

SMOKING BAN LEGISLATION IN NEW JERSEY: SHOULD CASINOS BE IMMUNE FROM SMOKE?

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I. INTRODUCTION

In recent years, several states have enacted anti-smoking legislation. Indeed, more and more states and cities are considering enacting similar legislation.² Bars, restaurants and other public forums are the targets of these statutes.³ Many bar and restaurant owners complain that these statutes hurt their business and that the government has no right to tell them how to run their businesses.⁴ However, these statutes persist and are gaining in popularity. New Jersey is currently considering anti-smoking legislation, though it has not yet brought a specific bill to the floor for a vote.⁵

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² The city of Philadelphia considered a smoking ban in bars and restaurants:

With a unanimous vote yesterday, a City Council committee asked Philadelphia's smokers to please, please take it outside.

The 6-0 vote by Council's Committee on Public Health and Human Services clears the way for a March 17 vote by the entire council on a controversial bill that would ban smoking in bars, restaurants and other workplaces. Similar legislation failed four years ago, but this year's measure - supported by Mayor Street, cosponsored by nine of 17 council members, and endorsed yesterday by an array of business and public-health groups - appears to be gaining steam.

Michael Currie Schaffer, *City Smoking Ban Moves Ahead*, THE PHILA. INQUIRER, Mar. 8, 2005, available at <http://www.philly.com/mld/inquirer/11076631.htm>.

³ NY CLS PUBLIC HEALTH LAW § 1399 (2004).

⁴ “Bars in places like Dunkirk, NY, near the Pennsylvania border, and in towns along the New Jersey border to the south have complained of losing business to states that do not have similar smoking restrictions.” Ron DePasquale, *A New York Smoking Ban has Barstools Reeling*, BOSTON GLOBE, January 11, 2004, at A9.

⁵ See Abbott Koloff, *Morris Restaurants, Bars Brace for Smoking Ban; State Lawmakers Likely to Consider Bill Full of Exemptions*, DAILY RECORD (Morristown, NJ) July 25, 2004, at 1A.

The primary reason New Jersey has not voted on a bill yet is because of the issue of who should be exempted from the bill, in particular, casinos.⁶ In this note, I will first review similar statutes in other states and exemptions for which they provide. I will then examine the effects of similar smoking ban legislation on businesses, including bars and restaurants, in the states that have passed this type of statute. Next, I will examine the current New Jersey legislation regarding smoking as well as proposed legislation and the challenges to casinos being provided an exemption. Finally, I will explore whether a smoking ban that would exempt casinos would be damage their business.

II. HISTORY OF ANTI-SMOKING LEGISLATION

Smoking restriction legislation has been in effect for the past several decades.⁷ Statutes banning smoking in the workplace were originally aimed at office environments and generally left other enclosed public areas exempt. In the past several years, however, beginning in California in 1994, state legislatures and courts have extended the restrictions to restaurants, bars, as well as other indoor areas not previously covered by workplace statutes.⁸ Legislatures and courts have upheld these statutes based on protecting employee health. However,

⁶ According to State Assemblywoman Loretta Weinberg:

She said she expects casinos to be given some sort of exemption -- with smoking allowed at least in areas where gambling takes place. She also said she would consider an exemption for small bars run by their owners, and which don't have any employees. A draft version of the bill allows smoking in all parts of a casino but contains no exemption for bars of any size. It includes exemptions for cigar bars and some social organization. Peter Pappas, a co-owner of a diner in Madison, New Jersey stated that, "his business increased by 30 percent after he banned smoking last year. He said he has lost some late-night business, especially the bar crowd, but is busier for lunch and dinner.

Deborah Dowdell, president of the New Jersey Restaurant Association noted that: ...[S]ome New York City pubs report losing between 20 percent and 50 percent of their business because of the city's smoking ban. New York City officials counter that tax revenues from bars and restaurants actually have increased slightly since the ban. Dowdell said those revenues should have increased at a greater rate because more people have been visiting the city compared with the year after the 9/11 terrorist attacks....If smoking is allowed in casinos but not elsewhere, she said, some people might drink at casinos instead of at bars where smoking is banned. That would give casinos an unfair advantage.

Id.

⁷ For a brief history of smoking ban legislation, see Tad Vezner, *Smokers have Faced Tougher Bans, Debate has Fumed Through Ages*, (October 24, 2004), at <http://www.data-yard.net/10x1/toledo-glantz.htm>. Early laws against smoking took the form of regulations that restricted smoking from certain areas in public buildings. *Id.* Arizona, in 1973, was the first state to restrict indoor smoking, prohibiting smoking in elevators, classrooms, and music halls. *Id.* In 1975, Minnesota became the first state to regulate smoking in restaurants, requiring non-smoking dining areas. *Id.* California was the first state to bar smoking in indoor work places. *Id.*

⁸ *Id.*

several states' statutes contain exemptions for membership organizations, private clubs, and casinos even though these organizations have employees that would presumably require the same protections as those working in restaurants and bars.

A. LEGAL AND SOCIAL RATIONALE OF STATUTES IN OTHER STATES

Legislators have used the argument of Equal Protection under the United States and state constitutions in defending the legality of smoking ban statutes.⁹ Though this legislation may be constitutional, it is normally greeted with mixed reviews by both residents and business owners. However, where the statutes are actually enforced, they generally gain acceptance among people. Beneficial health effects may explain why the statutes are gaining acceptance.

1. LEGAL BASIS FOR SMOKING BANS

In July of 2003, New York passed a statewide smoking ban. The smoking ban applied to certain indoor, public areas including bars and restaurants.¹⁰ The passage of this statute caused much concern among the owners, as well as patrons, of these establishments.¹¹ New York however, is not the first state to pass such legislation extending smoking restriction to restaurants and bars¹² and indeed, smoking ban legislation has become increasingly popular with state legislatures in recent years with several states passing similar statutes.¹³

⁹ See *New York City C.L.A.S.H. v. City of New York*, 315 F. Supp. 2d 461, 481 (S.D.N.Y. 2004) (stating that in areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against the plaintiff's equal protection challenge).

¹⁰ N.Y. PUB. HEALTH LAW § 1399-0 (2004) (providing for smoking restriction in places of employment, bars, food service establishments, bingo facilities, as well as other enclosed public facilities).

¹¹ See Stacey Stowe, *Smokers Get Ready for Lights Out*, N.Y. TIMES, May 11, 2003, at 14CN (interviewing bar owners and patrons about their concerns over the enactment of smoking ban legislation in Connecticut).

¹² Several states have passed legislation restricting smoking in the workplace. See, e.g., ARIZ. REV. STAT. Ann. § 36-601.02 (West 2004); CONN. GEN. STAT. § 31-40s (2003). California was the first state to extend the restriction to bars and restaurants with the passage of the California Smoke-Free Workplace Act. See Damon K. Nagami, *Enforcement Methods Used in Applying the California Smoke-Free Workplace Act to Bars and Taverns*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 159, 163 (2001) (discussing history of smoking ban legislation in California).

¹³ For other examples of statewide smoking bans in restaurants, bars, and other enclosed public areas, see CAL. LAB. CODE § 6404.5 (Deering 2004); CONN. GEN. STAT. § 19a-342 (2003); DEL. CODE ANN. tit. 16 § 2903 (2004).

According to lawmakers, the primary purpose behind the smoking ban legislation in New York is the protection of employees from second-hand smoke in these areas.¹⁴ The constitutionality of the New York statute, as well as those of other states, has been challenged in courts, and up until now, the statutes have been upheld.¹⁵ Generally, courts up have upheld these statutes based on Equal Protection guarantees under the United States, as well as individual state constitutions.¹⁶ The rationale is that environmental control statutes generally place the burden on certain groups, but that alone is not enough to make the laws unconstitutional.¹⁷ Thus, so long as lawmakers do not unduly burden

¹⁴ As the mayor of New York City stated, smoking ban legislation “extends the smoke-free air legislation in order to protect as many New York City workers as possible. In addition, this legislation will result in smokers smoking less and fewer people smoking overall. Less than 20 percent of New Yorkers smoke and the vast majority of them want to quit. Smoke-free workplace legislation helps them accomplish this goal without harming business.” Mayor Michael R. Bloomberg, Remarks at a Public Hearing on Local Laws (December 30, 2002), available at <http://www.nyc.gov/html/doh/html/public/presso2/mr344.html>.

¹⁵ See *C.L.A.S.H.*, at 481. In this case, the New York group, C.L.A.S.H., Inc. (CLASH) challenged the constitutionality of the recent amendments to the New York State Clean Indoor Air Act which proscribed smoking in virtually all public areas including bars and restaurants. *Id.* at 461. In upholding the constitutionality of the amendments, the court stated that in areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against the plaintiff’s equal protection challenge. *Id.* at 481. The court also found that CLASH’s First Amendment argument without merit noting that the act of smoking in a bar or restaurant was not expressive conduct that would merit its protection. *Id.* at 474. Finally, the court also found no merit in the group’s Privileges and Immunities Clause argument. *Id.* at 484. See also, *Sayville Inn 1888 Corp. v. County of Suffolk*, 1998 U.S. Dist. LEXIS 23472, at 7 (E.D.N.Y. August 3, 1998). In this case, the owners and operators of bars and restaurants in Suffolk County challenged a law passed by the County Legislature banning smoking in restaurants by arguing it violated their rights under the Fourteenth Amendment. *Id.* at 1. In upholding the constitutionality of the law, the court acknowledged that so long as lawmakers do not burden fundamental rights or single out suspect classifications, lawmakers are free to engage in rational speculation unsupported by evidence. *Id.* at 7. But see, *Pankos Diner Corp. v. Nassau County Legislature*, 321 F. Supp. 2d 520 (E.D.N.Y. 2003). In this case, restaurant owners challenged a county statute banning smoking in restaurants as unconstitutionally vague and in violation of the Fifth and Fourteenth Amendments. *Id.* at 523. The court agreed and granted a preliminary injunction, halting enforcement of the smoking ban statute on the grounds that it conflicted with a previous statute and was unconstitutionally vague. *Id.* at 525.

¹⁶ “[G]overnmental actions that establish quasi-suspect classifications, such as those based on gender or illegitimacy, are subjected to an intermediate level of review. ...[I]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. ...While it is true that the Smoking Bans do single out a particular class of persons and place some greater burdens on their activities, this circumstance alone is insufficient to render the governmental action violative of the Equal Protection Clause,” *C.L.A.S.H.*, at 481-82.

¹⁷ “In particular, clean air and other environmental controls always place burdens on some groups more than others. For example, compliance with a host of state automobile exhaust emission laws, some rather stringent, undoubtedly increases the cost of manufacturing and selling automobiles – a cost ultimately borne by motorists. On the basis of CLASH’S equal protection arguments, an

fundamental rights or single out classifications of people, courts are willing to find the passage and application of these statutes constitutional.

However, in another case in Erie County, New York, a tavern owner sought a waiver from the Clean Indoor Air Act (CIAA) on the basis of an undue financial hardship as provided in the statute.¹⁸ Although the act provided for local officials to establish their own guidelines for granting waivers,¹⁹ the Court found that the guidelines set by the Commissioner of Health were irrational since the owner had to demonstrate a 15 percent drop in sales in order to receive a waiver.²⁰ Therefore, although there were not claims challenging the constitutionality of the statute, the Court recognized that the smoking ban could cause financial hardships on businesses, such as the tavern in this case, and that guidelines for waivers must be practicable.²¹ Since this decision, there have been several other grants of waivers to the CIAA based on local guidelines.²²

Other courts have upheld smoking ban legislation. Smoking bans have been challenged in several states mainly for violating constitutional rights, especially where laws exempt certain public areas. In Arizona, a local ordinance banning smoking in restaurants in Tucson was challenged by a local restaurant

organization such as the Automobile Association of America could argue for the repeal of these laws on the grounds that they deliberately discourage driving and unequally burden motorists as a class. Such an argument, however, would fail for the same reasons applicable to this case, namely, that a governmental action that does not implicate a fundamental right or a protected class survives an equal protection challenge if the government articulates some rational basis for the action.” *Id.*

¹⁸ *Elmwood-Anderson Corp. v. Novello*, 782 N.Y.S.2d 312, 313 (App. Div. 2004). In this case, the tavern owner was denied a waiver by the Commissioner of Health because Plaintiff could not show a 15 percent reduction in sales required by County guidelines in order to demonstrate a financial hardship. *Id.* at 314. The Supreme Court of New York annulled the Commissioner’s determination and granted the Plaintiff a six-month waiver from the smoking ban and finding the County guidelines to be “arbitrary and capricious as well as irrational.” *Id.* The Appellate Division agreed with the Supreme Court noting that although the State statute allows for local officials to choose their own guidelines for granting waivers, the guidelines chosen by Erie County were made in excess of the Commissioner’s authority and were inconsistent with the language and purpose of the statewide smoking ban. *Id.* The Court analogized the concept of “undue financial hardship” as used in other statutes and concluded that “it generally is understood to include consideration of the financial impact of compliance in the context of the particular business’s operations” and that a business could suffer an undue financial hardship without a 15 percent drop in sales. *Id.* at 315. In addition, the court stated that the purpose of the ban was to reduce second-hand smoke as much as was practicable, “not to eliminate involuntary exposure to second-hand smoke by means that are impracticable.” *Id.* Thus, the Commissioner was ordered to reformulate the guidelines in accordance with the statute. *Id.*

¹⁹ *Id.* at 314.

²⁰ *Id.*

²¹ *Id.* at 315.

²² See, e.g., *Smoking Ban Waivers Granted to 2 Restaurants*, BUFFALO NEWS, Mar. 7, 2005, at B3.

owner claiming the ordinance, which exempted bars and bowling alleys, unconstitutionally discriminated against her business.²³ The court summarily dismissed all of the plaintiff's constitutional claims including First Amendment and Equal Protection challenges.²⁴ Again, we see the court's willingness to find validity in smoking bans passed by local governments, even where those ordinances contain exemptions for specified public establishments.

Similarly, in Connecticut, which recently passed a statewide smoking ban, the Superior Court upheld the constitutionality of the law.²⁵ The smoking ban in Connecticut exempted casinos as well as certain private clubs.²⁶ However, because the court found there was a rational basis for exempting private clubs and casinos and therefore, the plaintiff's Equal Protection Rights were not violated.²⁷ This demonstrates a court's inclination to uphold smoking ban

²³ *City of Tucson v. Grezaffi*, No. 00-0172, 2001 Ariz. App. LEXIS 201, at 14 (Ariz. Ct. App. May 10, 2001). In this case, the owner of a restaurant in Tucson, Arizona, violated a local ordinance prohibiting smoking in restaurants except in designated areas where smoke could not drift over to nonsmoking areas. *Id.* at 1. Plaintiff brought a number of constitutional claims challenging the validity of the statute which the court summarily dismissed in affirming the trial courts decision. *Id.* at 25. In dismissing plaintiff's First Amendment claim that the ordinance violated the right to freedom of association, the court stated that there is no generalized right of association under the Amendment. *Id.* at 13. The court also found plaintiff's argument that the ordinance violated the Equal Protection Clause without merit. *Id.* at 14. In noting that Plaintiff was not a member of a suspect class and the law did not recognize a fundamental, constitutionally protected right, the court applied the rational basis test, holding that the ordinance was rationally related to further a legitimate governmental interest of "promoting the public welfare by alleviating smoke-related health concerns in restaurants." *Id.* at 17.

²⁴ *Id.* at 25.

²⁵ *Batte-Holmgren v. Galvin*, No. CV044000287, 2004 Conn. Super. LEXIS 3313, at 18 (Conn. Super. Ct. Nov 5, 2004). In May of 2003, Connecticut adopted a statute that prohibited smoking in "numerous public places, including state buildings, retail food stores, college dormitories, restaurants and most public establishments with alcoholic liquor permits." *Id.* at 3. The act was then amended to prohibit smoking in "the bar area of bowling alleys and in areas of a dog track or a facility equipped with screens for the simulcasting of off-track betting race programs or jai alai games." *Id.* The ban exempted private clubs that obtained an alcohol permit prior to May 2003, but applied to clubs that obtained licenses after that date. *Id.* Plaintiffs were restaurant and café owners and operators serving liquor and sought a declaratory judgment that the statewide ban violated the Equal Protection Clause. *Id.* at 1. The basis of Plaintiffs argument was that the ban exempted casinos and certain private clubs in violation of 42 U.S.C. § 1983 and infringed on their Equal Protection rights. *Id.* at 2. Specifically, Plaintiffs claimed they were deprived of substantial business due to the ban while casinos and private clubs were not affected. *Id.* at 4. The Defendants, the Commission of Public Health and the Attorney General, argued that there was a rational basis for exempting the specified clubs and casinos and that the Plaintiffs' proper redress was in the legislature. *Id.* at 5.

²⁶ *Id.* at 2.

²⁷ *Id.* at 18. Specifically, the Court found that private clubs, by their very definition, provide a rational basis for treating them differently under the law. *Id.* at 12. The court stated that "[p]rivate clubs and associations are frequently subject to different laws and legal requirements than public locations. The law recognizes that they can be regulated differently. The legislature's decision to exempt certain private clubs from the ban is a manifestation of this." *Id.* at 13. As far as casinos, the

statutes which contain exemptions for certain public establishments. Ultimately, the state decides how far it is willing to go in order to protect the public health and welfare of its citizens.

2. SOCIAL BASIS FOR SMOKING BANS

In order to gain popular support, state legislatures also accentuate the societal benefits of a smoking ban statute. For instance, the dangers of second-hand smoke have long been well known and documented.²⁸ In fact, the harmful effects to health from smoking have been the impetus for the passage of anti-smoking legislation.²⁹

Although smoking has been recognized as being harmful to cigarette smokers for decades,³⁰ the harmful effects of environmental tobacco smoke (“ETS”) and second-hand smoke were not scientifically recognized until the 1970’s and 1980’s.³¹ After such results were released, states began to pass clean indoor air laws in the 1970’s³² which eventually led to the passage of statewide smoking bans. While the constitutionality of these bans has been contested in courts, the courts generally find them to be a valid exercise of the states’ power to protect public health and welfare.³³

Court explained that the State had a rational concern that it could not enforce the ban on them because in Connecticut “casinos are ‘considered to be on sovereign nation status and they are not subject to the same laws as the rest of Connecticut. They’re only affected by their own regulations.’” *Id.* at 14. Of course, this is not the case in New Jersey where casinos are not on tribal land and are not afforded the privileged status of a sovereign nation. However, the Court also noted that the fact that “casinos have considerable political and economic influence does not alter the required legal analysis.” *Id.*

²⁸ For a general description of the dangers of second-hand smoke, see EDWIN B. FISHER, AMERICAN LUNG ASSOCIATION 7 STEPS TO A SMOKE-FREE LIFE 27 (1998). See also, Robert F. Cochran, Jr., *Beyond Tobacco Symposium: Tort Issues in Light of the Cigarette Litigation: From Cigarettes to Alcohol: The Next Step in Hedonic Product Liability?*, 27 Pepp. L. Rev. 701, 707 (2000).

²⁹ See Nagami, *supra* note 11, at 159.

³⁰ Medical studies conducted in the 1950’s published and popularized the notion that cigarette smoking was a serious threat to health and that smokers had a greater risk of lung cancer. These findings helped to spark the modern anti-tobacco movement. See Justin C. Levin, *Protect Us or Leave Us Alone: The New York State Smoking Ban*, 68 ALB. L. REV. 183, 188 (2004).

³¹ *Id.* at 190. Research in the 1970’s and 1980’s reported the harmful effects of ETS in children, causing those exposed to higher rates of respiratory disease. Reports also linked ETS with increased risk of heart disease. *Id.*

³² Arizona was the first to enact a law prohibiting smoking in some public buildings in 1972. This was followed by a similar statute passed in Minnesota in 1975. *Id.* at 191.

³³ See *C.L.A.S.H.*, at 474 (explaining that First Amendment freedoms do not warrant constitutional protection when the activities may be harmful to public health or general welfare).

With the legality of the statutes safely grounded, the practical effects of the legislation must be reviewed. In states like New York, that have passed acts banning smoking in bars and other defined enclosed public spaces, the air quality in the workplace has dramatically improved.³⁴ In addition, studies have shown that the beneficial effects of a smoke-free environment extend to the health of the patrons as well.³⁵ After the statutes have been implemented, citizens tend to feel that the encroachment of these statutes into their personal liberties is tolerable.³⁶

B. STATUTES THAT CONTAIN EXEMPTIONS FOR CASINOS OR PRIVATE CLUBS

Interestingly, some states that have passed smoking ban legislation have granted exemptions to private clubs and casinos. In Connecticut, casinos are exempted from the smoking ban as long as they operate under a valid casino liquor permit.³⁷ Similarly, Delaware allows casinos to establish smoking

³⁴ The New York City Department of Health and Mental Hygiene has stated, "A study by the New York State Department of Health confirmed that restaurant and bar workers now face significantly less second-hand smoke exposure at work. They measured levels of cotinine - a tobacco by-product found in people who have inhaled tobacco smoke - among non-smoking workers one month prior to implementation of the New York State Clean Indoor Air Act, and again three months after it took effect. They found an 85% decline in cotinine levels, showing that non-smoking workers are now breathing much cleaner air at work." New York City Department of Health and Mental Hygiene, *Workers, Owner, City Officials and Health Groups Toast One-Year Anniversary of the Smoke-Free Air Act* (March 29, 2004), available at <http://www.nyc.gov/html/doh/html/public/presso4/pro31-0329.html>.

³⁵ Studies have shown that smoke-free restaurants and bars in California have had beneficial effects on both employees as well as patrons. For example, "[o]ne study found that the respiratory health improved rapidly in a sample of bartenders after a state clean smoke-free workplace law was implemented in California, and another study reported a 40% reduction in acute myocardial infarctions admitted to a regional hospital during the 6 months that a local smoke-free ordinance was in effect." Andrew Hyland, Mark Travers, & James Repace, *7 City Air Monitoring Study (7Cam), March-April 2004*, at 4 (May 2004), available at <http://www.tobaccofreekids.org/pressoffice/7camreport.pdf>. See also, *Of Smoking Bans and Heart Attacks*, N.Y. TIMES, Apr. 27, 2004, at 24 (ban on smoking in public and workplace in Helena, Montana coincided with a sharp drop in heart attack among local residents).

³⁶ For an example of public support of smoking ban legislation, see John Milgrim, *Poll, Data Buttress New York's Anti-Smoking Efforts*, (Oct. 3, 2003), at http://www.pressrepublican.com/Archive/2003/10_2003/100320032.htm. New York voters overwhelmingly approve of the state's new ban on most indoor smoking, according to the first independent poll conducted since the law went into effect.... Statewide, 59 percent of voters approve of the ban on smoking in bars and restaurants and 37 percent disapprove, according to a Quinnipiac University poll released Thursday. The approval is 57 percent in rural upstate and jumps to 67 percent in the suburbs," *id.*

³⁷ "Smoking Act, P.A. 03-45, doesn't apply to casinos as long as casinos operate under a valid casino liquor permit issued pursuant to C.G.S. §30-37k, casinos aren't subject to the smoking ban. The Mohegan Tribe operates the Mohegan Sun under a casino permit and the Mashantucket Pequot Tribe operates Foxwood under a temporary casino permit." *Smoking Act, P.A. 03-45, Doesn't Apply To Casinos*, CONNECTICUT LAW TRIBUNE, October 13, 2003, at 251.

pavilions on the premises as long as they are open at least at one end.³⁸ Casino owners argue that casinos should be exempted from such statutes because a ban on smoking may stop people from coming, causing a dramatic loss in their revenues.³⁹ While this assertion does not differ much from those of bar and restaurant owners, the casino industry provides a sizable portion of income to the states.⁴⁰ Therefore, legislatures have tried to pacify casinos by providing an exemption from the smoking ban.

III. EFFECTS OF SMOKING BANS ON LOCAL BUSINESSES

A major argument against smoking ban legislation from bar and restaurant owners is that people will avoid their establishments because patrons will not be allowed to smoke, which hurts business. Another complaint asserts that a ban discriminates against people of lower income, who tend to be the largest group of tobacco users.⁴¹ Casinos have a similar argument, yet states that

³⁸ "State law dictates that for casinos to have smoking areas, they must establish pavilions that must be open at least at one end." James Merriweather, *Bright Spot for Smokers*, THE NEWS JOURNAL (Wilmington, DE), January 17, 2004, at 16B.

³⁹ For example, in Delaware, a state that does not fully require casinos to be smoke-free as long as they have an open-ended pavilion for smoker, casinos still saw a drop in revenue, *id.* As one Delaware casino noted, "slot revenues at Dover Downs were up 12.7 percent during the 11-month period before the ban became effective. In the year after the ban, he said, the take dropped by 11.3 percent." *Id.*

⁴⁰ See N. J. CASINO CONTROL COMM'N, 2004 ANNUAL REPORT 24 (2005) (reporting that tax revenues from Casinos totaled \$384,578,000.)

⁴¹ As the president of the Cumberland County Bar & Restaurant Owners Association, Don Bernardi, states:

Many of us have non-smoking establishments or limited areas to accommodate smokers, a matter of free choice for owners and patrons alike. Many of us have customers who would be classified as lower income, statistically the largest group of tobacco users, who enjoy a cold beverage and a smoke after work. To penalize and discriminate against these people, not to mention all socio-economic groups who enjoy the use of tobacco products while relaxing and socializing, is unconscionable. Many of these people, from all walks of life, who refrain from smoking in the home, in their vehicle, in the proximity of their children, their spouse or significant other, make a conscious decision to indulge at a bar, tavern or restaurant - again a matter of free choice.

Although socio-economic discrimination is of great concern to Bernardi, he is equally concerned about a possible casino exemption from the smoking ban:

The part of this matter we find most difficult to understand is that we have also been informed by NJLBA that Atlantic County (the casinos), will be exempt from any smoking bans. Were we all asleep when equal treatment under the law was rescinded? Have our constitutional rights been abolished? Many of us watch our customers flock to the shore all summer; are we now to be subjected to the same all winter as well over the tobacco issue?

pass anti-smoking legislation will provide exemptions for casinos while forcing bar and restaurants to comply.⁴² In most cases, however, bar and restaurant business is not adversely affected by the legislation.⁴³ There are certain cases, especially in towns that border states without such legislation, that have harmful effects on their business, but in many instances, business has improved for these establishments. Therefore, it begs the question whether casino business would be adversely affected if casinos were not provided an exemption from these statutes.

In anticipation of state action, some restaurants have placed self-imposed smoking bans.⁴⁴ Obviously in these cases, not all bars and restaurants need comply and thus certain establishments, such as cigar bars, continue to operate as a smoking facility.⁴⁵

A. POSITIVE EFFECTS IN NEW YORK CITY AND OTHER CITIES WITH SMOKING BANS

After New York passed its statewide smoking ban in July 2003, there was speculation as to whether the bar and restaurant business would be gravely affected. However, many establishments in New York City saw positive effects in

Don Bernaradi, Editorial, *My View*, THE DAILY JOURNAL (Vineland, N.J.), Mar. 4, 2005, at 9A.

⁴² See *supra* note 34 and accompanying text; see also Merriweather, *supra* note 35 and accompanying text.

⁴³ For example:

The smoking ban in New York City does not appear to have drastically depressed business. From March to June, the city created 10,000 new restaurant and bar jobs, according to the Department of Labor. The state Department of Taxation and Finance's most recent report of alcohol and beer tax collections (which measures both on-premises consumption and retail sales) shows that revenues rose to \$15.2 million this past August, from \$14.4 million in August 2002. And although the tobacco lobby continues to finance a campaign claiming that New Yorkers are unhappy with the ban, a poll released earlier this month by Quinnipiac University reported that 59 percent of voters in the state favor prohibiting smoking in public places; another survey, commissioned in August by antismoking groups, found that 70 percent of New York City voters support it.

Rosemary Ellis, *The Secondhand Smoking Gun*, N.Y. TIMES, Oct. 15, 2003 at 19.

⁴⁴ For example, in Worcester, Massachusetts, "The city itself has held back from imposing a smoking ban, waiting for state action." The smoking ban in Massachusetts is being upheld due to an exemption contained for cigar bars and nursing homes contained in the proposed bill. See Chris Echegaray, *A Victory of Sorts; For City Cigar Lounge, An Auspicious Opening*, TELEGRAM & GAZETTE (Massachusetts), May 26, 2004 at B1.

⁴⁵ *Id.* Although the success of the cigar bar may be attributed to the fact that it is the only smoking establishment in the city, two other cigar bars were not able to survive in the town. The owner attributes the bar's success to having a high-tech ventilation system and due to her perception that "There are not a lot of places where you can smoke and have a drink for a couple of hours for \$5." *Id.*

the ensuing months. After the passage of the Smoke-Free Air Act in New York, revenues in bar and restaurants were up and more jobs in the industry were created.⁴⁶ In addition, business tax receipts for those businesses had increased after passage of the legislation.⁴⁷ Although opponents criticize these reports because bar and business statistics are not separated,⁴⁸ the bottom line is that although tax rates have not changed, New York City collected more money in taxes from bars and restaurants after the ban went into effect.⁴⁹

In other cities that have passed ordinances banning smoking in restaurants and bars, such as El Paso, Texas which passed one in 2002, businesses have not been adversely affected and continue to thrive.⁵⁰ Though El

⁴⁶ See Ellis, *supra* note 42.

⁴⁷ As noted in a one-year review issued by New York City, "From April 1, 2003, through January 31, 2004...bar and restaurant tax receipts were up 8.7% from the same period in 2002-2003. From April 2003 through January 2004, the City collected \$17,375,688 in tax receipts from bars and restaurants; in the same period one year previously, the City collected \$15,984,811." New York City Department of Finance, New York City Department of Health & Mental Hygiene, New York City Department of Small Business Services, New York City Economic Development Corporation, *The State of Smoke-Free New York City: A One-Year Review*, (March 2004), available at <http://www.nyc.gov/html/doh/pdf/smoke/sfaa-2004report.pdf>.

⁴⁸ For example, "[c]ritics say the report is flawed because it does not separate bar and restaurant statistics, whereas bars have suffered more from the ban, critics contend. The increase in tax payments and jobs must be weighed against the restaurant industry's emergence from the post-9/11 recession." In one case, an owner of five taverns explained that his business experienced a 1 percent increase in sales compared to the usual 8 to 15 percent increase in previous years. The owner attributes this to the fact that smokers now spend more time outside where he cannot serve drinks, whereas in the past they would stay inside to buy drinks while they smoked. Additionally, the president of the New York Nightlife Association noted that many restaurant and bar workers have to take on second jobs in order to make up lost tip income. See Andrea Elliot, *Bars and Restaurants Thrive Amid Smoking Ban, Study Says*, N.Y. TIMES, March 29, 2004 at B2.

⁴⁹ *Id.* "Data from the city's Department of Finance shows that the money spent in New York bars and restaurants has increased, the report states: from April 2003 to January, the city collected about \$17.3 million in tax payments from bars and restaurants, a rise of about \$1.4 million over the same period a year earlier. The payments were for the general corporation tax and the unincorporated business tax, and are usually collected quarterly from restaurants and bars. The rates have not changed since before April 2003." Furthermore, the study showed that "[a]n average of 164,000 people were employed in restaurants and bars in 2003, the highest number in at least a decade. Since the smoking ban took effect last March 30, employment in bars and restaurants has risen by 10,600 jobs, taking into account seasonal fluctuations, according to the report." Finally, the study showed that 97 percent of establishments inspected by the city were in compliance and in general, New Yorkers reported less exposure to second-hand smoke since the ban took effect. *Id.*

⁵⁰ The Center for Disease Control (CDC) conducted an analysis of the effects of a smoking ban ordinance passed in El Paso prohibiting smoking in bars and restaurants. The CDC found there was no total decline in bar or restaurant revenue after the passage of the ordinance. It noted that despite claims that the law might reduce alcoholic beverage revenues, sales of alcoholic beverages were not affected. It also indicated that analyses in other cities with smoking ban ordinances were similar to the El Paso analysis and that in general, the bans had no effect on restaurant or bar revenue. For a detailed discussion on the agency's method of the analysis and its findings, see P. HUANG ET AL., CENTER FOR DISEASE CONTROL, IMPACT OF A SMOKING BAN ON RESTAURANT AND BAR REVENUES – EL

Paso has the most stringent smoke-free indoor air ordinance in Texas, data shows that no changes in retail revenue occurred in restaurants and bars after the smoking ban was passed.⁵¹ Figures such as these seem to indicate that if people have a desire to go to a certain restaurant or bar, a ban prohibiting smoking in a particular establishment is not going to affect their decision to go there.

Still other studies have shown that overall, smoking bans are good for the bar and restaurant business.⁵² Although nightclub owners saw the number of customers drop in the months following the smoking ban in New York City,⁵³ restaurant revenue and employment rose since implementation of the statewide ban.⁵⁴ Similarly, some restaurant owners in Florida do not think the smoking ban implemented there has made any difference in revenue.⁵⁵ In these cases, it seems that a smoke-free environment in dining establishments does little to deter potential customers whether they are smokers or non-smokers. However, these statistics fail to curb the fears of restaurant owners' in other states with proposed smoking ban legislation.⁵⁶

B. NEGATIVE IMPACT IN OTHER TOWNSHIPS

Although there have been documented positive effects on local businesses, there have also been negative effects in other towns. In particular, states with exemptions for casinos have seen business in surrounding towns suffer as a result.⁵⁷ In addition, towns which border states that do not have smoke-free

PASO, TEXAS, 2002 (Feb. 27th 2004), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5307a2.htm>.

⁵¹ *Id.*

⁵² A professor of medicine at the University of California-San Francisco, who published several studies measuring the impact of smoking bans, noted that “[i]n the short run, nothing happens and, in the long run, these smoking bans seem to be good for the hospitality industry.” In discussing potential smoking ban legislation in Georgia, which would exempt business with less than 8 employees, bars, and private nursing homes, the article demonstrates the instances of the minimal impact smoking ban ordinances have in New York as well as Florida. See Clint Williams, *Smoking Ban Studies Show Restaurants Unhurt*, THE ATLANTA JOURNAL-CONSTITUTION, Mar. 28, 2004 at 5E.

⁵³ *Id.*

⁵⁴ *Id.* However, as the CEO of the New York State Restaurant Association stated, “that doesn’t mean 10 restaurants in Buffalo aren’t suffering because of this.” *Id.*

⁵⁵ *Id.* Another reason owners think the smoking ban actually has a positive impact is because customers do not linger while drinking coffee and having a cigarette, which opens more tables for new customers. Additionally, in establishments with patio seating, restaurant owners see even less of an impact from the ban. In fact, these restaurants are even more attractive to smokers. *Id.*

⁵⁶ *Id.*

⁵⁷ “Exemptions in Connecticut for casinos and private clubs hurt surrounding

legislation have noted adverse effects on their businesses.⁵⁸ It is these concerns that currently confront New Jersey legislatures while they decide if they should pass workplace smoking ban legislation, including bars and restaurants, and whether casinos in Atlantic City should be exempted from such a statute.

In the ensuing months after the statewide smoking ban was passed in New York, not all data was positive and hardships on certain businesses were obvious.⁵⁹ According to some data, beer and liquor sales fell dramatically.⁶⁰ The data also attributes losses in gaming revenue, as well as factory layoffs, to the smoking ban.⁶¹ The drop in sales and gaming contributed to a drop in government revenue and enlarged the deficit in at least one city in New York.⁶² Though there is contrasting data, it is apparent that some businesses are losing revenue and can at least partially attribute this loss to the smoking ban.

businesses. Though bans in general have been found to be constitutional, statutes containing exemptions for certain public forums may not be.” Ken Dixon, *Smoking Case Hinges on Fairness*, CONNECTICUT POST (Bridgeport, CT), Sept. 29, 2004.

⁵⁸ See, e.g., *A New York Smoking Ban has Barstools Reeling*, *supra* note 2.

⁵⁹ As some data reflects:

While the Bloomberg administration claims that tax receipts are up one year after the ban, the data failed to control for any mitigating factors, including a 4.5 percent increase in the sales tax rate and inflation of about 2.5 percent. Controlling for these factors alone would eliminate any reported growth in sales tax revenue...According to a state Department of Health analysis of state Liquor Authority data, there are fewer on-premise liquor licensees in upstate New York after the smoking ban (October 2003) than before the smoking ban (October 2002). In a November 2003 membership survey conducted by the New York City chapter of the New York State Restaurant Association, 76 percent of respondents reported a decline of 25 percent or more in bar sales and 15 percent or more in food sales as a result of the smoking ban. Beer wholesalers are reporting a 15 percent decline statewide in beer sales to on-premise licensees...The declining beer sales in the state as a result of the ban have resulted in a reduction in the number of bottles needed, leading to the possibility of layoffs at the Owens-Illinois glass factory in Central New York. Gov. George Pataki's executive budget proposal recognizes the impact of the smoking ban on sales of the state's Quick Draw lottery game by projecting a decline in state lottery revenue. Charitable gaming (bingo, pull tabs, etc.) in New York is also being hurt by the smoking ban. Capital District Off-Track Betting Corporation reported a \$4 million decline in handle in the five months following the smoking ban. The resulting drop in local government revenue added \$100,000 to the city of Schenectady's 2003 budget deficit.”

See Scott Wexler, *Data Show Indoor Smoking Ban has Been Bad for Business*, THE TIMES UNION (Albany, NY), April 13, 2004, at A8.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

In addition, in some jurisdictions that have anti-smoking statutes, studies have shown that many bars and restaurants are either in violation of the law or simply disregard the law.⁶³ Because the cost of installing ventilation systems is expensive, some bars do not comply w/ the statute.⁶⁴ Although many other studies show that smoking bans have little effect on bar and restaurant business, owners do not agree and feel that their business will be gravely affected.⁶⁵

Furthermore, opponents of smoking bans claim that studies which show bans are good for business have been largely conducted by anti-smoking organizations.⁶⁶ Opponents point out that according to studies conducted by organizations not affiliated with anti-smoking, New York bars and restaurants actually lost jobs and earnings as a result of the smoking ban.⁶⁷ Similarly, businesses in Toledo, Ohio reported substantial losses in revenue causing some of them to close.⁶⁸

Smoking bans have been extended not only to bars and restaurants, but to other public spaces as well. In Peabody, Massachusetts, the local smoking ban does not prohibit smoking in Veteran of Foreign War's (VFW) or other private

⁶³ One such study was conducted in Howard County, Maryland by the Smoke Free Howard County Tobacco Coalition (SFHC). In 1993, Howard County banned smoking in restaurants that did not serve liquor while business that served liquor had to limit smoking to fully enclosed, well-ventilated rooms. In 2004, the SFHC found that 47 percent of businesses that served liquor either allowed smoking throughout the establishment or had poor ventilation systems. See Ayesha Ahmad, *Study Finds Howard County Smoking Violations*, (Nov. 24, 2004), available at <http://www.data-yard.net/10x1/howard.htm>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Michael L. Maurer, *Guest Column*, NEWARK ADVOCATE (Newark, OH), Sept. 21, 2004 at 7A. Maurer also questions the validity of studies showing the seriousness of effects caused by second-hand smoke inhalation, in particular:

[a]ctual case control studies (one by the World Health Organization) on the effects of second-hand smoke exposure to various lung cancers statistically concluded insignificant risk factors. Advocates of smoking bans cannot prove or document any deaths caused by second-hand smoke except the documented cases of hospitality workers who were killed while attempting to enforce smoking bans.

Id.

⁶⁷ *Id.* For example, the "Ridgewood Economic Association on behalf of the Empire State Restaurant and Tavern Association did one of the few business studies not conducted by anti-smoking groups....The study...found businesses that service and supply bars and restaurants lost 2560 jobs, \$50 million in earnings, and \$71.5 million in gross state product. This is a direct result of smoking bans on business." *Id.*

⁶⁸ *Id.* However, this report did not indicate which industries in Toledo were affected or if the revenue and job losses were a result of the smoking ban.

clubs,⁶⁹ but members note that in neighboring towns that do prohibit smoking in private clubs, business at those clubs has been severely injured.⁷⁰ Although members of these clubs realize that the towns and state have the right to ban smoking in their establishments, smokers feel that they are being squeezed out of more and more public areas and finding it difficult to go somewhere to relax and enjoy themselves.⁷¹

Not only have bars seen drops in their alcohol sales, places that have gaming, such as Keno, have also seen an unexpected drop in those receipts.⁷² By being forced to go outside, cigarette smokers not only do not drink, they also do not play games which generate more money for drinking establishments.⁷³ However, owners of bars and restaurants in towns that had smoking bans before the statewide ban took effect believe the statewide ban is evening out the playing field and helping them to win back smokers who no longer can go to neighboring towns to avoid the ban.⁷⁴

⁶⁹ One member, Manny Raymond, is afraid the town may pass a stricter ban prohibiting smoking in private clubs as well. He laments that "cities have the right to implement stricter smoking regulations than the state's law. He also knows that business is off at other veterans clubs in Saugus and Lynn, where smoking is banned in private clubs." The article explains how veterans who attend the club believe that it would not survive a smoking ban in private clubs such as VFW's. The VFW in Peabody generates most of its revenue from the bar and members fear a smoking ban would cause a dramatic drop in business. In neighboring towns that have banned smoking in private clubs, VFW's have seen a 50 to 55 percent decline due to people buying their alcohol at package stores and staying home. See Steven Rosenberg, *Bans Cloud Future of VFWs, Smoking Regulations Squeeze Private Clubs*, (Dec. 2, 2004), available at <http://www.data-yard.net/10x1/vfw.htm>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² In Quincy, Massachusetts, after a statewide smoking ban took effect, the Keno receipts at a local restaurant dropped significantly. Overall, in 2004, after a statewide smoking ban went into place, "Keno sales in Massachusetts fell by about 4 percent from July 1 through Oct. 16 compared with the same time a year ago" down to \$220 million from \$230 million the previous year. "The Keno sales can be a small, but important, additional source of revenue for restaurants, bars and convenience stores. Businesses that host a Keno terminal typically get a 5 percent commission on all sales, and a 1 percent cut of all prize payments - much like payments made for the sale of other Lottery products." Also, the drop in Keno receipts coincided with a boost in Lottery sales, partly attributed to a new advertising campaign. The State Treasurer noted that the blow to Keno receipts was one of the 'unseen impacts of the smoking ban' and prompted the state to fund a \$6 million project to revamp Keno terminals to reverse the trend. However, not all restaurants have seen a decrease in Keno receipts. Owners of restaurants in towns that had smoking bans before the statewide ban went into effect, see the statewide ban as evening the playing field since they will no longer lose customers to neighboring towns without bans. See Jon Chesto, *Unseen Impact; Keno Burned by Smoking Ban*, THE PATRIOT LEDGER (Quincy, MA), Oct. 21, 2004, at 43.

⁷³ *Id.*

⁷⁴ *Id.*

Other states contain similar exemptions in local smoking ban ordinances. In Winooski, Vermont, a similar smoking ban ordinance also exempts private clubs and bar owners fear these establishments will have an unfair advantage in attracting patrons.⁷⁵ Also, towns without smoking bans, bordering towns like Winooski that do have bans, have seen increased business.⁷⁶ However, if a statewide smoking ban were to pass, that increased business could evaporate.⁷⁷ Although the smoking ban is popular among the residents of Winooski, the council members gave in to pressure to provide an exemption for private clubs in fear of possible litigation from owners of these establishments.⁷⁸

In West Virginia, a smoking ban in Cabell County is blamed for the decline in lottery sales.⁷⁹ Statewide lottery sales were up, except in Cabell County where a smoking ban was enacted in February of 2004.⁸⁰ Lottery retailers in the county attribute the loss in lottery revenue to the smoking ban because, as one owner stated, “[g]amblers are smokers.”⁸¹ Other counties have since implemented smoking bans,⁸² but it remains to be seen what the effect will be in those jurisdictions. It is possible that a statewide smoking ban would dampen the effect of decreased lottery sales since it currently seems that gamers migrate to other areas within the state that do not have smoking bans.

⁷⁵ Vermont does not have a state-wide smoking ban but several towns, including Burlington, South Burlington, Williston and Winooski have smoking bans. The Winooski smoking ban contains an exemption for private clubs. While private clubs say it is difficult to gain access since the public cannot go in “without first submitting an application and gaining sponsorship from an existing member,” tavern owners believe in reality that it is very easy to get into a private club. In addition, bars in towns that do not have smoking bans and border ones that do have seen increased business. See Matt Sutkoski, *Smoking Ban Spurs Continued Debate*, THE BURLINGTON FREE PRESS (Burlington, VT), November 4, 2004, at 1B.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Owners of taverns in Cabell County explain how customers like to spend time playing various games while smoking. The smoking ban in Cabell County, however, does not apply to businesses that generate 80 percent or more of their revenue from the sale of alcohol. “Statewide, lottery sales increased about \$14.3 million, or 7.4 percent, in the fiscal year, but the growth was slower in Cabell County. Lottery retailers here saw their sales increase by about \$280,000, or 3 percent.” In addition, “[t]hree of the top five retailers in Cabell County - Hart’s Corner Backdoor, Jolly Pirate and DC Carryout No. 2 - saw sales decline from 2003 to 2004.” See Jim Ross, *Retailers Blame County’s Smoking Ban for Last Fiscal Year’s Sales Drop*, THE HERALD-DISPATCH (Huntington, WV), Aug. 4, 2004, at 1C.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

IV. CURRENT SITUATION IN NEW JERSEY

Currently, New Jersey does not ban smoking in any bar, restaurant, or casino. This lack of restriction has resulted in poorer air quality in bars and restaurants in New Jersey than in states that have enacted smoking bans.⁸³ New Jersey does ban smoking in certain workplace environments, however bars and restaurants are only strongly encouraged to have non-smoking areas while casinos are not mentioned.⁸⁴ Therefore, while New Jersey does not ban smoking in bars and restaurants like other states, as New York and California have done, it has laid down the ground work by officially passing legislation stating that the government strongly encourages these establishments to at least provide non-smoking areas.

The judicial branch of New Jersey has upheld the constitutionality of the current law as well as the supremacy of the state law over municipal ordinances.⁸⁵ In June of 2000, Princeton Township adopted a local smoking ban prohibiting smoking in all public indoor spaces, including bars and restaurants.⁸⁶ A group of

⁸³ One study conducted in Hoboken found the following:

...[A]ir quality in 62 bars and restaurants in eight cities around the country by the Roswell Park Cancer Institute in Buffalo concluded that carcinogens and other pollutants in New Jersey bars and restaurants were nine times worse than those in New York City, where a smoking ban was enacted in March 2003.

George James, *The Smoke Just Won't Settle*, N.Y. TIMES, Jan. 9, 2005, § 14NJ, at 7.

⁸⁴ See N.J. STAT. ANN. §§ 26:3D-1 to 3D-54 (West 2004) (banning smoking on passenger elevators, educational institutions, health care facilities, as well as controlling smoking in places of employment through designation of specified smoking areas). For legislation concerning the New Jersey policy for smoking in bars and restaurants, see N.J. STAT. ANN. § 26:3E-7 (West 2004). Though the statute does not ban smoking in these areas, it does strongly encourage restaurants to establish non-smoking areas. The legislature states as follows:

The Legislature finds and declares that the resolution of the conflict between the right of the smoker to smoke and the right of the nonsmoker to breathe clean air involves a determination of when and where, rather than whether, a smoker may legally smoke. It is not the public policy of this State to deny anyone the right to smoke. In addition to the deleterious effects upon smokers, tobacco smoke is (1) at least an annoyance and a nuisance to a substantial percentage of the nonsmoking public, and (2) a substantial health hazard to a smaller segment of the nonsmoking public. Therefore, the Legislature finds that it is in the interest of the public health to encourage restaurants to establish nonsmoking areas.

Id.

⁸⁵ See, e.g., *LDM, Inc. v. Princeton Reg'l Health Comm'n*, 336 N.J. Super. 277 (2000) (holding that a municipal ordinance banning smoking in all indoor public places, including bars and restaurants, was preempted by state law which only regulated smoking in indoor public places and specifically exempted bars and restaurants).

⁸⁶ *Id.* at 284.

local bar and restaurant owners brought suit against the Princeton Regional Health Commission (the commission that adopted the ordinance) seeking a preliminary injunction enjoining the commission from enforcing the ordinance.⁸⁷ The court engaged in a thorough discussion of the current New Jersey statute regulating smoking in certain indoor public spaces. In its decision, the court struck down the ordinance that banned smoking in all indoor public areas in Princeton, New Jersey.⁸⁸ Based on its decision, it appears that the court is reluctant to extend smoking ban legislation in New Jersey, which forces the legislature to enact a statewide smoking ban or, at the very least, authorize municipalities to act on their own authority.

New Jersey has two separate bills proposed to prohibit smoking in bars, restaurants and other workplaces. One proposed bill, written in 2004, contains an exemption for casinos.⁸⁹ The other proposed bill, written several months

⁸⁷ *Id.*

⁸⁸ *Id.* at 318. Specifically, the Superior Court of New Jersey stated that:

The language of the statute is clear and unambiguous. The statute allocates to the restaurant owner, manager or person in charge, the authority to determine whether or not a nonsmoking section will be provided. Furthermore, the decision in reference to the size and location of the nonsmoking area, if one is designated, is left to the sole discretion of the owner, manager or person in charge.

....

The statute...precludes a municipality from banning smoking in restaurants based on the alleged deleterious effects of smoking on the public health. The authority of the municipality to restrict smoking in restaurants is limited to protecting life and property from fire.

Id. at 298. Thus, the court drastically limits the ability of municipalities to enact their own smoking ban and strictly construes the New Jersey statute to exempt bars and restaurants from any smoking ban.

⁸⁹ A proposed bill in New Jersey sponsored by Assemblyman Eric Munoz provides in part :

4. a. Smoking is prohibited in an indoor workplace, except as otherwise provided in this act.

....

5. The provisions shall not apply to:

....

d. any casino as defined in section 6 of P.L.1977, c.110 (C.5:12-6), casino simulcasting facility as defined in N.J.A.C.19:55-3.1, and bar located in a casino or casino simulcasting facility.”

A3424, 211th Leg., Reg. Sess. (N.J. 2004).

The state senate of New Jersey proposed an identical bill sponsored by Senators John H. Adler and Thomas H. Kean, Jr. *See*, S1926, 211th Leg., Reg. Sess. (N.J. 2004).

later, contains exemptions for some public spaces, but does not include a casino exemption like the previous bill.⁹⁰ The purpose behind these proposed bills is to protect workers and patrons from the harmful effects caused by smoking as well as second-hand smoke.⁹¹ Based on the existence of these bills, it is apparent that the legislature of New Jersey would like to pass a more extensive smoking ban than the one currently in effect,⁹² but different opinions on how far the ban should extend are preventing any bill from being passed at all.⁹³ One debate focuses on whether or not casinos should be exempted from legislation banning smoking in indoor public areas.

In a recent state senate committee meeting of the Wagering, Tourism and Historic Preservation Committee, the Director of the Center for Regional and Business Research claimed that the smoking ban in Delaware has led to a

⁹⁰ See A3730, 211th Leg., Reg. Sess. (N.J. 2005). This bill sponsored by Assemblywoman Loretta Weinberg and Assemblyman Reed Gusciora contains identical language to the bill quoted above; however this bill contains no exemption for casinos. There is currently no corresponding state senate proposal.

⁹¹ According to the proposed state Senate bill:

The Legislature finds and declares that: tobacco is the leading cause of preventable disease and death in the State and the nation, and tobacco smoke constitutes a substantial health hazard to the nonsmoking majority of the public; the separation of smoking and nonsmoking areas in indoor public places and workplaces does not eliminate the hazard to nonsmokers if these areas share a common ventilation system; and, therefore, subject to certain specified exceptions, it is clearly in the public interest to prohibit smoking in all enclosed indoor places of public access and workplaces. Id.

⁹² As the chief medical officer of the American Cancer Society of New York and New Jersey, Alfred S. Ashford, recently stated:

The New Jersey Smoke-Free Air Act was expected to be considered by the Senate Health Committee on the same day that the full Senate acted on the ethics package. There was a lot of lip service paid to changing the way Trenton does business, but, at the end of the day, the Legislature sidestepped taking comprehensive action on smoke-free workplaces in favor of a most welcome, commendable -- yet limited -- ban on smoking in college dormitories. More must be done.

....

The pressure to act on this measure has never been greater. The health benefits are indisputable; 74 percent of New Jersey voters support a smoke-free workplace law; similar measures in other states continue to show an economic upside; and the growing movement for smoke-free workplaces across the region, nation and world has even hit Cuba, which adopted smoking restrictions last month.

Alfred S. Ashford, *The High Ground is Smoke Free*, N.Y. TIMES, Mar. 6, 2005, § 14NJ, at 13.

⁹³ See Koloff, *supra* note 3; see also *supra* text accompanying note 4.

decrease in slot machine revenues.⁹⁴ However, in the hearing the Director noted that although revenue from slot machines initially decreased after the smoking ban, revenue eventually returned normalcy.⁹⁵ Notably, Delaware has also seen a decline in overall smoking since the ban was enacted.⁹⁶

V. CASINO REVENUE CONTRIBUTIONS TO THE NEW JERSEY BUDGET

Casino revenue significantly contributes to the state budget of New Jersey through the taxes and regulations imposed on the industry.⁹⁷ This significant

⁹⁴ In a New Jersey senate committee hearing, the following exchange took place:

DR. PERNICIARO: ...[S]ome people in Delaware insist that just the right or ability to smoke has made people shift back to Atlantic City from Delaware, where smoking was banned.

SENATOR BUONO: Oh, say that again.

DR. PERNICIARO: Smoking was banned in Delaware.

SENATOR BUONO: So that inability has shifted them—

DR. PERNICIARO: Their revenues took a dive and have not come back, actually – or just came back to about where they were.

Testimony on the potential impact on Atlantic City of emergent competition from slot machines in New York and Pennsylvania, and how Atlantic City has responded and will respond to this competitive challenge: Hearing Before the Senate Wagering, Tourism, and Historic Preservation Comm., 2004 Leg., 2nd Sess. 52 (N.J. 2004).

⁹⁵ *Id.*; see also *supra* text accompanying note 82.

⁹⁶ Another example of the increasing popularity of statewide smoking bans is shown in Maryland where a statute is being considered. As one advocate of the smoking ban argues:

Delaware enacted what was the nation's most radical smoking ban in 2002, outlawing smoking in all public places including bars, casinos and restaurants. During the first year, there were many outcries from smokers and business owners about wrecking the economy, but that has not been the case. An initial small dip in business, amounting to 10 percent or so on average the first few months, quickly rebounded. Some businesses even saw an increase in business because nonsmokers began to venture out more.

....

In addition to suffering negligible, if any, economic damage, Delaware has also seen an 11 percent decrease in smoking overall since the ban was enacted.

Susan Parker, Editorial, *Our View – Smoking Ban*, DAILY TIMES (Salisbury, MD), Feb. 4, 2005, at 10.

⁹⁷ According to a 1998 commission report analyzing the economic and social impacts of the gambling industry in New Jersey, the Casino Revenue Tax gives the state a direct 8 percent stake in gross gaming revenue. The report further states:

contribution has led to many economic and social improvements for many communities.⁹⁸ Furthermore, the money from the Casino Revenue Fund, which

The casino industry in New Jersey has generated more than \$7 billion in taxes for federal, state, and local governments;

....

An 8 percent tax on casino gross revenue provides over \$300 million annually and is dedicated to funding programs for senior citizens and the disabled;

....

Atlantic City Luxury Tax and Tourism Promotion Fee...[t]ogether... amount to over \$22 million annually;

....

Assessed value of Atlantic City property increased from \$319 million in 1976 to over \$6 billion in 1996, with casino hotel properties amounting to almost 80 percent of the property tax base[.]

NEW JERSEY CASINO CONTROL COMM'N, CASINO GAMBLING IN NEW JERSEY: A REPORT TO THE NATIONAL GAMBLING IMPACT STUDY COMMISSION 6 (1998).

⁹⁸ *Id.* The report gives several examples of the benefits provided to the state through revenue generated by taxing casinos. The report states:

The alternative investment tax based on 1.25 percent of casino gross revenue and dedicated to redevelopment projects has resulted in commitments of over \$750 million for projects in Atlantic City and throughout the state;

....

Casino parking fee revenues of over \$15 million per year are being used to finance development of Atlantic City's corridor near the new \$268 million Convention Center;

....

Regulatory savings of over \$16 million in the Atlantic City Fund are financing construction of a minor league baseball stadium and marine life education center;

....

Casinos employ almost 50,000 New Jersey residents in full-time and part-time jobs and have an annual payroll of over \$1 billion;

Welfare assistance from in Atlantic County declined from 6,900 before casinos to 3,200 by 1997, while the population increased by over 24 percent. At the same time, those receiving Aid to Families with Dependent Children declined from 5,300 to 3,000;

....

Casinos purchased over \$250 million in goods and services from businesses owned by women and minorities in 1996[.]

is 8 percent of the gross revenue of casinos, is entirely dedicated to programs for senior citizens and the disabled.⁹⁹ Due to the amount of money that casinos generate for the state, including money for various programs, it is clear why certain groups oppose an initiative that may adversely affect the gross income of casinos. A primary reason to exempt casinos from a comprehensive smoking ban is that people will avoid spending money in casinos, which in turn would decrease available funds in the New Jersey state budget.¹⁰⁰

Although casinos contribute a large amount to the state budget as well as various programs, the dangers of smoking and second-hand smoke are well known and their harmful effects cost the New Jersey taxpayers billions in health care costs.¹⁰¹ Furthermore, most of those costs come out of the State's Medicare expenditures.¹⁰² Moreover, smoking and second-hand smoke causes employers a loss in productivity which in turn leads to diminished profits.¹⁰³ The New Jersey Comprehensive Tobacco Control Program ("CTCP"), a program which aims to reduce ETS,¹⁰⁴ notes that states that have implemented measures to reduce

Id.

⁹⁹ *Id.* at 17. See also NEW JERSEY CASINO CONTROL COMM'N, NEW JERSEY CASINO REVENUE FUND: FINANCIAL STATEMENT (June 2004), available at <http://www.state.nj.us/casinos/crf.pdf>. This document provides information on the various services and programs that are in part funded by the Casino Revenue Fund and how much money is provided for each program by the fund.

¹⁰⁰ Koloff, *supra* note 4, at 1A.

¹⁰¹ According to a study performed by the Department of Health and Senior Services, "New Jersey citizens pay approximately \$1.7 billion in annual health care costs for smoking-related illnesses." DEPT OF HEALTH AND SENIOR SERVICES, N. J. COMPREHENSIVE TOBACCO CONTROL PROGRAM: ANNUAL REPORT 2 (2001), available at <http://www.state.nj.us/health/as/njreport.pdf>.

In addition, the study also notes:

Scientists have known for years that exposure to second-hand smoke is associated with low birth-weight babies, SIDS, severe respiratory infections, asthma, and cancers... In an effort to decrease exposure to environmental tobacco smoke, DHSS is working with all New Jersey communities to promote voluntary restrictions on tobacco use in public places.

Id. at 18.

¹⁰² According to the Center for Disease Control ("CDC"), "tobacco use cost New Jersey and its taxpayers \$2.5 billion every year in direct healthcare costs...The overall total includes more than \$755 million in Medicaid dollars alone. This amount accounts for approximately 16 percent of the State's Medicaid expenditures, or about \$929 per recipient." DEPT OF HEALTH AND SENIOR SERVICES, N. J. COMPREHENSIVE TOBACCO CONTROL PROGRAM: EXECUTIVE SUMMARY 5 (2001), available at http://www.state.nj.us/health/as/ctcp/report01_a.pdf.

¹⁰³ As the CDC has estimated, "tobacco use costs New Jersey employers more than \$2.2 billion annually in lost productivity through sick days, smoking breaks, and disability, representing nearly \$2,000 per smoker." *Id.*

¹⁰⁴ The CTCP list its goals as trying to:

second-hand smoke, as well as decreasing tobacco use in general, have seen a dramatic savings in health care costs.¹⁰⁵ Therefore, it can be argued that the positive effect of casino revenue towards the state budget is minimized since casinos permit smoking which contributes to health care costs. In other words, the money that casinos generate for the state offsets, at least in part, the health care costs it incurs for the state by allowing smoking, and its accompanying deleterious affects, in their establishments.

VI. CONCLUSION

Increasingly, states are beginning to extend smoking bans to many other indoor public areas, including bars and restaurants. The issue is divisive because it concerns individuals' freedoms, including one's right to smoke, as well as the rights of workers and patrons of these establishments to be able to eat and drink in a smoke free environment. Though states have initially met with resistance in passing these laws from establishment owners as well as the public, it seems that eventually people become accustomed to the bans and businesses, in the long run, are not as adversely affected as initially feared.

In states that have legalized casino gambling, the issue of passing a statewide smoking ban in public places is even more challenging. Casinos, like the ones in New Jersey, can generate a substantial amount of revenue for the state which can be benefit social programs. Understandably, however, owners of bars and restaurants feel unfairly discriminated against since these bans do not contain exemptions for them, except in certain cases where they must comply with strict local ordinances that cost thousands in installing new ventilation systems or extensive remodeling.

Since the stated purpose of most smoking bans is to protect workers and patrons from the harmful effects of smoking and second-hand smoke, it seems that allowing a similar statewide ban in New Jersey, exempting only casinos,

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1. Decrease the acceptability of tobacco use among all populations;
 2. Decrease the initiation of tobacco use by youths under 18 years of age and young adults 18 to 24;
 3. Increase the number of youth and adult tobacco users who initiate treatment;
 4. Decrease exposure to environmental tobacco smoke (ETS); and
 5. Reduce disparities related to tobacco use and its effects among different population groups.

Id.

¹⁰⁵ The CTCP goes on to state that, "Savings produced by the California Tobacco Control Program in direct medical costs alone are estimated at \$3.02 billion between 1990 and 1998, or \$3.62 for every dollar spent on the program. A 1999 Massachusetts Institute of Technology study found that Massachusetts saves \$2 in healthcare costs for every dollar spent on tobacco prevention." *Id.*

would thwart that purpose. Atlantic City casinos employ over 45,000 people alone.¹⁰⁶ If a main purpose of a smoking ban statute is to protect the health of workers, it seems that a large number of the New Jersey working population remains unprotected. Furthermore, since various state and federal agencies note that smoking and second-hand smoke add billions to healthcare costs, the argument that casino revenues contribute to state programs is weakened since the state could save a significant amount of money by decreasing tobacco use. Moreover, though casinos argue that they will lose patrons who smoke, the main attraction of Atlantic City is gambling. Most people do not visit Atlantic City to have a cigarette but rather to gamble, see shows, and to generally have a good time. Casinos do not account for nonsmokers who may increase in patronage because the idea of gambling in a smoke-filled gaming room may have kept them away. Atlantic City is itself a huge attraction and destination for many people and currently there is no comparable gambling area that compares. If New Jersey passes a comprehensive smoking ban in indoor public places, an exemption for casinos, though likely to be constitutional, would compromise the purpose behind the bill and would likely not contribute any notable positive effect.

¹⁰⁶ See *supra* note 39, at 18.