Alternatively to Strike, *Kastroll v. Wynn Resorts, Ltd.*, No. 2:09-CV-02034, 2010 U.S. Dist. Ct. Motions LEXIS 388, at *3–4 (D. Nev. Feb. 16, 2010), ECF No. 22.

In 2011, Denise Bevrotte brought a class action suit on behalf of her deceased son and all former, current, and future nonsmoking employees of Harrah's New Orleans Hotel and Casino ("Harrah's").⁸⁴ Her son, a nonsmoker, was a poker dealer for fifteen years at Harrah's where he was continually exposed to secondhand smoke at work.⁸⁵ As a result of this exposure, he suffered numerous health effects such as contraction of leukemia, shortness of breath, dizziness, wheezing or tightness in the chest, and headaches.⁸⁶ The court struck the class allegations because the claims raised fact-intensive issues of causation and damages that could not be adjudicated in a class action format.⁸⁷

However, Ms. Bevrotte was allowed to proceed with an individual claim against Harrah's for the wrongful death of her son.⁸⁸ Ms. Bevrotte argued that her son contracted leukemia because of his exposure to secondhand smoke in his working conditions at Harrah's.⁸⁹ By doing so, she alleged an occupational disease as defined by the Louisiana Workers' Compensation Act ("LWCA").⁹⁰ The court explained that damages resulting from an occupational disease are compensable only under the LWCA.⁹¹ The rights and remedies under the LWCA are exclusive of all other rights,⁹² meaning that Ms. Bevrotte could not recover in tort.⁹³ As such, the court dismissed her claim as barred by the LWCA.⁹⁴ It did not decide as to whether leukemia caused

84. *Bevrotte v. Caesars Ent. Corp.*, No. 11-543, 2011 U.S. Dist. LEXIS 114463, at *1-2 (E.D. La. Oct. 4, 2011).

85. *Id.*

86. *Id.*

87. *Id.* at *16-17.

88. *Bevrotte v. Caesars Ent. Corp.*, No. 11-543, 2012 U.S. Dist. LEXIS 95712, at *1-2 (E.D. La. July 11, 2012).

89. *Id.* at *5.

90. *Id.* at *8.

91. *Id.* at *7.

92. Workers' compensation acts automatically entitle employees to certain benefits for injuries or exposure to occupational disease suffered in the workplace—negligence and fault need not be proven. In exchange for such assured benefits, a plaintiff seeking recovery under a state's workers' compensation act forfeits their right to sue the employer under a tort theory of liability. Thus, workers' compensation acts are designed to limit an employer's exposure to liability. *See* LARSON'S WORKERS' COMP. LAW, *supra* note 50, at § 1.01.

93. *See Bevrotte*, 2012 U.S. Dist. LEXIS 95712, at *7-8.

94. *Id.* at *9.

by exposure to secondhand smoke should be considered an occupational disease under the LWCA.

It should be noted that non-casino employees injured by secondhand smoke exposure in the workplace have successfully recovered under the common law theory of an employer's duty to provide a safe working environment.⁹⁵ However, because legislatures specifically allowed for smoking to continue indoors in casinos, it is unlikely future courts will find that casino employers are failing to provide a safe working environment by doing what the law allows them to do—permit indoor smoking.

Similarly, negligence suits are also hampered⁹⁶ because legislation allows for indoor smoking in casinos. These laws effectively eliminate any duty casino employers might have to provide a smoke-free environment. Additionally, causation is difficult for plaintiffs to prove in negligence suits involving secondhand smoke exposure because detailed, time-intensive, factual inquiries into the dates, times, durations of exposure to secondhand smoke at the workplace, exposure outside of the workplace, and at previous places of employment must be proven.⁹⁷ Simply put, the current likelihood of casino workers recovering for their injuries through the tort system is essentially nonexistent.

C. How the COVID-19 Pandemic May Usher in Change for Legal Relief

The COVID-19 pandemic has triggered society's awareness of public health and what is transmitted through airways.⁹⁸ As discussed throughout this Comment, it is well-known that exposure to secondhand

95. *Shimp v. N.J. Bell Tel. Co.*, 368 A.2d 408, 415–16 (N.J. Super. Ct. Ch. Div. 1976).

96. *See, e.g.*, Defendant's Reply in Support of Its Motion to Dismiss or, Alternatively to Strike, *supra* note 83 (arguing a casino could not be found liable to employees for allowing smoking to occur in a place where the law specifically permits smoking).

97. *Bevrotte v. Caesars Ent. Corp.*, No. 11-543, 2011 U.S. Dist. LEXIS 114463, at *12 (E.D. La. Oct. 4, 2011).

98. *See Here's How the Coronavirus Pandemic Has Changed Our Lives*, CLEVELAND CLINIC (Sept. 25, 2020), <https://health.clevelandclinic.org/heres-how-the-coronavirus-pandemic-has-changed-our-lives/> (analyzing how the COVID-19 pandemic has heightened public health awareness).

smoke can be deadly. Casino workers have been calling for protection from such exposure for years, but their cries have fallen on deaf ears. Casino workers would be wise to capitalize on society's sensitivity and heightened awareness of toxins transmitted through the airways as triggered by the COVID-19 pandemic. Because attitudes surrounding public health have arguably shifted—with many regarding physical health a greater priority than economic health⁹⁹—there is no better time for casino workers to lobby for change and call for an end to indoor smoking in casinos.

Casino workers may recover for their injuries from secondhand smoke with likely success in two ways: (1) recognizing secondhand smoke exposure as a recoverable toxic tort and (2) classifying secondhand smoke exposure as an occupational disease, thereby allowing recovery under workers' compensation laws.

First, recognizing secondhand smoke exposure as a recoverable toxic tort is not beyond the realm of possibility. Exposure to secondhand smoke is strikingly similar to a well-known and long-standing toxic tort: asbestos exposure.¹⁰⁰ Exposure to secondhand smoke parallels exposure to asbestos because both involve airborne transmission of dangerous materials that damage workers' lungs after inhalation. Asbestos and secondhand smoke are both classified by the EPA as Group A carcinogens, and as with secondhand smoke, no level of asbestos exposure is safe.¹⁰¹ Exposure to either causes similar injuries, like difficulty breathing and slow-progressing diseases like lung cancer.¹⁰² However, the two deviate from the protection afforded to victims of exposure. The Occupational Safety and Health Administration ("OSHA") has regulations in place to protect workers

99. See generally Penelope Dash et al., *How Prioritizing Health Could Help Rebuild Economies*, MCKINSEY & CO. (July 8, 2020), <https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/how-prioritizing-health-could-help-rebuild-economies> (discussing how improvement of public health will lead to societal and economic benefits).

100. See, e.g., 1 CACI No. 435 (Causation for Asbestos-Related Cancer Claims); see generally Gideon Mark, Comment, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871, 878–79 (1983) (detailing two main tort theories used by asbestos injured workers).

101. Vallone, *supra* note 12, at 828, 830.

102. *Id.* at 830.

from the dangers of exposure to asbestos.¹⁰³ This protection has allowed injured workers to receive compensation through the tort system.¹⁰⁴ OSHA has no such regulations that apply to smoking,¹⁰⁵ thereby thwarting workers' attempts at tort recovery for injuries caused by secondhand smoke exposure.

As the COVID-19 pandemic increases concern over air quality and disease transmission,¹⁰⁶ courts are primed to seriously consider secondhand smoke exposure as a toxic tort. Allowing for such a tort would provide casino workers with a path to recover for their injuries caused by secondhand smoke, similar to the path afforded to victims of asbestos exposure. The asbestos model has provided relief to millions of individuals injured by exposure and has resulted in billions of dollars in litigation costs and settlements.¹⁰⁷ Because tobacco smoke and exposure to secondhand smoke is wholly preventable and can easily be banned, it is not beyond reason to think that the public, court, and legislation's appetite for creating a penalty for those employers who allow workers to be exposed to a known deadly risk to finally come to fruition and follow the asbestos model.

Currently, casino owners do not have repercussions for allowing indoor smoking, and employees have no legal remedy for recovery. However, if a new tort gains traction—as it is reasonable to suspect it could considering the current climate on public health concerns—casinos are likely to be subject to catastrophic liability, similar to employers who expose their employees to asbestos.

Second, given the current climate, classifying secondhand smoke exposure as an occupational disease is also likely to garner attention. Many states have introduced and enacted legislation to recognize the

103. OCC. SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB., OSHA FACT SHEET: ASBESTOS (2014), <https://www.osha.gov/sites/default/files/publications/OSHA3507-.pdf>.

104. Vallone, *supra* note 12, at 828.

105. Letter from Richard D. Edsell, Dir., Off. of Sci. & Tech. Assessment, to Donald Cameron Frye, Inquirer (May 7, 1986), <https://www.osha.gov/laws-regs/standardinterpretations/1986-05-07>.

106. *See generally* Chia C. Wang et al., *Airborne Transmission of Respiratory Viruses*, 373 SCIENCE 981 (2021).

107. *See* AMERICAN ACADEMY OF ACTUARIES' MASS TORTS SUBCOMMITTEE, OVERVIEW OF ASBESTOS CLAIMS ISSUES AND TRENDS 11 (2007), https://www.actuary.org/sites/default/files/files/asbestos_aug07.4.pdf/asbestos_aug07.4.pdf (discussing magnitude of asbestos claims under the current tort system).

contraction of COVID-19 as a compensable workers' compensation occupational disease.¹⁰⁸ If the contraction of COVID-19—a contagious disease contracted through close contact with an infected individual, similar to influenza,¹⁰⁹ that has no relation to any workplace hazard—is being recognized as an occupational disease, the exposure to secondhand smoke must also be recognized. Secondhand smoke, similar to COVID-19, is a deadly yet completely preventable workplace condition.¹¹⁰

As such, calls to legislatures to recognize exposure to secondhand smoke as an occupational disease are likely to succeed now more than ever before. Suppose exposure to secondhand smoke is recognized as an occupational disease in states' workers' compensation acts. In that case casino workers will be allowed to recover for their injuries through the workers' compensation process. This route of recovery may appeal to casino owners as well because damages are generally limited and resolved at amounts lower than what could be recovered in a traditional tort suit.¹¹¹ However, because of the sheer magnitude of potentially injured casino workers, liability would still likely be of great significance.

III. SOLUTIONS FOR CASINO OWNERS AS POTENTIAL RISK OF LIABILITY LOOMS

It is well within the realm of possibility that the courts and legislatures will be more amenable to recognizing injury by secondhand smoke as a recoverable tort or an occupational disease recoverable under states' workers' compensation laws. If a path to recovery is opened for injured casino workers, there are potentially large pools of workers that could bring claims for their injuries, which could be a catastrophic cost to casino owners.

108. Laura Kersey, *2021 Regulatory and Legislative Trends Report*, NCCI HOLDINGS, INC. (Aug. 24, 2021), <https://www.ncci.com/Articles/Pages/Insights-Regulatory-Legislative-Trends2021.aspx>.

109. *Influenza (Flu): Similarities and Differences Between Flu and COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 18, 2022), <https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm>.

110. See generally 50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL, *supra* note 19, at 11–12.

111. LARSON'S WORKERS' COMP. LAW, *supra* note 50, at § 1.03.

Casino owners need to be aware of this potential risk and act now to protect themselves from potentially endless claims by injured employees. Casino owners cannot shield themselves from claims by previously injured employees, but implementing a ban would prevent any future injury from occurring to yet-to-be-hired employees, newly hired employees, and existing employees who have fatefully avoided the consequences of exposure to secondhand smoke.

Casino owners would be wise to be proactive and implement policies on their volition banning indoor smoking, and support legislation eliminating the casino exemptions in states' clean indoor air acts to create an even "smoke-free playing field" in the gaming industry.

A. Casino Owners Should Implement Policies Banning Indoor Smoking in Casinos

The reasons for casinos to implement policies banning indoor smoking are numerous. In addition to preventing liability, indoor smoking bans would also protect the health of employees and patrons, promote public relations and company image, and even increase revenue by attracting new patrons, like nonsmokers and high-risk or health-conscious individuals. A discussion of each of these benefits follows.

1. Casino Smoking Bans Will Protect the Health of Employees and Patrons

Casino workers should no longer have to put their lives on the line to earn a paycheck. As explained throughout this Comment, there is simply no question that secondhand smoke leads to deadly consequences for those exposed to it. Implementing smoking bans is the only way to protect against the dangers of secondhand smoke. Ventilation systems and designated indoor nonsmoking areas are wholly ineffective.¹¹²

The health of casino workers is one of the most significant benefits noted in smoke-free casino initiatives enacted in response to the COVID-19 pandemic. For example, Brian King of the CDC's Office

112. HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE, *supra* note 22, at 11; *STATE Fact Sheet*, *supra* note 6.

on Smoking and Health considered the smoking bans spurred by the COVID-19 pandemic to be a definite ““public health win”” that protects casino workers and patrons.¹¹³ King elaborated that not only do smoke-free policies help to reduce secondhand smoke exposure, which is well-known to increase risk of stroke, lung cancer, and heart attack in adults, but such policies also encourage people to stop smoking altogether.¹¹⁴

Pittsburgh Tribune-Review gaming writer, Mark Gruetze, similarly emphasized the importance of the health of the public and casino workers when discussing his support for the recently reignited smoke-free movement by stating:

One side effect of the pandemic was forcing each Pennsylvania casino to test how customers reacted to a smoking ban. Casinos’ bottom lines prove people like it—or, at the very least, it didn’t matter. People go to casinos to gamble, not to smoke . . . Players and workers on the gaming floor must have the same protection as everyone else in Pennsylvania.¹¹⁵

In Shreveport, Louisiana, casino workers and patrons are experiencing the positive effects of an indoor smoking ban just 100 days after the ordinance took effect.¹¹⁶ A study examining the ban’s effect on air quality found “employees and patrons in Shreveport’s casinos are no longer exposed to harmful levels of indoor air pollution resulting from indoor smoking.”¹¹⁷

Similarly, the Navajo Nation, which operates four casinos in Arizona and New Mexico employing over 1,100 casino workers,¹¹⁸ took a monumental step toward protecting casino workers by enacting

113. Rios, *supra* note 2.

114. *Id.*

115. *Atlantic City Casinos Set Revenue Record*, *supra* note 17.

116. *Air Quality Report Shows Smoke-Free Ordinance in Shreveport Working; Indoor Air Quality Improves in First 100 Days of Smoke-Free Ordinance*, AM. NONSMOKERS’ RTS FOUND. (Nov. 9, 2021), <https://no-smoke.org/air-quality-report-shows-smoke-free-ordinance-in-shreveport-working/>.

117. *Id.*

118. KNAU Staff, *Navajo Leaders Approve \$25 Million in COVID-19 Relief for Casino Employees*, KNAU (Aug. 24, 2020, 4:53 AM), <https://www.knau.org/knau-and-arizona-news/2020-08-24/navajo-leaders-approve-25-million-in-covid-19-relief-for-casino-employees>.

“The Air is Life Act.”¹¹⁹ This Act requires casinos and other public spaces to be completely smoke-free.¹²⁰ Navajo Nation President Jonathan Nez remarked that the Act was a positive step toward protecting the health of the Navajo people.¹²¹ He acknowledged the health concerns of secondhand smoke exposure and reinforced his support for the Act by stating, “Public health professionals have concluded that the only way to protect nonsmokers and vulnerable populations from secondhand smoke is to require smoke-free workplaces and public spaces. It is a fundamental right to protect our Navajo people’s right to breathe clean air.”¹²²

Casinos remain one of the few public places where employees and patrons are exposed to secondhand smoke at high levels.¹²³ As demonstrated, implementing a ban on indoor smoking in casinos would undoubtedly positively affect the health of casino employees and patrons.

2. *Casino Smoking Bans Will Improve Company Image and Public Relations*

The public wants casino owners to put their money where their mouths are. The COVID-19 pandemic has caused many casino owners to publicly state their dedication to providing a healthy and safe workplace for employees and patrons.¹²⁴ However, as Randy Hayden, a consultant for Americans for Nonsmokers’ Rights pointed out, these public statements do not hold water “if [casino owners] allow

119. Vivian Chow, *Navajo Nation Bans Indoor Smoking Throughout Reservation*, ABC4.COM (Nov. 7, 2021, 12:49 PM), <https://www.abc4.com/news/navajo-nation-bans-indoor-smoking-tobacco-use-throughout-reservation/>.

120. *Id.*

121. *Id.*

122. *Id.*

123. Bryan Horwath, *Will Park MGM No-Smoking Policy Set a Trend in Las Vegas?*, L.V. SUN (Sept. 27, 2020, 2:00 AM), <https://lasvegassun.com/news/2020/sep/27/will-park-mgm-no-smoking-policy-set-a-trend/>.

124. Larry Henry, *Smoke-Free, Adults-Only Concepts Taking Hold at Las Vegas Casinos*, CASINO.ORG (Mar. 21, 2021, 1:17 AM), <https://www.casino.org/news/smoke-free-adults-only-concepts-taking-hold-at-las-vegas-casinos/> [hereinafter Henry, *Smoke-Free, Adults-Only Concepts Taking Hold*].

customers to pull down their masks and blow toxic, COVID-laced smoke at a gaming table.”¹²⁵

Similarly, Assemblywoman Valerie Vainieri Huttel, the original sponsor of a bill pending before the New Jersey state legislature to eliminate the casino exemption to the state’s Smoke-Free Air Act, recounted an email she received from a frustrated casino employee saying, “I don’t understand how we casino employees can be protected from a virus that *might* kill, but not be protected from second-hand smoke, which *will* kill us.”¹²⁶ Simply put, it is difficult for the public to believe that casino owners sincerely care about the health and safety of their employees and patrons while they continue to allow smoking indoors. Banning smoking indoors would back up casino owners’ words and improve the gaming industry’s image.

3. *Casino Smoking Bans Will Attract More Patrons*

The gaming industry, like many industries, is continually looking for different ways to attract new customers.¹²⁷ After all, loyal customers age, and newer generations must come in to replace them if businesses want to survive. Attracting younger generations to casinos has been a challenge for the gaming industry.¹²⁸ As Geoff Freeman, CEO of the American Gaming Association, stated of the process in 2015, “It’s going to be a lot about throwing things up on the wall and seeing what sticks.”¹²⁹ One idea has been to overhaul the traditional slot machine model by developing machines that involve an element of skill and are designed to more closely resemble a video game.¹³⁰ Although these efforts may successfully attract the younger generation to casinos, there may be a more straightforward barrier keeping the younger generation away from casinos: smoking.

125. *Id.*

126. Edelstein, *supra* note 1 (emphasis added).

127. See Jane Wells, *Gambling Industry Tries to Figure Out Millennials*, CNBC LLC (Sept. 30, 2015, 10:50 AM), <https://www.cnbc.com/2015/09/30/gambling-industry-tries-to-figure-out-millennials-.html> (discussing methods used to attract a younger generation of gamblers to casinos).

128. *Id.*

129. *Id.*

130. *Id.*

In 2018, cigarette smoking among young adults hit an all-time low of just under 10%.¹³¹ This means 90% of young adults are nonsmokers. Randy Hayden asserted that these young adults are “more health-conscious than the older generation that currently frequents a casino,”¹³² thus it is likely they do not want to patronize a casino filled with smoke.

However, it is not only the younger generation that prefers smoke-free environments. In a 2017 survey of more than 4,000 adults conducted by the Public Health Reports journal, nearly 75% reported to favor nonsmoking casinos.¹³³ Some casinos have listened to this kind of data and have started to experiment by implementing policies to eliminate or reduce smoking in hopes of attracting new customers. Most notably, on September 30, 2020, megaresort hotel and casino Park MGM reopened during the pandemic as an entirely nonsmoking property, making it the first 100% smoke-free casino on the Las Vegas Strip.¹³⁴ According to Park MGM Chief Operating Officer, Anton Nikodemus, the reopening provided an “opportunity to be responsive to recurring demand for a fully non-smoking casino resort on The Strip.”¹³⁵ Just a year after reopening, Park MGM President, Ann Hoff, commented that the transition to a smoke-free environment has been “a very positive differentiator” and the move has been “very[,] very well received.”¹³⁶

Two other Las Vegas Strip properties have made efforts to attract nonsmokers, although not as drastically as Park MGM’s move to go 100% smoke-free. Specifically, in September 2020, the Cosmopolitan hotel and casino banned smoking in the resort’s public walkways and

131. *Young Adult Smoking Rate Drops to 10%*, TRUTH INITIATIVE (Sept. 5, 2018), <https://truthinitiative.org/research-resources/tobacco-prevention-efforts/young-adult-smoking-rate-drops-10>.

132. Henry, *Smoke-Free, Adults-Only Concepts Taking Hold*, *supra* note 124.

133. Horwath, *supra* note 123.

134. Ed Komenda, *Las Vegas’ Cosmopolitan Hotel Bans Smoking in Public Walkways*, RENO GAZETTE J. (Sept. 22, 2020, 10:52 AM), <https://www.rgj.com/story/news/2020/09/22/las-vegas-cosmopolitan-hotel-bans-smoking-parts-resort/5866210002/>.

135. *Id.*

136. *Park MGM President Says Going Smokefree Has Been “A Very Positive Differentiator,”* AM. NONSMOKERS’ RTS. FOUND. (Oct. 25, 2021), <https://no-smoke.org/park-mgm-president-says-going-smokefree-has-been-a-very-positive-differentiator/>.

corridors.¹³⁷ In a statement, the Cosmopolitan explained the ban was implemented as part of a “continued effort to further protect the health and wellbeing of our guests and employees.”¹³⁸ Smoking, however, is still allowed on the gaming floor.¹³⁹ Similarly, in Summer 2021, the Las Vegas Strip’s newest casino resort, Resorts World Las Vegas, opened as a primarily smoke-free resort, with smoking only allowed in the casino.¹⁴⁰

These efforts signify the public’s changing attitude toward smoking. As Malcolm Ahlo, Tobacco Control Coordinator for the Southern Nevada Health District stated, “If I had been asked 20 years ago what the appetite for casinos going smoke-free was, I would have said zero to none When Park MGM goes smoke-free, it will be a long time coming.”¹⁴¹

The COVID-19 pandemic has provided yet another incentive for casinos to go smoke-free. For those individuals reluctant to venture into public places for fear of poor health standards, casinos that allow smoking are likely not one of the places they would feel safe patronizing.¹⁴² Allowing guests to remove their masks and blow not only toxic secondhand smoke into the shared air but droplets of life-threatening contagious disease, is likely not worth the risk.¹⁴³ A smoking ban will help attract these reluctant patrons back to casinos.

137. Komenda, *supra* note 134.

138. *Id.*

139. Larry Henry, *Resorts World Las Vegas to Open as Limited-Smoking Property*, CASINO.ORG (July 5, 2021, 2:40 AM), <https://www.casino.org/news/resorts-world-las-vegas-to-open-as-limited-smoking-property/> [hereinafter Henry, *Resorts World Las Vegas*].

140. *Id.*

141. Horwath, *supra* note 123.

142. See Cynthia Hallett, *Park MGM Is a Good Start, but Smoke Free Should Be the New Standard on the Las Vegas Strip*, THE NEV. INDEP. (Oct. 24, 2020, 8:41 AM), <https://thenevadaindependent.com/article/park-mgm-is-a-good-start-but-smoke-free-should-be-the-new-standard-on-the-las-vegas-strip> (discussing how safety standards of public places are under high scrutiny because of the COVID-19 pandemic).

143. *Id.*

4. *Casino Smoking Bans May Increase Revenue*

Casino owners likely have reservations about banning indoor smoking for fear that doing so would negatively impact business. The COVID-19 pandemic has provided an unexpected way to test this hypothesis,¹⁴⁴ such as in New Jersey, where casinos reopened with a smoke-free policy following the height of the pandemic.¹⁴⁵ During that time, the smoking ban did not harm revenue.¹⁴⁶ Indeed, Atlantic City casinos posted an all-time revenue record in the month of June 2021, the last full month that they operated smoke-free.¹⁴⁷ Although it is unclear whether these numbers are skewed due to pent-up demand for entertainment following the pandemic, they are at least indicative of the fact that patrons did not avoid casinos because they were prohibited from smoking.¹⁴⁸

Like Atlantic City casinos, Nevada casinos have experienced high gaming revenue since fully reopening after the height of the pandemic.¹⁴⁹ The Park MGM is the only Las Vegas Strip property to have gone completely smoke-free and is the best-case study to determine whether revenue dropped, increased, or stayed the same after the ban on smoking was implemented. Unfortunately, MGM Resorts International, the owner and operator of Park MGM, does not report casino revenue trends by property so the exact economic impact from the ban is unknown.¹⁵⁰ However, MGM Resorts International overall has shown a steady increase in revenue every quarter since the reopening following the COVID-19 pandemic.¹⁵¹

144. *See Atlantic City Casinos Set Revenue Record, supra* note 17.

145. Richard N. Velotta, *Anti-Smoking Group Taking Another Swing at Casino Smoking Ban*, L.V. REV.-J., INC. (July 18, 2021, 8:00 AM), <https://www.reviewjournal.com/business/business-columns/inside-gaming/anti-smoking-group-taking-another-swing-at-casino-smoking-ban-2401945/> (“When the pandemic was raging, New Jersey leaders ordered a temporary ban on all smoking in casinos.”).

146. *Atlantic City Casinos Set Revenue Record, supra* note 17.

147. *Id.*

148. Velotta, *supra* note 145.

149. *Id.*

150. *Id.*

151. *See generally Financial Info: Latest Earnings*, MGM RESORTS INT’L, <https://investors.mgmresorts.com/investors/financial-info/earnings/default.aspx> (last

The COVID-19 pandemic is not the first instance testing the financial impact of banning smoking in casinos. In 2002, Delaware became one of the rare states that did not provide a casino exemption when enacting its clean indoor air act.¹⁵² Instead, Delaware's act was a comprehensive smoke-free workplace law that banned indoor smoking in workplaces and public places such as restaurants, bars, live music venues, and casinos.¹⁵³ In 2006, Governor Ruth Ann Minner addressed the success of the indoor smoking ban stating, "Some predicted that the Clean Indoor Air Act would hurt the bottom line of businesses, even forcing some to close. Conversely, . . . Delaware's three slot machine casinos have all experienced their highest revenue periods in the last two years."¹⁵⁴

Finally, banning indoor smoking may also attract more institutional investors.¹⁵⁵ Specifically, many investors are considering the environmental, social, and corporate governance ("ESG") criteria in making investment decisions.¹⁵⁶ Publicly traded casino companies that allow indoor smoking would not fit the ESG-conscious ideals that many investors are seeking.¹⁵⁷

These examples suggest a smoking ban will not result in disastrous loss of revenue, but rather may have a positive impact. Additionally, as discussed previously in this Comment, it is possible that new generations and health-conscious customers will begin to patronize casinos and contribute to gaming revenue should casinos decide to become smoke-free.

There is a good possibility that a ban would positively impact casino revenue on indoor smoking. However, in the event the predictions are wrong and casino revenues take a dip, the loss is likely to pale in comparison to the potential litigation casinos face if they

visited Nov. 13, 2021) (financial reports indicating an increase in net revenues after reopening from the COVID-19 pandemic).

152. *Smokefree Advocates Remember Gov. Minner as Champion for Clean Air, Including at Casinos*, AM. NONSMOKERS' RTS. FOUND. (Nov. 5, 2021), <https://no-smoke.org/smokefree-advocates-remember-gov-minner-as-champion-for-clean-air-including-at-casinos/>.

153. *Id.*

154. *Id.*

155. Edelstein, *supra* note 1.

156. *Id.*

157. *Id.*

continue to allow smoking. The damages casino employees may recover from casino employers should secondhand smoke exposure be recognized as a toxic tort or occupational disease are astronomical.

B. Casino Owners Should Support Legislation Eliminating the Statutory Exemptions for Casinos in Smoking Bans to Create an Even “Smoke-free Playing Field” in the Gaming Industry

Spurred by the success of smoke-free operations in the wake of the COVID-19 pandemic, citizens are calling on states’ elected leaders and casinos to make gaming venues permanently smoke-free.¹⁵⁸ One state leading the charge is New Jersey, which has introduced a bill calling for the elimination of the casino exemption to the state’s Smoke-Free Air Act.¹⁵⁹ The sponsor of the bill, Assemblywoman Valerie Vainieri Huttle, believes the bill finally has a good shot at passing because casinos have already had to adjust to smoking bans due to the COVID-19 pandemic.¹⁶⁰ The Governor of New Jersey, Phil Murphy, has already indicated his support for the legislation stating that he will sign it into law, should it pass through the state legislature and hit his desk for final approval.¹⁶¹ Similarly, as discussed earlier in this Comment, the Navajo Nation and City of Shreveport, Louisiana, have also enacted legislation eliminating smoking in casinos.¹⁶²

158. *Atlantic City Casinos Set Revenue Record*, *supra* note 17.

159. Assemb. Health Comm. A2151, 2022 Leg., 220th Sess. (N.J. 2022). This bill is a carryover of bill number A4541 from the 219th legislature.

160. Edelstein, *supra* note 1. Note, Assemblywoman Valerie Vainieri Huttle sponsored the bill when it was first introduced before the New Jersey General Assembly as bill number 4541. On February 7, 2022, the bill was reintroduced before the New Jersey General Assembly as bill number 2151. The text of the bill did not change.

161. Molly Shelly, *Gov. Murphy Expresses Support for Smoking Ban in Atlantic City Casinos*, PRESS OF ATL. CITY (Sept. 23, 2021), https://pressofatlanticcity.com/news/local/gov-murphy-expresses-support-for-smoking-ban-in-atlantic-city-casinos/article_a660f01e-1c9e-11ec-81c2-775725a757ae.html.

162. Chow, *supra* note 119; *Shreveport Bars and Casinos Go Smoke-Free Starting Sunday*, KTBS 3 (July 31, 2021), https://www.ktbs.com/news/incaseyoumissedit/shreveport-bars-and-casinos-go-smoke-free-starting-sunday/article_c706d112-f25f-11eb-beb9-e3d38658d1b4.html.

Supporting similar legislation to ban indoor smoking in all states is in the best interest of the gaming industry. Understandably, casino owners may be reluctant to gamble with their profits and implement smoking bans on their own accord. Smoking in casinos is so engrained in society that making a shift to nonsmoking seems like a monumental undertaking. However, for the myriad of reasons cited throughout this Comment, a ban on indoor smoking is the right decision to best protect the health and well-being of the public and the casino employees. Many casino owners already recognize this fact as is evidenced by the moves limiting smoking indoors by the Cosmopolitan and Resorts World Las Vegas resorts and by eliminating smoking entirely as the Park MGM has done.¹⁶³

Perhaps casino owners are reluctant to become smoke-free because they do not want to compete against other properties that opt to continue permitting indoor smoking. While the casino owners may know going smoke-free is the right thing to do, taking a risk that profits walk across the street to a casino that allows smoking may be too great of a concern. As such, casino owners should push for state legislatures to pass laws requiring all casinos to ban indoor smoking. Doing so would even the playing field and alleviate any apprehension about being the only smoke-free property in town. This would allow casino owners to take advantage of all the benefits that accompany smoke-free policies without undertaking an uncertain risk of decreased profits. Gamblers who like to smoke will continue to gamble. They will simply adjust their habits as they had to do when smoking was federally banned in most restaurants, bars, and on airplanes.¹⁶⁴

CONCLUSION

There is simply no benefit in continuing to allow smoking in casinos. The health effects of secondhand smoke are staggering, causing disease and premature death in thousands of nonsmokers. Additionally, revenue reports have shown that smoking bans are not

163. Komenda, *supra* note 134; Henry, *Resorts World Las Vegas*, *supra* note 139.

164. *See generally* Pallini, *supra* note 33 (discussing the history of smoking on airplanes and the eventual ban that took effect in 2000); Hallett, *supra* note 142.

negatively impacting profits, as feared by casino owners in their longstanding opposition to instituting smoking bans.¹⁶⁵

Due to the COVID-19 pandemic, public concern over matters of health is at an all-time high. By implementing indoor smoking bans in their own casinos, casino owners will not only curb any future potentially staggering litigation and workers' compensation liability, but they will also curry favor with the public and casino employees alike. It is possible that non-smoking patrons, young adults, and high-risk individuals who have avoided casinos for fear of exposure to secondhand smoke will patronize casinos if smoking is banned. As such, casino revenue may even increase with the implementation of a ban. At the very least, it will provide protection from future liability and damages to be paid to injured casino workers. Simply put, smoking is a greater liability than it is an asset for casinos and change must be made.

The COVID-19 pandemic has shown that society's tolerance for continuing to allow preventable health risks to fester is running out. As Cynthia Hallett, President and CEO of the American Nonsmokers' Rights Foundation, wisely remarked, "Casinos are the last frontier for extinguishing smoking indoors . . . [L]ook at airplanes and restaurants, which we now take for granted as places that should obviously be smoke free. In the near future, we'll look back at casinos the same way and wonder what took so long."¹⁶⁶ Casino owners take heed, indoor smoking is about to be extinguished.

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165. *Atlantic City Casinos Set Revenue Record*, *supra* note 17; Velotta, *supra* note 145.

166. Hallett, *supra* note 142.

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