

NOTE

ARE ARTIFICIAL TANS THE NEW CIGARETTE? HOW PLAINTIFFS CAN USE THE LESSONS OF TOBACCO LITIGATION IN BRINGING CLAIMS AGAINST THE INDOOR TANNING INDUSTRY

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Indoor tanning salons have grown significantly in popularity during recent years. Scientific research has revealed a strong link between skin cancer and ultraviolet light exposure from indoor tanning lamps. Despite such dangers, federal regulations place minimal restrictions on the labeling of indoor tanning lamps. Indoor tanning salons work vigorously to dispel notions of a link to skin cancer, often falsely promoting various health benefits of indoor tanning. The first lawsuit for injuries resulting from indoor tanning was recently filed against an indoor tanning salon, and other such litigation is poised to follow. This Note examines three potential tort claims against indoor tanning manufacturers and salons, and suggests ways to formulate compelling arguments in each instance. In doing so it draws on cases finding liability in the context of cigarettes, identifying similarities between the indoor tanning and cigarette industries.

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* J.D., University of Michigan Law School, May 2008. Special thanks to my family, as well as Professor Don Herzog, my Note Editors Andrew Goetz and Meg Barry, and the Volume 106 and Volume 107 Notes Offices.

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INTRODUCTION

Gone are the days when a fair complexion was desirable because it indicated one's wealth and ability to avoid outdoor manual labor.¹ Today the coveted look is quite the opposite—darkly tanned individuals are perceived to be the healthiest, wealthiest, and most attractive.² Some have decided that natural exposure to sunlight is insufficient to meet their needs and instead turn to alternative sources to achieve a year-round tan. One of the most popular choices is the indoor, artificial-light tanning salon.³ These salons provide individual tanning beds where users expose themselves to high intensities of ultraviolet (“UV”) rays in short doses to attain the bronze tone they desire.⁴ Since its inception nearly thirty years ago, the tanning salon business has blossomed into a five-billion-dollar-a-year industry with over thirty million indoor tanning salon users nationwide.⁵

Despite the popularity of tanning beds, they present a variety of well-established dangers to users. These include an increased risk of skin cancer, eye damage, premature wrinkling, and skin rashes.⁶ Doctors estimate that frequent use of tanning facilities contributes to drastic increases in skin cancer rates, especially among young women.⁷ Since 1975, incidence of the most lethal form of skin cancer, melanoma, has doubled in women fifteen to twenty-nine years old.⁸ The Food and Drug Administration

1. See Margaret Hunter, *Light, Bright, and Almost White: The Advantages and Disadvantages of Light Skin*, in *SKIN DEEP* 22, 25–26, 29 (Cedric Herring et al. eds., 2004).

2. Julie Rawe, *Why Teens Are Obsessed With Tanning*, *TIME*, Aug. 7, 2006, at 54–55.

3. See *id.* at 54.

4. See Ctr. for Devices & Radiological Health, FDA, Tanning Products, <http://www.fda.gov/cdrh/tanning/tanningproducts.html> (last visited Aug. 20, 2008) [hereinafter FDA, Tanning Products].

5. Rawe, *supra* note 2, at 54; Jim Snyder, *Indoor tanning industry feels the heat*, *THE HILL*, Sept. 28, 2006, at 12, available at <http://thehill.com/the-executive/indoor-tanning-industry-feels-the-heat-2006-09-28.html>; Paul Vitello, *Skin Cancer Is Up; Tanning Industry a Target*, *N.Y. TIMES*, Aug. 14, 2006, at B1.

6. Fed. Trade Comm'n, Facts for Consumers: Indoor Tanning (Aug. 1997), <http://www.ftc.gov/bcp/edu/pubs/consumer/health/health1.pdf>.

7. See Rawe, *supra* note 2, at 54.

8. *Id.* A doctor at New York City's Mount Sinai School of Medicine comments that “[s]kin cancer used to be something old people got. . . . Not a month goes by that I don't see somebody in their 20s now. That was unheard of 10 years ago.” *Id.*; see also Am. Acad. of Dermatology, *The Darker Side of Tanning* (Feb. 4, 1997), http://www.dhh.louisiana.gov/offices/miscdocs/docs-206/food_drug/dark_side.pdf (“The number of skin cancer cases has been rising over the years, and

(“FDA”),⁹ the Federal Trade Commission (“FTC”),¹⁰ the American Academy of Dermatology,¹¹ the Centers for Disease Control and Prevention,¹² the Department of Health and Human Services,¹³ the World Health Organization,¹⁴ and the American Medical Association,¹⁵ as well as individual doctors and health care professionals, all recognize that increases in UV exposure, such as those received through the use of indoor tanning beds, “have a damaging effect on the immune system” and cause skin cancer.¹⁶ These organizations and professionals have repeatedly stated that “[t]here’s no such thing as a safe tan,” and have uniformly discouraged any use of indoor tanning equipment.¹⁷

In spite of these facts, indoor tanning salon franchisors and operators continue to promote their products as completely safe. Many companies in the industry advertise that indoor tanning does not cause cancer.¹⁸ Tanning websites boast claims such as “Can a Tanning Bed be Safe? Of Course! . . . Many Doctors are now changing their old, outdated ideas to agree that Sunshine is healthy!”¹⁹ Tanning company representatives vehemently deny a

experts say that this is due to increasing exposure to UV radiation from the sun, tanning beds, and sun lamps.”).

9. Michelle Meadows, *Don't Be in the Dark About Tanning*, FDA CONSUMER, Nov.–Dec. 2003, at 16.

10. Fed. Trade Comm’n, *supra* note 6, at 2.

11. Lisette Hilton, *The Darker Side of Tanning*, 3 DERMATOLOGY INSIGHTS (Am. Acad. of Dermatology, Schaumburg, IL), Vol. 3, No. 1 (2002), at 11.

12. Ctrs. for Disease Control & Prevention, Dep’t of Health & Human Servs., Cancer: Protect Yourself from the Sun, http://www.cdc.gov/cancer/skin/basic_info/howto.htm (last visited Aug. 20, 2008).

13. See Am. Acad. of Dermatology, Dermatology Association Calls for Tighter Regulations on Indoor Tanning, <http://www.yourskinandsun.com/indoortan.html> (last visited Aug. 17, 2008).

14. WORLD HEALTH ORG., ARTIFICIAL TANNING SUNBEDS: RISKS AND GUIDANCE 4 (2003), available at <http://www.who.int/uv/publications/en/sunbeds.pdf> (“[C]umulative exposure to UV radiation increases the risk of skin cancers.”).

15. Council on Scientific Affairs, *Harmful Effects of Ultraviolet Radiation*, 262 JAMA 380, 380–84 (1989).

16. Am. Acad. of Dermatology, *supra* note 8; see also Vitello, *supra* note 5 (“[I]ndoor tanning is similar—we know it will cause cancer. Not maybe. Not might. It’s going to cause cancer.” (quoting a Mt. Sinai School of Medicine doctor drawing a comparison to the harmfulness of cigarettes)).

17. *The Truth About Tanning: What You Need to Know to Protect Your Skin*, FDA & YOU (FDA, Washington, D.C.), Summer 2005, at 1, 5 (“[T]he FDA doesn’t recommend the use of indoor tanning equipment—EVER.”); see also Am. Acad. of Dermatology, *supra* note 8 (“The Food and Drug Administration (FDA) and the Centers for Disease Control and Prevention (CDC) encourage people to avoid use of tanning beds and sun lamps. . . . AMA and AAD have urged action that would ban the sale and use of tanning equipment for nonmedical purposes.”).

18. For example, Brand Expansion advertises that “[c]ontrary to popular fear, [indoor] tanning does not cause cancer, [but] rather prevents it!” Tanning Franchise Review, <http://tanning-franchises.brandexpansion.com/image-sun-tanning-franchise-offers-great-training-innovation/> (last visited Aug. 20, 2008). The claim that indoor tanning does not cause cancer is false. See *supra* text accompanying notes 6–17.

19. SunTanning.com, <http://www.suntanning.com> (last visited Aug. 20, 2008); see also Novatan, *Are Tanning Beds Safe?*, <http://www.novatan.com/are-tanning-beds-safe.html> (last visited

connection between indoor tanning and skin cancer, claiming that no solid proof of a link exists.²⁰ In fact, tanning companies have taken their denials a step further by making promises about the various health *benefits* of indoor tanning.²¹

One factor enabling these aggressive advertisements may be the lack of adequate regulations at both the federal and state levels, which in turn allows tanning consumers to be exposed to unnecessary and unreasonable risks. On the federal level, current regulations of manufacturers are somewhat broad, regulating issues such as radiation emissions and mandating only general warning labels.²² Once artificial tanning machines reach the individual tanning salons, the regulation of operations is largely left to the states.²³ Currently, only twenty-nine states regulate tanning salon operators, and enforcement of the widely differing state provisions is limited and often

Aug. 3, 2008) (“[I]ndoor tanning is beneficial as one is not exposed to the harmful effects of the sun.”).

20. Vitello, *supra* note 5 (“[D]ermatologists have been trying to link indoor tanning to skin cancer for 20 years, and there is no proof.” (quoting John Overstreet, the executive director of the Indoor Tanning Association)). This Note assumes that government and other independent scientists are more credible than tanning companies, the latter of which have an investment in a particular outcome of scientific research regarding tanning and its benefits and harms.

21. Indoor Tanning Ass’n, FAQs, <http://www.theita.com/indoor/faq.cfm> (last visited Aug. 20, 2008) (“[R]elatively brief exposure to sunshine or its equivalent in tanning beds several times a week can help to ward off a host of debilitating and sometimes deadly diseases, including osteoporosis, hypertension, diabetes, depression, and cancer of the bladder, breast, colon, ovary, uterus, kidney and prostate, as well as multiple myeloma and non-Hodgkin’s lymphoma.” (footnotes omitted)); *see also* Vitamin D May Lower Risk Of Multiple Sclerosis, <http://www.lookingfit.com/hotnews/71h410390.html> (last visited Aug. 20, 2008); Wolff System, Health Benefits of Indoor Tanning, <http://www.wolfftanningbed.com/tanning-bed-benefits.html> (last visited Aug. 20, 2008) (claiming indoor tanning “aids in the building of strong bones, teeth, and blood cell formation,” treats psoriasis, and helps treat seasonal affective disorder).

22. 21 C.F.R. § 1040.20 (2007) (“Sunlamp products and ultraviolet lamps intended for use in sunlamp products”). These regulations specify details such as irradiance ratio limits, timer system specifications, control for termination of radiation emission, protective eyewear, compatibility of lamps, instructions for users, and labeling requirements. The labeling requirements require the following warnings:

DANGER—Ultraviolet radiation. Follow instructions. Avoid overexposure. As with natural sunlight, overexposure can cause eye and skin injury and allergic reactions. Repeated exposure may cause premature aging of the skin and skin cancer. WEAR PROTECTIVE EYEWEAR; FAILURE TO MAY RESULT IN SEVERE BURNS OR LONG-TERM INJURY TO THE EYES. Medications or cosmetics may increase your sensitivity to the ultraviolet radiation. Consult physician before using sunlamp if you are using medications or have a history of skin problems or believe yourself especially sensitive to sunlight. If you do not tan in the sun, you are unlikely to tan from the use of this product.

Id. § 1040.20(d)(1)(i). However, there is no requirement as to where this label is placed or how big the label and its content should be. *See id.* § 1040.20. The federal regulations use the term “sunlamp;” this Note uses the term “tanning bed” analogously. Sunlamps emit the ultraviolet rays that cause tanning; tanning beds are called “sunlamp products” because they arrange the sunlamps into a bed-shaped form, but are essentially the same product. *See* The Free Dictionary, Tanning Bed, <http://www.thefreedictionary.com/tanning+bed> (last visited Aug. 20, 2008); *see also* Ctr. for Devices & Radiological Health, FDA, Sunlamps and Sunlamp Products (Tanning Beds/Booths), <http://www.fda.gov/cdrh/radhealth/products/sunlamps.html> (last visited Aug. 20, 2008).

23. Am. Acad. of Dermatology, *supra* note 13.

nonexistent.²⁴ In addition, many states lack requirements relating to tanning equipment registration, training of salon operators, or equipment usage.²⁵ This often results in salon operators tampering with lamps post-manufacture to produce greater tanning effects.²⁶ If they are present at all, state regulations relating to advertising, restrictions on use by minors, and consumer warnings are by no means uniform or universal.²⁷ As a result, aggressive and questionable advertisements abound, tanning bed misuse occurs frequently,²⁸ and indoor tanning consumers are subject to dangerous (yet avoidable) risks.²⁹

This environment has led to tort litigation against the indoor tanning industry. In 2006, a class action plaintiff brought the first lawsuit of this kind, stating claims against an indoor tanning salon operator ranging from failure to warn consumers of the dangers of indoor tanning to breach of warranty and fraud.³⁰ Tanning litigation presents unique facts for these familiar claims, and thus raises questions as to how exactly such litigation fits within the established framework of similar tort claims against consumer companies.

Successful litigation against various cigarette companies³¹ provides a useful comparison and starting point for formulating persuasive tort claims against indoor tanning salons because the industries share a number of characteristics.³² Initially, both cigarette smoking and indoor tanning are

24. *Id.*; see also Alan B. Fleischer, Jr. et al., *Tanning facility compliance with state and federal regulations in North Carolina: A poor performance*, 28 J. AM. ACAD. DERMATOLOGY 212 (1993).

25. See Am. Acad. of Dermatology, *supra* note 13.

26. Jim McKinley, *Town Regulates Tanning Salons*, N.Y. TIMES, Mar. 8, 1987, § 11NJ, at 16.

27. *Id.* The FTC also regulates advertising, though its enforcement of regulations concerning false advertising against tanning salons seems weak. See *infra* Section I.B.

28. A salon worker stated:

I had a pretty good number of ladies . . . who would try and come in every day, and I mean every day. . . . I know that they would come in later on when I was off and tell a coworker of mine that that was their first of the day. And if that didn't work out they would go over across the street to one of the other salons in the area.

Phillip Vannini & Aaron M. McCright, *To Die For: The Semiotic Seductive Power of the Tanned Body*, 27 SYMBOLIC INTERACTION 309, 317–18 (2004). “One young man who owned [a tanning lamp] said ‘Yeah, I don’t care. I’ll do forty minutes. Sometimes it feels so nice that I nap in there.’” *Id.* at 322.

29. See *id.* at 314; see also *supra* text accompanying notes 6–17.

30. The case was filed August 14, 2006 in New Jersey. Class Action Complaint, *Nafar v. Hollywood Tanning Sys., Inc.*, No. 2:06-cv-03826-DMC-MF (D.N.J. Aug. 14, 2006).

31. These include Philip Morris, R.J. Reynolds, and Brown & Williamson. *Whiteley v. Philip Morris Inc.*, 11 Cal. Rptr. 3d 807 (Cal. Ct. App. 2004); *Engle v. R.J. Reynolds*, No. 94-08273 CA-22, 2000 WL 33534572 (Fla. Cir. Ct. 2000), *rev’d sub nom.* *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003), *modified* 945 So. 2d 1246 (Fla. 2006); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005).

32. Because tort claims against indoor tanning salons are novel, plaintiffs and courts will necessarily look to tort cases involving other industries for guidance. The similarities between the cigarette and indoor tanning industries signal that cigarette litigation offers a useful starting point in forming successful tort claims against indoor tanning salons and manufacturers.

nonessential, non-food-related acquired behaviors.³³ In both instances, people acknowledge cosmetic or image-related motivations for their use of the product.³⁴ Additionally, consumption of either of these products at practicable levels has been scientifically proven to cause disease, specifically cancer.³⁵ When confronted with scientific evidence affirming a link, companies from both industries have fervently denied any connection to disease.³⁶ Similarly, public health campaigns to educate consumers about each of these products' dangers have proven unsuccessful at eliminating use.³⁷ Both the cigarette and indoor tanning industries have shown a heightened interest in encouraging youth consumption.³⁸ Finally, consumers have filed lawsuits

33. Acquired behaviors are defined as "activities that people choose to do." Am. Cancer Soc'y, Cigarette Smoking, http://www.cancer.org/docroot/PED/content/PED_10_2X_Cigarette_Smoking.asp?sitearea=PED (last visited Aug. 20, 2008) [hereinafter Am. Cancer Soc'y, Cigarette Smoking].

34. Am. Acad. of Dermatology, Research Shows Popularity of Indoor Tanning Contributes to Increased Incidence of Skin Cancer (Jan. 12, 2006), http://www.aad.org/media/background/jaad/jaad_increase_skin_cancer_12_05.html (last visited Aug. 20, 2008); Am. Cancer Soc'y, Cigarette Smoking, *supra* note 33.

35. *See supra* text accompanying note 16. Established scientific evidence, some of which was conducted by the cigarette companies themselves, shows a conclusive link between cigarette smoking and various types of cancer. *Boeken v. Philip Morris Inc.*, 26 Cal. Rptr. 3d 638, 648–49 (Cal. Ct. App. 2005); Am. Cancer Soc'y, Cigarette Smoking, *supra* note 33. The findings of this research, completed in the 1950s, produced anticigarette campaigns by the American Cancer Society, the American Lung Association, and the American Heart Association, and a wave of consumer litigation. *See* MARK WOLFSON, *THE FIGHT AGAINST BIG TOBACCO: THE MOVEMENT, THE STATE, AND THE PUBLIC'S HEALTH* 21, 31–32, 38–39 (2001).

36. *See* WOLFSON, *supra* note 35, at 39; *supra* text accompanying notes 16–20. The Indoor Tanning Association, which represents thousands of indoor tanning manufacturers, distributors, and facility owners, refuses to admit that indoor tanning is responsible for skin cancer. Instead, the Association blames increased skin cancer rates on "bad habits from the 1960s, 1970s and 1980s that were based on ignorance and misinformation about sun tanning." Indoor Tanning Ass'n, *supra* note 21. In addition, the organization claims that "photobiology research . . . has determined that most skin cancers are related to a strong pattern of intermittent exposure to ultraviolet light in people who are genetically predisposed to skin cancer." *Id.*

37. *See* Am. Cancer Soc'y, Cigarette Smoking, *supra* note 33.

38. In the cigarette cases, courts evinced a dislike for advertising targeted at teenagers, speaking extremely harshly when discussing the behavior of tobacco companies. *See, e.g., Boeken*, 26 Cal. Rptr. 3d at 654; *Whiteley v. Philip Morris*, 11 Cal. Rptr. 3d 807, 843 (Cal. Ct. App. 2004). Similarly, the tanning industry recognizes youth, particularly females, as an important customer segment. A 2006 study estimated that 2.3 million teenagers, or as many as 13–34% of youths in the United States, use indoor tanning salons. *See* Rawe, *supra* note 2, at 54. Indoor tanning companies advertise heavily to these clients. Many offer student discounts, advertise in college coupon books and bookstores, and concentrate such advertisements around spring break, prom, and winter holidays. Janice C. Young & Robert Walker, *Understanding Students' Indoor Tanning Practices and Beliefs to Reduce Skin Cancer Risks*, 14 AM. J. HEALTH STUD. 120, 121, 124 (1998) (talking about a "healthy" tan). In response to the particular allure of indoor tanning for youths, states have passed laws regulating underage use. *See* Nat'l Conference of State Legislatures, Tanning Restrictions for Minors: A State-by-State Comparison, <http://www.ncsl.org/programs/health/tanningrestrictions.htm> (last visited Aug. 20, 2008). The industry has adamantly protested state implementation of age limits on indoor tanning, hiring lobbyists to further such interests. *See* Snyder, *supra* note 5; Vitello, *supra* note 5. For a discussion of why social factors particularly encourage youth tanning, see Vannini & McCright, *supra* note 28, at 319–22; Rawe, *supra* note 2, at 55; and Am. Acad. of Dermatology, *supra* note 13. For a discussion of the unique health risks indoor tanning presents to youths, see Richard C. Palmer et al., *Indoor Tanning Facility Density in Eighty U.S. Cities*, 27 J. COMMUNITY HEALTH 191, 192 (2002); Carol Rados, *Teen Tanning Hazards*, FDA CONSUMER, Mar.–Apr. 2005, at

against companies producing both products, claiming they were injured as a result of their consumption.³⁹ The claims are similar in both circumstances and include failure to warn, fraud, and products liability causes of action.⁴⁰ The counterarguments to these lawsuits have also followed a similar path, stating that people assume the risks of use from voluntarily consumption, and that no proof exists that consumption causes cancer.⁴¹ Commentators have likewise made comparisons between the cigarette and indoor tanning industries.⁴² Although there are no doubt other products that could suitably be compared to indoor tanning, this Note simply draws on the similarities⁴³ between the cigarette and tanning industries as one way to formulate compelling indoor tanning claims.

This Note analyzes successful cases against the cigarette industry in order to identify the strongest legal arguments for future indoor tanning litigation against tanning salons. Parts I, II, and III begin by examining cigarette cases where plaintiffs succeeded in their fraud, failure to warn, and design defect claims, respectively. Each Part then draws on lessons from these tobacco cases to suggest ways for indoor tanning plaintiffs to formulate persuasive arguments concerning each claim. It concludes that although

8; CBC News, No indoor tanning for children: study (Apr. 24, 2003), http://www.cbc.ca/news/story/2003/04/24/tanteens_030424.html (last visited Aug. 20, 2008); Fed. Trade Comm'n, *supra* note 6.

39. As of the date this Note was sent to publication, the initial indoor tanning suit was not yet resolved. While the majority of lawsuits against the cigarette industry have been largely unsuccessful, there have been a number of high-profile, large-verdict victories. See W. KIP VISCUSI, *SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL* 10, 215 (2002); WOLFSON, *supra* note 35, at 39. This indicates that lawsuits of this kind are tough, but not impossible, to win.

40. See *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 55, 61, 65 (Cal. Ct. App. 2004); Brief of Defendant in Support of Motion for Partial Judgment on the Pleadings at 10, 18, *Nafar v. Hollywood Tanning Sys., Inc.*, No. 06-CV-03826, 2007 WL 1101440 (D.N.J. Apr. 10, 2007).

41. See WOLFSON, *supra* note 35, at 39; Brief of Defendant, *supra* note 40, at 25. Though a full analysis of causation issues is beyond the scope of this Note, at least two difficulties will be present in any case. First, plaintiffs must allege a causal link between the tanning company's UV rays and the resulting injury. Cigarette plaintiffs often had a solid causation claim because (1) cigarettes were unique in causing lung cancer and (2) plaintiffs often smoked only one brand of cigarette. *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 597-98 (8th Cir. 2005); *Henley*, 9 Cal. Rptr. 3d at 40-41. These plaintiffs therefore knew exactly who to blame once an injury materialized. In the tanning context this could be problematic because contact from a single indoor tanning company's beds will never be the sole source of a person's UV-ray exposure. People are exposed to natural UV rays from sunlight and are likely to have tanned indoors at many different salons. Thus, the ideal plaintiff to bring an indoor tanning lawsuit is one who has minimal natural UV exposure and has received a majority of her artificial UV-ray exposure from the same company's indoor tanning beds. Second, plaintiffs must show proximate causation. Plaintiffs need to convince a jury that the tanning company's misconduct directly caused the injury: had the misconduct not been present the plaintiff would not have indoor tanned in this way and been injured. The argument will vary depending on the particular claim, but studies show educational campaigns about indoor tanning's dangers have the potential to change behavior. Christina J. Mills et. al., *Symposium Report: Second Symposium on Ultraviolet Radiation-related Diseases*, 18 CHRONIC DISEASES IN CAN. (1997), available at http://www.phac-aspc.gc.ca/publicat/cdc-mcc/18-1/e_e.html (reviewing a symposium presentation by Mark Elwood on how educational programs alter behavior).

42. CBC News, *supra* note 38; William Saletan, *Master Sunshine: The Overzealous War on Indoor Tanning*, SLATE, May 13, 2006, <http://www.slate.com/id/2141649>.

43. There are many differences as well. For example, the tanning industry has only existed for the past twenty-five to thirty years. Indoor Tanning Ass'n, *supra* note 21.

such tort claim cases will be difficult to win, by using arguments and principles from successful litigation against the cigarette companies, potential plaintiffs can greatly increase their chances of success.

I. FRAUD CLAIMS

Tanning plaintiffs have a strong potential for success with fraud claims brought against indoor tanning salons. Section I.A first describes the components of a fraud cause of action. It then draws on several cigarette cases as examples of successful fraud claims, focusing on key factors that seemed to increase tobacco plaintiffs' success. Section I.B uses these factors to make suggestions for creating persuasive fraud claims in the indoor tanning context.

A. Lessons from Successful Cigarette Cases

Cigarette plaintiffs were successful in their fraud claims because they had evidence of severe levels of tobacco company misconduct. Additionally, the industry executed such behavior on a synchronized and collaborative basis. Though these elements are by no means necessary for a successful fraud claim, such instances provide useful insight for future indoor tanning plaintiffs hoping to prevail on a fraud claim against an indoor tanning salon.

The exact language of the standard for fraudulent misrepresentation varies state to state, but most states follow the Second Restatement approach:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other . . . for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.⁴⁴

A number of cigarette plaintiffs were able to succeed on fraud claims against the tobacco companies by demonstrating that these companies systematically lied about the hazards of cigarette smoking.⁴⁵ The lengths to which tobacco companies were willing to go influenced courts and encouraged these findings of extreme fraud.⁴⁶ Many courts have detailed the tobacco companies' appalling conduct in working to combat the belief that smoking causes lung cancer. For instance, the California Court of Appeal noted:

[Tobacco companies] knowingly engaged in a deliberate scheme to deceive the public . . . about the health effects of smoking. . . . [I]n concert with others, defendants issued numerous false denials regarding the health hazards of smoking, manufactured a false controversy as to whether smoking

44. RESTATEMENT (SECOND) OF TORTS § 525 (1965). For examples of states with Restatement-like approaches, see *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 352 (6th Cir. 2000) (Oklahoma law), and *Williams v. Philip Morris Inc.*, 48 P.3d 824, 830 (Or. Ct. App. 2002).

45. See, e.g., *Whiteley v. Philip Morris Inc.*, 11 Cal. Rptr. 3d 807, 843–46 (Cal. Ct. App. 2004); *Williams*, 48 P.3d at 831–35.

46. E.g., *Whiteley*, 11 Cal. Rptr. 3d at 843.

cigarettes actually caused cancer . . . and falsely assured the public that they were diligently engaging in research to find the truth about any health risks of smoking⁴⁷

Instead of making a good faith effort to research the health risks, tobacco companies “consciously avoided [performing] research in the United States.”⁴⁸ Philip Morris, for example, was careful to “conduct[] all sensitive research in a laboratory . . . purchased in Europe, taking care to avoid preserving records of the results in this country.”⁴⁹ When the company found unfavorable test results, it destroyed them to ensure that the cover-up would last for over four decades.⁵⁰ In fact, cigarette companies knew cigarettes were harmful, hid this information, and instead worked to *maximize* the addictiveness of the product.⁵¹ They paid their own scientists to change cigarettes’ chemical make-up, increasing the amounts of nicotine and ammonia smokers received from each cigarette.⁵² Courts additionally found that tobacco companies had falsely told consumers the causes of lung cancer were unknown,⁵³ and that theories the companies disseminated to the public attributing lung cancer to genetic factors were not “a legitimate scientific concept.”⁵⁴

Courts deciding tobacco cases also seemed to focus on the ways in which the tobacco companies collaborated with each other to perpetrate the fraud. Throughout the entire chain of events, the tobacco companies put on a united public face to proclaim that cigarettes were not harmful to smokers’ health. Together, they issued a full-page ad entitled “A Frank Statement to Cigarette Smokers” that explicitly stated smoking was “not injurious to health” and that “no proof” existed that smoking caused lung cancer.⁵⁵ Signed by the Tobacco Industry Research Committee, it was also publicly sponsored by the presidents of thirteen major tobacco companies.⁵⁶ The California Court of Appeal quoted the plaintiff’s epidemiological expert to condemn this coordinated advertisement as a “bald untruth.”⁵⁷

47. *Id.*

48. *Williams*, 48 P.3d at 834.

49. *Id.*

50. *E.g., id.* at 839.

51. *See Boeken v. Philip Morris Inc.*, 26 Cal. Rptr. 3d 638, 650–51 (Cal. Ct. App. 2005).

52. *Id.* at 650.

53. *Id.* at 648; *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 62 (Cal. Ct. App. 2004).

54. *Boeken*, 26 Cal. Rptr. 3d at 648.

55. Tobacco Indus. Research Comm., Advertisement, *A Frank Statement to Cigarette Smokers*, N.Y. TIMES, Jan. 4, 1954, at 15. This ad reached 43,245,000 people in 258 cities. PHILIP J. HILTS, *SMOKESCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP* 12 (1996).

56. Tobacco Indus. Research Comm., *supra* note 55.

57. *Boeken*, 26 Cal. Rptr. 3d at 647.

B. Application of Lessons to Indoor Tanning Fraud Claims

By focusing on the factors that made tobacco fraud claims particularly successful, indoor tanning plaintiffs can make compelling fraud claims. Plaintiffs should concentrate on instances of coordinated tanning salon behavior that show the extreme lengths tanning salons go to in order to deceive customers. Although the levels of behavior seen in the tobacco context have not and may not ever be discovered in the tanning realm, extreme fraud is not a necessary component in finding a defendant liable for fraud. And indoor tanning companies do currently make a number of representations that fly in the face of facts well established in the scientific community.

Statements by tanning organizations that indoor tanning does not cause cancer are prime ammunition for plaintiffs wishing to make successful fraud claims. As noted previously, many professional organizations and governmental agencies warn against indoor tanning because of its links to cancer.⁵⁸ Acting in a united manner, through the Indoor Tanning Association, indoor tanning manufacturers, distributors, and facility owners shift the blame for increased skin cancer rates on “bad habits from the 1960s, 1970s and 1980s that were based on ignorance and misinformation about sun tanning.”⁵⁹ It also claims “photobiology research” has revealed that skin cancer results not from UV exposure alone but from a “strong pattern of intermittent exposure to ultraviolet light in people who are genetically predisposed to skin cancer.”⁶⁰ Many other companies follow this lead by echoing the claim that no risk of skin cancer from tanning beds exists.⁶¹

Indoor tanning salon advertisements regarding the health *benefits* of artificial tanning provide another promising area for identifying potentially successful fraud claims.⁶² Initially, the validity of any such health benefits is strongly contested—cancer specialists from the International Agency for Research on Cancer, a division of the World Health Organization, have stated that “indoor tanning . . . does not provide any positive health benefits.”⁶³ The FTC, responsible for regulating advertising, expressly prohibits such health claims unless they can be substantiated by scientific evidence.⁶⁴ In 1996, the agency reached a settlement with California SunCare, Inc. for health claims the company made about indoor tanning. The settlement

58. See *supra* notes 9–17 and accompanying text.

59. Indoor Tanning Ass’n, *supra* note 21.

60. *Id.*

61. E.g., Tanning Franchise Review, *supra* note 18; see also Snyder, *supra* note 5 (describing industry lobbying efforts). These claims directly contradict scientific findings. See *supra* notes 6–17 and accompanying text.

62. The plaintiff in *Nafar v. Hollywood Tanning Systems Inc.* based her fraud claim on misrepresentations by the defendant stating indoor tanning is “beneficial to customer’s health and well-being.” Class Action Complaint, *supra* note 30, at ¶ 49.

63. *Cancer Specialists Issue Warning About Indoor Tanning Risks*, UNIV. OF IOWA HEALTH CARE NEWS, Jan. 15, 2007, <http://www.uihealthcare.com/news/news/2007/01/15tanning.html>. For more on the International Agency for Research on Cancer, see <http://www.iarc.fr>.

64. See Cal. SunCare, Inc., File No. 942-3218, 1996 WL 760095 (FTC Sept. 18, 1996) (Agreement Containing Consent Order to Cease and Desist).

agreement included a cease and desist order and required the company to spend \$1.5 million on advertisements “cautioning consumers that tanning even without burning can cause skin cancer and premature skin aging.”⁶⁵ The company claimed that indoor tanning lowers blood pressure, reduces the risk of cancers (including but not limited to colon and breast cancer), decreases cholesterol, treats Seasonal Affective Disorder, treats AIDS, and enhances the immune system.⁶⁶ The cease and desist order prohibited the company from making such claims “unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.”⁶⁷

Plaintiffs should look to such FTC rulings for guidance, as a lack of compliance with these could indicate the presence of fraud.⁶⁸ Indoor tanning salons making health claims without supportive scientific evidence may also know in fact or believe that such claims are untrue, thus fulfilling the standards for fraud. Currently, indoor tanning salons make a number of health claims that are similar to those the FTC found unsubstantiated in the California SunCare case:

Benefits of Tanning

WINTER BLUES—sufferers show improvement with exposure to UV light. According to research, bright light activates certain brain chemicals that make us feel good.

STRESS—Exposure to UV light decreases adrenaline levels and releases endorphins for the feeling of well being.

ACNE—UV light exposure has [been] shown to help improve skin appearance and clear up blemishes.

PSORIASIS—Eighty percent of sufferers show improvement with UV light exposure.

BODY WEIGHT—Sunlight stimulates the thyroid gland which boosts your metabolism.⁶⁹

Indoor salons also claim that indoor tanning prevents osteoporosis, hypertension, and diabetes.⁷⁰ One advertisement states that “Light Increases

65. *Id.*; Press Release, Fed. Trade Comm’n, FTC Settlement Stresses Health Risks of Tanning (Nov. 19, 1996), <http://www.ftc.gov/opa/1996/11/caltan.shtm>.

66. Cal. SunCare, Inc., File No. 942-3218, 1996 WL 760095 (FTC Sept. 18, 1996) (Agreement Containing Consent Order to Cease and Desist).

67. *Id.*; *see also* Press Release, Fed. Trade Comm’n, *supra* note 65.

68. There is no private right of action for violations of the FTC’s regulations. “In order to permit the FTC to discharge its responsibilities, Congress vested the Commission with broad discretionary powers that are akin to prosecutorial functions. For this reason, courts have uniformly held that there is no implied private right of action under the FTC Act.” *Trudeau v. United States*, 68 Fed. Cl. 121, 130 (2005) (citation omitted).

69. Salon Profilo and Spa, Tanning, <http://www.salonprofiloandspa.com/tanning.html> (last visited Aug. 20, 2008).

70. *See* Snyder, *supra* note 5.

Longevity” and claims that vitamin D, which is produced when the body is exposed to UVB rays, lowers cholesterol and prevents cancer.⁷¹ By focusing on advertisements claiming such health benefits, plaintiffs have a strong likelihood of being able to identify additional avenues for successful fraud claims against indoor tanning salons.

II. FAILURE TO WARN CLAIMS

The initial indoor tanning plaintiffs also argued that the tanning salon failed to warn consumers of known dangers from indoor tanning, including the risk of cancer.⁷² As this section will discuss, however, such an argument is vulnerable to a “common knowledge” defense claiming that the plaintiff knew of indoor tanning’s dangers yet assumed the risks. There are a number of ways that future indoor tanning plaintiffs could strengthen their arguments for such a tort claim against both indoor tanning salons and bed manufacturers. Section II.A describes the elements of a failure to warn claim. It then analyzes successful failure to warn claims in the cigarette context and points to specific factors that seemed to increase tobacco plaintiffs’ success. Section II.B. shows plaintiffs arguing a lack of knowledge that indoor tanning causes cancer will likely fail because this link is relatively well-known. Nevertheless, plaintiffs can still plead a failure to warn claim regarding the dangerous aspects of tanning that are less publicized. Section II.C suggests that plaintiffs focus one possible failure to warn argument on the discrepancy between the actual intensity of indoor tanning UV rays and uneducated consumer beliefs regarding this intensity. Section II.D alternatively suggests that plaintiffs argue failure to warn claims based on unknown harms that occur from indoor tanning, such as eye burns and reduced immunity to serious diseases.

A. Lessons from Successful Cigarette Cases

One of the most important factors in a failure to warn claim is a plaintiff’s ability to argue that she was unaware of the product’s danger and

71. UT Lotions, Benefits, <http://www.utlotions.com/benefits.htm> (last visited Aug. 20, 2008). However, “production of vitamin D by UV radiation requires doses that are considerably less than those usually obtained in a tanning session.” Henry W. Lim et al., *Sunlight, tanning booths, and vitamin D*, 52 J. AM. ACAD. DERMATOLOGY 868, 871 (2005). Consumers are not actually told this. Similar health claims are popular in the indoor tanning industry. See, e.g., Hollywood Tans, Health and Beauty Guide: Tanning, <http://adserver.sreader.com/guides/health/index.php?pageid=hollywdtans> (last visited Aug. 20, 2008); Novatan, *supra* note 19 (stating that sun exposure can help prevent cancer, that the benefits of sun exposure far outweigh the risks of sunburn and overexposure, and that indoor tanning helps reduce sunburns); Tanning-Advisor.com, Discussion: Indoor Tanning Versus Outdoor Tanning, <http://www.tanning-advisor.com/indoor-tanning-versus-outdoor-tanning.html> (last visited Aug. 20, 2008); Wolff System, *supra* note 21. In fact, a person’s daily vitamin D requirements can be satisfied by food and a few minutes of sun per week. Elisabeth Leamy & Allen Levine, *New Ads Claim Tanning is Good for You*, ABC NEWS, Mar. 27, 2008, <http://abcnews.go.com/GMA/OnCall/story?id=4534076>.

72. The particular claim was worded as a violation of the New Jersey Consumer Fraud Act. However, within the claim was an allegation of “omissions of material fact” concerning indoor tanning. See Class Action Complaint, *supra* note 30, at 14–15.

therefore did not voluntarily assume the risk of injury upon consumption. Successful cigarette plaintiffs convincingly argued that at the time of their cigarette use, the link between cigarettes and cancer was not common knowledge. They prevailed by pointing to both a lack of adequate warnings concerning tobacco's dangers and affirmative industry statements denying that cigarettes were linked to disease.⁷³

The specific elements of failure to warn claims vary, but most states require that the plaintiff show “(1) the defendant[] had reason to know of the dangers of using the product; (2) ‘the warnings fell short of those reasonably required,’ breaching the duty of care; and (3) the lack of an adequate warning caused the plaintiff’s injuries.”⁷⁴ Implicit in these factors is the requirement that the plaintiff prove the ordinary consumer would not have known of the risks defendants should have included on a warning.⁷⁵ This is known as the “common knowledge” doctrine, which releases the defendant from a duty to warn if the danger is “so well known to the community as to be beyond dispute.”⁷⁶

Before the passage of federal legislation mandating cigarette warning labels, many tobacco consumers did not know that smoking caused cancer and thus plaintiffs were able to satisfy the common knowledge portion of a failure to warn claim. In 1969 Congress passed The Public Health Cigarette Smoking Act, which required specific cigarette warning labels regarding the risks of cancer from smoking.⁷⁷ This legislation effectively limited lawsuit complaints relating to tobacco companies’ failure to warn to injuries occurring solely before 1969.⁷⁸ Some of these pre-1969 claims succeeded because they raised a serious issue as to the knowledge of consumers that cigarette smoking was harmful to their health—specifically, that it caused cancer.⁷⁹ At

73. *Whiteley v. Philip Morris Inc.*, 11 Cal. Rptr. 3d 807 (Cal. Ct. App. 2004); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29 (Cal. Ct. App. 2004).

74. *Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917, 924 (8th Cir. 2004).

75. *E.g.*, *Conley v. R.J. Reynolds Tobacco Co.*, 286 F. Supp. 2d 1097, 1111 (N.D. Cal. 2002).

76. *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir. 1996) (quoting *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 387 (Tex. 1991)). The term is used in other portions of the Restatement in reference to facts that are obvious and well known. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 388 (1965).

77. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91–222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1332–1340 (2000)).

78. *See* *Burton v. R.J. Reynolds Tobacco Co.*, 397 F.3d 906, 910 (10th Cir. 2005).

79. *E.g.*, *Whiteley v. Philip Morris Inc.*, 11 Cal. Rptr. 3d 807, 814 (Cal. Ct. App. 2004); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 39 (Cal. Ct. App. 2004); *Engle v. R.J. Reynolds*, No. 94-08273 CA-22, 2000 WL 33534572, at *6 (Fla. Cir. Ct. 2000), *rev’d sub nom.* *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003), *modified* 945 So. 2d 1246 (Fla. 2006). The majority of the tobacco cases based on a failure to warn claim at this time, however, were stopped by the courts because judges held that the dangers of smoking were in fact common knowledge. *See, e.g.*, *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 350–52 (6th Cir. 2000); *Allgood*, 80 F.3d at 172; *Todd v. Brown & Williamson Tobacco Corp.*, 924 F. Supp. 59, 62 (W.D. La. 1996) (“‘Knowledge that cigarette smoking is harmful to health is widespread and can be considered part of the common knowledge of the community.’” (quoting *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988))).

that time, despite inside industry knowledge that smoking caused cancer,⁸⁰ members of the public remained unaware of such information.⁸¹ This ignorance resulted from not only a lack of warnings, but affirmative statements made in a “massive public relations campaign” by the tobacco companies to “deny any link between smoking and serious illness.”⁸² For example, the 1954 advertisement “A Frank Statement to Cigarette Smokers,” denying cigarettes’ harm to health and links to cancer,⁸³ was published in over 400 major newspapers across the country.⁸⁴ Because of this misinformation, as well as a complete lack of accurate information, courts at the time believed that some tobacco consumers did not know smoking cigarettes would cause cancer.⁸⁵

B. Application of Lessons to Indoor Tanning Failure to Warn Claims

Prior successful cases against the cigarette companies illustrate the importance of overcoming the common knowledge hurdle in a failure to warn claim. Tanning salon patrons, however, do not share early cigarette consumers’ lack of knowledge concerning the link between consumption and cancer. Many studies show that knowledge of the link between artificial tanning and cancer is widespread.⁸⁶ This increased consumer knowledge is due in part to the work of various health organizations and doctors, who uniformly discourage tanning bed use.⁸⁷ Courts will thus likely conclude that the ordinary person knows excessive exposure to UV rays through indoor tanning is harmful to one’s health.⁸⁸ Common knowledge will therefore ren-

80. *Boeken v. Philip Morris Inc.*, 26 Cal. Rptr. 3d 638, 647–51 (Cal. Ct. App. 2005).

81. *Whiteley*, 11 Cal. Rptr. 3d at 814 (“Whiteley first learned that smoking could cause something more serious than a cough . . . [t]he day the doctor told [her she] had lung cancer . . .” (internal quotation marks omitted)); *Henley*, 9 Cal. Rptr. 3d at 39 (“[N]obody told her that cigarettes could cause her serious disease. . . . As a result she believed that cigarettes . . . were not a harmful product.” (internal quotation marks omitted)); *Miele v. Am. Tobacco Co.*, 770 N.Y.S.2d 386, 389–90 (N.Y. App. Div. 2003) (indicating that common knowledge would not bar claim in part because of the dissemination of information disputing the validity of evidence linking cigarettes to cancer).

82. *Whiteley*, 11 Cal. Rptr. 3d at 815.

83. Tobacco Indus. Research Comm., *supra* note 55.

84. HILTS, *supra* note 55, at 12.

85. *See* cases cited *supra* note 81.

86. Brief of Defendant, *supra* note 40, at 33 (“There is ample evidence that people know fully the information conveyed by these sources. In a survey of college students, more than 90% ‘believed tanning lamps could cause premature aging and skin cancer.’” (quoting Carla Kemp, *Tanning lamps popular with students despite risks*, AM. ACAD. PEDIATRICS NEWS, Jan. 2003, at 2)); *see also* J. Matthew Knight et al., *Awareness of the Risks of Tanning Lamps Does Not Influence Behavior Among College Students*, 138 ARCHIVES DERMATOLOGY 1311, 1311 (2002) (“Despite adequate knowledge of the adverse effects of UV exposure, university students freely and frequently use tanning lamps, primarily for desired cosmetic appearance.”); *Survey shows teens know risks but tan anyway*, MSNBC, May 2, 2005, <http://www.msnbc.msn.com/id/7701260>.

87. FDA, Tanning Products, *supra* note 4.

88. An analogy to fast food can also be drawn. *See* *Pelman v. McDonald’s Co.*, 237 F. Supp. 2d 512, 532 (S.D.N.Y. 2003) (finding that it was well known that fast food contained ingredients that were bad for one’s health).

der this particular failure to warn argument as one of the “endless . . . examples where users of products . . . that carry certain risks . . . believe that those risks exist but nevertheless assume those risks.”⁸⁹

C. A Failure to Warn Claim Concerning the Intensity
of Indoor Tanning UV Rays

Indoor tanning plaintiffs can overcome the common knowledge hurdle by stating not that they were uninformed that indoor tanning causes cancer, but that they were unaware of the actual harmfulness of each indoor tanning session. In making such a failure to warn argument, plaintiffs could explain that they had no knowledge concerning the true power of indoor tanning bed UV rays. Instead, based on limited awareness acquired through indoor tanning advertisements, they erroneously believed the UV-ray intensity of indoor tanning beds to be equal, if not safer, than that of an outdoor tanning session.⁹⁰ In light of such a belief, plaintiffs could argue they tanned at an increased frequency and duration that was actually inappropriate for artificial tanning. Had they been warned of the actual dangers of each indoor tanning session, dangers ostensibly known by the indoor tanning salons and manufacturers, plaintiffs would have cut back on their use and the injury would not have occurred—the company’s failure to warn caused the injury.⁹¹

The way in which indoor tanning companies market their product strengthens this particular failure to warn claim. Often, tanning salons market indoor tanning as *safer* than outdoor tanning.⁹² The difference, they explain, results from the types of rays that indoor tanning equipment emits.⁹³ While normal sunlight emits both UVA and UVB rays, indoor tanning lights emit forty percent fewer UVB rays, which are the more harmful of the two

89. Conley v. R.J. Reynolds Tobacco Co., 286 F. Supp. 2d 1097, 1114 (N.D. Cal. 2002).

90. In response to the question whether tanning beds are more intense than natural sunlight, the Indoor Tanning Association states:

The amount of UV radiation that a person is exposed to depends on many factors including time of day, season and latitude. *The spectrum of UV radiation from a tanning bed is similar to that of sunlight.* It is less intense than being in the sun at the equator in June at noon, but more intense than being in the sun in Boston or San Francisco at the same time of year. . . . This highlights an important benefit of moderate tanning—it prevents burning.

Indoor Tanning Ass’n, *supra* note 21 (emphasis added). For a discussion of the differences between natural sunshine and artificial tanning lamps, see Lim et al., *supra* note 71 (“[A] direct comparison in time between the sun and a sunlamp cannot be made.”).

91. See *supra* note 41 for a discussion on causation.

92. Elizabeth Carruth, Do Tanning Beds Cause Skin Cancer and Other Harmful Effects?, http://www.vanderbilt.edu/AnS/psychology/health_psychology/Tanning.html (last visited Aug. 20, 2008). The Indoor Tanning Association claims that indoor tanning is a more responsible form of tanning than outdoor tanning. Indoor Tanning Ass’n, *supra* note 21. Although this claim is available against both indoor tanning manufacturers and salons, salons do the majority of the advertising.

93. Carruth, *supra* note 92; see also TanningFacts.com, Outdoor vs. Indoor Tanning, http://tanningfacts.com/outdoor_vs_indoor (last visited Aug. 20, 2008) (suggesting that outdoor tanning is less desirable due to a variety of variables that leave “[o]utdoor tanners . . . at the mercy of many uncontrolled elements”).

types of rays.⁹⁴ In addition, many indoor tanning companies advertise that indoor tanning is superior to outdoor tanning because of the ability of users to control their exposure time, resulting in a “perfect balance.”⁹⁵ Some advertisements also encourage consumers to believe that indoor tanning both dramatically reduces the chance a person will get burned and prevents subsequent outdoor sunburns.⁹⁶ Evidence shows indoor tanning consumers believe the indoor tanning industry’s claims to mean that indoor tanning is safer in every single way.⁹⁷

In reality, indoor tanning is much more harmful to consumers overall than is outdoor tanning. The UV exposure received from indoor tanning is up to five times as powerful as the sun at the equator,⁹⁸ but warnings relating to the increased power of UV rays in an indoor tanning session as compared to an outdoor session of the same length are noticeably absent in indoor tanning advertisements.⁹⁹ Therefore, plaintiffs should argue that many consumers would be surprised to learn “[a] single 15- to 30-minute salon session exposes the body to the same amount of harmful UV sunlight as a *day at the beach*.”¹⁰⁰ Likewise, although tanning salons advertise that indoor tanning contains fewer of the harmful UVB rays,¹⁰¹ they omit information about the dangers the remaining UVA rays pose: UVA rays are similar to UVB rays in that they penetrate the skin and pose a risk of causing skin cancer.¹⁰² Like UVB rays, UVA rays are responsible for other types of harms

94. Carruth, *supra* note 92.

95. *Id.*

96. *Id.*; tanningtruth.com, Indoor Tanning: Smart Tan, http://www.tanningtruth.com/index.php/indoor_tanning (last visited Aug. 20, 2008) (“Studies have shown that teens who tan in salons are less likely to sunburn outdoors compared to non-tanners. . . . 83 percent of teenagers who tan indoors prior to taking sunny vacations report that their indoor tan . . . helped them to prevent sunburn.”).

97. Evidence suggests consumers mistakenly believe indoor tanning is a “healthy” alternative to outdoor tanning, that it is safer, and that having a base tan decreases the risk of skin cancer. See Carruth, *supra* note 92; see also Craig D. Murray & Elizabeth Turner, *Health, risk and sunbed use: A qualitative study*, 6 HEALTH RISK & SOC’Y 67, 73 (2004); Vannini & McCright, *supra* note 28, at 321; Young & Walker, *supra* note 38, at 124 (discussing the myth of a “healthy” tan).

98. Young & Walker, *supra* note 38, at 121; cf. Carruth, *supra* note 92 (“[T]he amount of UVA radiation [is] anywhere from about 3–8 times greater in the tanning beds than in the light from the sun.”).

99. Advertisements state that indoor tanning is more responsible than outdoor tanning, calling the former “moderate.” In response to questions about the intensity of indoor tanning UV rays, such ads claim that “[t]he spectrum of UV radiation from a tanning bed is similar to that of sunlight.” Indoor Tanning Ass’n, *supra* note 21.

100. Vilma E. Cokkinides et al., *Use of Indoor Tanning Sunlamps by U.S. Youth, Ages 11–18 Years, and by Their Parent or Guardian Caregivers: Prevalence and Correlates*, 109 PEDIATRICS 1124, 1129 (2002) (emphasis added).

101. See *supra* notes 92–94 and accompanying text.

102. Carruth, *supra* note 92.

including premature aging and damage to blood vessels, sweat glands, and nerves.¹⁰³

Even regulatorily imposed information that educates indoor tanning consumers about the power of indoor tanning does not fully spell out the overall heightened danger of the product when compared to outdoor tanning. One FDA warning statement merely says that “[i]ndoor tanning can be as harmful as outdoor tanning.”¹⁰⁴ Plaintiffs can argue that such wording leads consumers to believe UV-ray harms from indoor tanning are either less than or equal to those from outdoor tanning—not greater. FDA-mandated warning labels for tanning beds are similarly insufficient. Operators must place a “Recommended Exposure Schedule” on the front of each tanning bed as well as in the owner’s manual.¹⁰⁵ The only information this schedule gives, however, is a list of four different skin types and suggested exposure schedules.¹⁰⁶ The schedule not only fails to warn consumers adequately, it fails to provide any frame of reference for comparing the indoor tanning recommendations to those for outdoor tanning session lengths. Because of this omission, consumers are left ignorant as to the true harmfulness that indoor tanning presents.¹⁰⁷

D. A Failure to Warn Claim Concerning Hidden Health Risks of Indoor Tanning

Plaintiffs can strengthen a failure to warn claim and likely overcome the common knowledge problem by basing their argument on indoor tanning’s hidden dangers extending beyond skin cancer. These include various eye conditions, reduced immunity to serious diseases, blood vessel damage, and an increased sensitivity to serious sunburn when women combine indoor tanning with birth control hormones.¹⁰⁸ Such dangers are neither intuitive nor sufficiently well publicized. Federal regulations require a warning label that only warns broadly of “eye and skin injury and allergic reactions.”¹⁰⁹

103. *Id.*; see also Farah R. Abdulla et al., *Tanning and Skin Cancer*, 22 *PEDIATRIC DERMATOLOGY* 501, 503 (2005); James M. Spencer & Rex Amonette, *Tanning Beds and Skin Cancer: Artificial Sun + Old Sol = Real Risk*, 16 *CLINICS DERMATOLOGY* 487, 488–89 (1998).

104. Meadows, *supra* note 9.

105. Amy Thorlin, *Determining Exposure Schedules*, <http://www.vpico.com/articlemanager/printerfriendly.aspx?article=124874> (last visited Aug. 20, 2008).

106. Identity Salon Day Spa, *Tanning: Recommended Schedule & Warnings*, <http://www.identitypullman.com/services/tanning2.php> (last visited Aug. 20, 2008).

107. Carruth, *supra* note 92.

108. The Indoor Tanning Association makes no mention of these dangers on its web page concerning indoor tanning FAQs. See *Indoor Tanning Ass’n*, *supra* note 21.

109. 21 C.F.R. § 1040.20(d)(1)(i) (2007). The federal Regulations state as follows:

Each sunlamp product shall have a label(s) which contains:

(i) A warning statement with the words “DANGER—Ultraviolet radiation. Follow instructions. Avoid overexposure. As with natural sunlight, overexposure can cause eye and skin injury and allergic reactions. Repeated exposure may cause premature aging of the skin and

These generally worded labels are insufficient to properly warn customers of the previously mentioned health concerns. Yet because of the severity of the risks, the tanning industry has a duty to supply such a warning. Provided that states do not require such warnings and the particular indoor tanning salon or manufacturer at issue does not voluntarily post them, a strong failure to warn claim exists.¹¹⁰

Young women present one group of potential plaintiffs who have strong failure to warn claims based on dangers stemming from being on birth control hormones at the time they visit indoor tanning salons. Young to middle-aged women are the heaviest users of indoor tanning beds.¹¹¹ Young women are also likely to be on birth control hormones.¹¹² A woman who takes birth control hormones and tans indoors risks serious injury. Unbeknownst to many of these tanning customers, the use of these hormones combined with indoor tanning's high-intensity rays increases the photosensitivity of the individual and the risk of burning from indoor tanning.¹¹³ A failure to warn

skin cancer. WEAR PROTECTIVE EYEWEAR; FAILURE TO MAY RESULT IN SEVERE BURNS OR LONG-TERM INJURY TO THE EYES. Medications or cosmetics may increase your sensitivity to the ultraviolet radiation. Consult physician before using sunlamp if you are using medications or have a history of skin problems or believe yourself especially sensitive to sunlight. If you do not tan in the sun, you are unlikely to tan from the use of this product."

Id. § 1040.20(d)(1)(i).

110. Defendants are likely to argue that they are shielded from liability because their statements comply with federally mandated warnings. However, since the claims are based on state tort law, such an argument is not sufficient to shield them from liability. The FDA regulations do not indicate that they preempt state tort law suits. *See* 21 C.F.R. § 1040.20. In *Rucker v. Norfolk & Western Railway Co.*, the court, speaking of railway safety regulations, stated:

[W]e do not believe that the presence of Federal regulations on the subject precludes the imposition of tort liability according to State tort law standards more stringent than those contained in the Federal regulations. We find no indication in the Federal regulations that the preemption of State tort law was intended. In fact, it would be reasonable to conclude that the purpose of the regulations is to insure greater safety and that the imposition of tort liability on the basis of more stringent State tort law is consistent with this purpose.

396 N.E.2d 534, 537 (Ill. 1979) (citations omitted); *see also* Haidak v. Collagen Corp., 67 F. Supp. 2d 21, 33 (D. Mass. 1999) (discussing the Medical Devices Amendments, the court required a party claiming preemption to demonstrate that there was "a conflict between the state and federal regulations of the medical devices which threaten[ed] to interfere with a specific federal interest." (quoting *Mitchell v. Collagen Corp.*, 126 F.3d 902, 912 (7th Cir. 1997)). However, if the FDA were to subsequently indicate that its regulations preempt state tort law, courts would likely afford this determination deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863–64 (1984). In *Horn v. Thoratec Corp.*, the court found the plaintiff's claims "preempted by the express preemption provision in the Food Drug and Cosmetic Act." 376 F.3d 163, 164 (3d Cir. 2004).

111. *See* Diana Clarke, *Dermatology Association Calls For Tighter Regulations On Indoor Tanning*, <http://www.statssheet.com/articles/article10856.html> (last visited Aug. 20, 2008).

112. The leading method of contraception in the United States in 2002 was the oral contraceptive pill. At that time it was being used by 11.6 million women 15–44 years of age, and had been used at some point by a total of 44.5 million women 15–44 years of age. William D. Mosher et al., *The Use of Contraception and Use of Family Planning Services in the United States: 1982–2002*, ADVANCE DATA VITAL & HEALTH STATS. (Dep't Health & Human Servs./Ctrs. Disease Control & Prevention, Hyattsville, Md.), Dec. 10, 2004, at 1, 1.

113. *See* Young & Walker, *supra* note 38, at 121 ("Many female students are completely unaware of their skin's elevated sensitivity to natural or artificial light due to the use of birth-control hormones and of their increased risk of burning.").

female customers of this danger can be extremely harmful, as just one severe sunburn doubles an individual's risk of developing malignant melanoma, or skin cancer.¹¹⁴

Plaintiffs can also state a strong failure to warn claim based on a number of additional unknown risks that translate into harm for an ill-informed consumer. These include photosensitive reactions, cataracts, reduced immunity to certain types of cancers and other diseases, exacerbation of photosensitive diseases, and blood vessel damage.¹¹⁵ Indoor tanning can also lead to "interaction," which is an increased risk of burning if an individual uses both indoor tanning and outdoor tanning in the same twenty-four hour period.¹¹⁶ Because some consumers are unaware of all of the potential harms indoor tanning can cause, the common knowledge defense may be unavailable to indoor tanning companies and plaintiffs can make convincing arguments that a failure to warn caused their resulting injury.

III. DESIGN DEFECT CLAIMS

In addition to bringing fraud and failure to warn claims, indoor tanning consumers might bring design defect claims.¹¹⁷ Plaintiffs arguing this cause of action would state that the tanning bed manufacturer sold a defective product that was unreasonably dangerous and caused injury. Section III.A details the particular components of a design defect claim. It then focuses on specific elements that were important to the success of tobacco plaintiffs' design defect claims. Section III.B uses such factors to assess and suggest potential design defect claims indoor tanning plaintiffs could make in the future in order to create the most compelling case possible.

A. Lessons from Successful Cigarette Cases

Plaintiffs who brought successful design defect claims against the tobacco companies all had similar arguments. Initially, they alleged a defect specific to a particular brand of cigarettes as opposed to cigarettes in general. In addition, they argued that during their use they had no knowledge of the dangerousness of the cigarettes. Finally, their complaints suggested a reasonable alternative design for the cigarettes that the manufacturer could have adopted. The combination of these three factors led to the ultimate

114. *Id.*

115. *Id.*; see also Palmer et al., *supra* note 38, at 192 (identifying exacerbation of photosensitive diseases as a possible risk); Spencer & Amonette, *supra* note 103, at 489 (same); Carruth, *supra* note 92 (identifying damage to blood vessels and damage to immune system as potential risks).

116. Spencer & Amonette, *supra* note 103, at 489. The success of such a claim is contingent on the defendant actually having such knowledge. However, the evidence suggests that indoor tanning salons and bed manufacturers are aware of the potential for interaction. See, e.g., Tanning Beds Central, Indoor Tanning Beds, <http://www.tanning-bed-central.com/indoor-tanning-beds.htm> (last visited Aug. 20, 2008); TanningOnline.com, Tanning Info, http://www.tanningonline.com/tanning_bed_info_warnings.html (last visited Aug. 20, 2008).

117. Cigarette plaintiffs brought design defect claims successfully in the past. E.g., Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594 (8th Cir. 2005).

success of cigarette plaintiffs and is useful in formulating future indoor tanning design defect claims.

The three main components of a design defect claim are (1) that the general product offered by the company was designed in such a way as to make it defective, (2) that this condition rendered the product unreasonably dangerous, and (3) that the defect proximately caused the injury.¹¹⁸ In contrast to failure to warn or fraud causes of action, this claim would only apply against indoor tanning bed manufacturers.

In general, and as seen in the cigarette cases, courts interpret the first requirement of a design defect claim to require that plaintiffs allege some defect specific to a *particular brand* of the product; a categorical attack on the product itself does not suffice.¹¹⁹ In the tobacco cases, the courts held that an attack relating to the nature of the product as a whole, claiming that all cigarettes were defective, was insufficient.¹²⁰ Successful design defect claims against tobacco manufacturers were supported by evidence that one cigarette brand in particular was defective because it contained higher levels of carcinogenic tar than other brands and lacked the effective filter technology that other companies used at the time.¹²¹

Under the second, “unreasonably dangerous,” element of the design defect claim, successful cigarette plaintiffs also had to prove that they had no knowledge of the dangerousness of cigarettes during their use.¹²² The Restatement articulates a standard of unreasonable dangerousness: “The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. . . . Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful”¹²³ Simple harm to one’s health, according to a Restatement example concerning cigarettes, does not automatically render a product unreasonably dangerous.¹²⁴

Additionally, whether a design is defective turns in part on whether there is a “reasonable alternative design” that the manufacturer could have

118. *Id.* at 598; *see also* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

119. *See Boerner*, 394 F.3d at 598–99; *see also* *Whiteley v. Philip Morris Inc.*, 11 Cal. Rptr. 3d 807, 862–63 (Cal. Ct. App. 2004) (“[P]laintiff has [not] shown ‘in reasonable medical probability’ that the alleged *negligent design* of those cigarette products was a substantial factor contributing to . . . her risk of developing lung cancer.” (second emphasis added)).

120. *See, e.g., Boerner*, 394 F.3d at 598–99.

121. *E.g., id.* at 599.

122. *See Liggett Group, Inc. v. Davis*, 973 So.2d 467, 474 (Fla. Dist. Ct. App. 2007) (“[T]here is sufficient evidence from which the jury could reasonably have concluded that Davis, as an ordinary consumer, was not aware of the extent of the dangers of the product she was consuming.”).

123. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965). Tobacco plaintiffs were able to win despite this because evidence came to light that certain cigarette companies altered the pH level in their cigarettes’ smoke to maximize nicotine intake and the resulting addiction to cigarettes. *See Boeken v. Philip Morris Inc.*, 26 Cal. Rptr. 3d 638, 649–50 (Cal. Ct. App. 2005).

124. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

adopted.¹²⁵ For example, successful cigarette plaintiffs stated a viable claim because they proved particular cigarette companies had increased the amounts of ammonia in cigarettes in order to maximize the tobacco's effect on consumers.¹²⁶ Since it was feasible on both a scientific and commercial level to remove such high levels of ammonia, courts permitted the claims to go forward.¹²⁷ However, in cases where no such removable defect is identified, the design defect claim is not viable.

Courts hearing tobacco cases also indicated that specific legislative intent opposed claims requesting liability for the general dangerousness of cigarettes. Tobacco defendants successfully argued that comprehensive legislative regulation of the industry conveyed congressional intent to prevent the overall elimination of the tobacco industry that would likely result from a finding of liability.¹²⁸ Starting in 1965, Congress enacted six distinctive statutes that constituted a "specific regulatory scheme."¹²⁹ These included the Cigarette Labeling and Advertising Act and the Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents.¹³⁰ Courts viewed this comprehensive legislation as creating a "collective premise . . . that cigarettes . . . will continue to be sold in the United States."¹³¹ This understanding served to protect both consumers and the national economy.¹³² Therefore, litigation that would eventually destroy the industry would contradict this implicit congressional mandate.¹³³ Defendants prevailed by arguing that a defective product claim regarding a characteristic "so inherent in 'tobacco products' that it would not be scientifically . . . feasible to remove" should be prohibited because allowing such an argument would "effectively constitute a ban on the manufacture of tobacco products"¹³⁴

B. Application of Lessons to Indoor Tanning Design Defect Claims

Future indoor tanning plaintiffs should use lessons from these past cigarette cases to formulate persuasive design defect arguments. The strongest design defect claim a plaintiff can advance is one in which she alleges a defect specific to a particular indoor tanning manufacturer's machines. By

125. RESTATEMENT (THIRD) OF TORTS § 2 (1998); *see also id.* § 2 cmt. g. This is a separate issue from the three general requirements and is an addition to the newest version of the Restatement.

126. *See Boeken*, 26 Cal. Rptr. 3d at 650.

127. *See id.*

128. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

129. *Id.* at 159.

130. WOLFSON, *supra* note 35, at 22, 35.

131. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 139.

132. *See Conley v. R.J. Reynolds Tobacco Co.*, 286 F. Supp. 2d 1097, 1105–06 (N.D. Cal. 2002).

133. *See id.*

134. *Id.* at 1107–08.

claiming the consumer had no awareness of the added dangers stemming from the poor design, a plaintiff can meet the knowledge element of a design defect claim. Additionally, plaintiffs have a number of arguments available concerning a reasonable alternative design for indoor tanning beds. Alternatively, plaintiffs can use comment e of the Restatement on Products Liability to overcome the “reasonable alternative design” requirement for design defect claims. This argument is supported by a seeming lack of expressed legislative intent to protect the indoor tanning industry from such a claim.

Rather than make a categorical attack on the general nature of indoor tanning beds,¹³⁵ indoor tanning plaintiffs may be able to satisfy the initial “defective” requirement by looking to the practices of a particular indoor tanning manufacturer. If indoor tanning lamps are not within the federal regulation’s guidelines,¹³⁶ and emit higher levels of UVA or UVB rays than permitted, a design defect claim is viable. Such a claim would fit within courts’ interpretations of the Restatement because it alleges a defect particular to one brand of indoor tanning equipment, in contrast to a broader attack on all indoor tanning machines.¹³⁷

Indoor tanning plaintiffs can meet the second requirement of a design defect claim by arguing that they had no knowledge of the dangerousness of the indoor tanning beds. First, the plaintiff could allege that she had no knowledge that this specific brand of indoor tanning beds was defective and particularly harmful. She would argue that she believed this brand of indoor tanning machines followed the specifications required by federal regulations, and had no reason to believe otherwise. Such a plaintiff could also use arguments, similar to those made in a failure to warn claim, that she was ignorant of the dangerousness of indoor tanning.¹³⁸ By asserting lack of knowledge in these two ways, plaintiffs can create compelling claims that the product was “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it.”¹³⁹

There are a number of arguments that plaintiffs could make in order to potentially satisfy the “reasonable alternative design” requirement. Initially, if the tanning lamps are not within federal guidelines, plaintiffs should point to the existence of indoor tanning beds that do meet required federal regulations in order to satisfy the reasonable alternative design requirement. In the alternative, indoor tanning plaintiffs could attempt to argue that a particular indoor tanning manufacturer should have adopted a scientifically and com-

135. See Brief of Defendant, *supra* note 40, at 15 (“Plaintiff contends that Hollywood Tans . . . has harmed her . . . by unknowingly exposing [her] to potentially cancer causing ultraviolet light. The harm is the damage to a user’s DNA from UV exposure caused by Defendant’s tanning beds which Plaintiff contends in turn increases a user’s risk of later developing skin cancer.” (citations omitted)).

136. 21 C.F.R. § 1040.20 (2007).

137. See cases cited *supra* note 119.

138. See *supra* Sections II.C.–D.

139. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

mercially feasible alternative design that aligns the relative proportions of UVA and UVB rays, as well as their respective intensity, with those found in normal sunlight.¹⁴⁰ This argument is limited, however, by the Restatement's requirement that such a design be in existence.¹⁴¹ Currently, no such tanning bed designs exist, at least publicly—if anything the industry seems poised to move in the opposite direction. Deemed the “future of the tanning industry,”¹⁴² high-pressure tanning beds have emerged as a way to get an even longer-lasting artificial tan.¹⁴³ These beds provide increased light exposure and faster tans, achieved through reflectors and quartz bulbs instead of fluorescent bulbs.¹⁴⁴ Most importantly, they use even higher proportions of UVA rays than normal tanning beds.¹⁴⁵

Alternatively, indoor tanning plaintiffs could argue that section 2, comment e of The Restatement on Products Liability eliminates the “reasonable alternative design” requirement, enabling liability to attach to *any* manufacturer of indoor tanning equipment under a design defect claim. Under this comment, the Restatement indicates that for some products no alternative design may be available because the very feature of the product the plaintiff complains of is that which users value, and this feature thus necessarily limits the scope of the court's ability to find alternatives.¹⁴⁶ When this is the

140. Tanning beds contain a higher proportion of UVA rays and lower proportion of UVB rays than normal sunlight. See *supra* note 94 and accompanying text. Additionally, “the intensity of lights used in tanning devices is much greater . . . than the intensity of UV rays in natural sunlight.” Fed. Trade Comm'n, *supra* note 6.

141. See Quinlivan Wexler LLP, The 3rd Restatement of Torts—Shaping the Future of Products Liability Law (1999), <http://library.findlaw.com/1999/Jun/1/127691.html>.

142. Tanning-Advisor.com, About High Pressure Tanning Beds . . . , <http://www.tanning-advisor.com/high-pressure-tanning-beds.html> (last visited Aug. 20, 2008).

143. Year Round Brown, The Difference between a high-pressure bed and a low-pressure bed, <http://www.yearroundbrown.com/article-highandlow.html> (last visited Feb. 12, 2008; removed as of Aug. 20, 2008).

144. InSun, Inc., High Pressure Bed at InSun, Inc., <http://www.insun.us/high-pressure-tanning-beds.php> (follow “The Difference” hyperlink) (last visited Aug. 20, 2008).

145. *Id.*; Year Round Brown, *supra* note 143. As a tradeoff, UVB rays are reduced as compared to a normal, low-pressure tanning bed. Tanning-Advisor.com, *supra* note 142. UVA rays, as opposed to UVB rays, penetrate deeper into the skin, causing relatively more photo-damage: “Photo-damage is responsible for increased collagen and elastin break down and UVA can cause many forms of skin cancer.” Yes They're Fake! Cosmetic Plastic Surgery & Beauty Network, Indoor Tanning, http://www.yestheyrefake.net/indoor_tanning.html (last visited Aug. 20, 2008).

146. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. e (1998). The illustration accompanying comment e provides an example:

ABC Co. manufactures novelty items. One item, an exploding cigar, is made to explode with a loud bang and the emission of smoke. Robert purchased the exploding cigar and presented it to his boss, Jack, at a birthday party arranged for him at the office. Jack lit the cigar. When it exploded, the heat from the explosion lit Jack's beard on fire causing serious burns to his face. If a court were to recognize the rule identified in this Comment, the finder of fact might find ABC liable for the defective design of the exploding cigar even if no reasonable alternative design was available that would provide similar prank characteristics. The utility of the exploding cigar is so low and the risk of injury is so high as to warrant a conclusion that the cigar is defective and should not have been marketed at all.

Id. at illus. 5.

case, there are no comparable alternatives yet the claim can still stand.¹⁴⁷ This determination would apply to those products that have such a low degree of social utility, yet such a high degree of danger, that liability may attach to defendants even despite a lack of proof of reasonable alternative design.¹⁴⁸

Plaintiffs have an argument that indoor tanning design defect claims should fall under this comment. The precise reason that customers use indoor tanning salons is because they provide an artificial source of UV light, which physically changes the skin's pigment cells during exposure.¹⁴⁹ It would be impossible to obtain this effect by removing UV rays from indoor tanning beds—the beds would be rendered useless.¹⁵⁰ Such UV exposure and its effects are the very factors that plaintiffs complain of in a lawsuit. Plaintiffs have a strong argument that indoor tanning beds are unreasonably dangerous given that they are much more powerful than natural sunlight.¹⁵¹ Thus they have an argument that indoor tanning booths fit under this portion of the Restatement and no “reasonable alternative design” need be shown in order to support a viable claim.

In order to fully persuade a court that this comment appropriately covers an indoor tanning design defect claim, plaintiffs should also argue that the social utility of indoor tanning is outweighed by the danger it poses and so liability should attach. In both cigarette and alcohol cases, courts analyzed design defect claims under this portion of the Restatement and found that the social utility outweighed the product's dangers—thus relief under this comment was precluded.¹⁵² Though the argument failed in these contexts, the cases still shed light on what courts believe to be important in a social utility argument.¹⁵³ A number of factors seem essential to the

147. *Id.* § 2 cmt. e.

148. *Id.* Use of this part of the Restatement is, however, quite limited. Although several courts have indicated this possibility in dictum, currently only New Jersey has explicitly implemented such a standard: “It is intended that such a finding [under the exception] would be made only in genuinely extraordinary cases—for example, in the case of a deadly toy marketed for use by young children, or of a product marketed for use in dangerous criminal activities.” Senate Judiciary Committee Statement, S. 2805-L.1987, c. 197, reprinted in N.J. STAT. ANN. § 2A:58C-1 (West 2000).

149. See Health Physics Society, Suntanning and Tanning Booths, <http://www.hps.org/publicinformation/ate/faqs/tanningbooths.html> (last visited Aug. 20, 2008) (“In tanning booths it is the ultraviolet (UV) light bulbs emitting UV radiation that causes the tanning.”).

150. See FTC, Indoor Tanning, *supra* note 6.

151. See *supra* Section II.C.

152. In the cigarette context, despite the many health dangers and seemingly nonexistent benefits of smoking, courts refused to find that cigarettes were unreasonably dangerous such that the dangers of smoking outweighed cigarettes' social use. Anthony J. Sebok, The “Big Fat” Class Action Lawsuit Against Fast Food Companies: Is it More Than Just a Stunt? (Aug. 14, 2002), <http://writ.news.findlaw.com/sebok/20020814.html>; see also *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1159 (E.D. Pa. 1987); *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417, 420–22 (Pa. Super. Ct. 1990). The same was found when plaintiffs made claims against alcoholic beverage manufacturers alleging that the risks associated with alcohol consumption outweighed the utility of the product. *Dauphin Deposit Bank & Trust Co. v. Toyota Motor Corp.*, 596 A.2d 845, 849 (Pa. Super. Ct. 1991).

153. Overall, past judicial social utility analysis is sparse and ill defined.

analysis,¹⁵⁴ beginning with Congress's manifested intent to prevent elimination of the industry.¹⁵⁵ As discussed later in this Note, the indoor tanning industry lacks similar congressional support for its existence.¹⁵⁶ Additionally, the population's overall volume of use may have influenced the court's decisions. Studies show that in 1965, near the peak of cigarette use, almost fifty-two percent of adult men and thirty-four percent of all adult women were smokers.¹⁵⁷ Courts may have been wary in labeling such a widely used product as having a "manifestly unreasonable design" and so may have allowed the product's popularity to drive their decisions.¹⁵⁸ Given its high level of use, the cigarette industry was vitally important to the U.S. economy—a consideration the court could not have overlooked.¹⁵⁹ Should courts evaluating indoor tanning claims also determine social utility from level of use, plaintiffs have an argument that the costs of indoor tanning far outweigh its social utility. Despite the growing popularity of indoor tanning,¹⁶⁰ only about ten percent of the nation's population currently uses such salons.¹⁶¹ Strengthening this lack-of-social-utility claim, plaintiffs could point out that in addition to lower levels of use, indoor tanning "is practiced solely for cosmetic reasons."¹⁶²

Plaintiffs can add to their comment e argument by claiming that indoor tanning differs from the tobacco context: the lack of a comprehensive statutory framework suggests there is no congressional intent to preserve the indoor tanning industry. Using the cigarette cases as a basis for comparison, a void in both the volume of legislation and the substantive regulations

154. The concept of social utility is not well defined and courts seem to make decisions relating to this term without clearly articulating what factors they are considering. *See O'Brien v. Muskin Corp.*, 463 A.2d 298, 304 (N.J. 1983) (looking to "[t]he usefulness and desirability of the product—its utility to the user and to the public as a whole" without further explanation). In the tobacco context, some of the opinions reasoned that the courts prefer legislative rather than judicial action in determining that products should not be on the market. *See Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1159 (E.D. Pa. 1987). However, decisions regarding tobacco and alcohol lacked any sort of an analysis or explanation about a determination of social utility; instead, they only contained summarily dismissive statements giving the conclusion. *See id.*; *Dauphin*, 596 A.2d at 849.

155. *See supra* notes 128–134 and accompanying text.

156. *See infra* text accompanying notes 164–168.

157. Dietrich Hoffmann & Ilse Hoffmann, *The Changing Cigarette, 1950–1995*, 50 J. TOXICOLOGY & ENVTL. HEALTH 307, 310 (1997).

158. *See id.*

159. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–61 (2000).

160. Skin Cancer Found., *Indoor Tanning—Magnitude of the Health Issue*, 5 J. DRUGS DERMATOLOGY 193, 193 (2006) ("Commercial indoor tanning is unfortunately one of the fastest growing industries in the United States . . . Reports indicate that between 1986 and 1996 there was a three-fold increase in the percentage of Americans using tanning beds." (footnotes omitted)).

161. Am. Acad. of Dermatology, Indoor Tanning Fact Sheet, http://www.aad.org/media/background/factsheets/fact_indoortanning.html (last visited Aug. 20, 2008).

162. Am. Acad. of Dermatology, *supra* note 34. In contrast, there are a number of reasons people smoke cigarettes. These include stress reduction, appetite suppression, physical addiction, and social or cosmetic motivations. Andrew W. Bergen & Neil Caporaso, *Cigarette Smoking*, 91 J. NAT'L CANCER INST. 1365, 1368 (1999).

themselves are persuasive.¹⁶³ In contrast to the six different statutes Congress enacted concerning cigarettes, the only comparable governmental regulation of indoor tanning has been a single administrative regulation that regulates sunlamp products and ultraviolet lamps intended for use in sunlamp products.¹⁶⁴ This regulation sets specifications for the types of equipment that ultraviolet lamps may use.¹⁶⁵ It also provides for labels and warnings that must appear on the product.¹⁶⁶ However, the labels are general and only go so far as to provide a recommended exposure schedule and warn of the risk of eye damage if proper eye protection is not worn.¹⁶⁷ Nowhere are there congressionally mandated labels that explicitly list the harms consumption causes, similar to cigarette warnings such as: “SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy.”¹⁶⁸ Because the requirements promulgated under the single tanning regulation indicate a lack of comprehensive legislation, plaintiffs have an argument that unlike in the cigarette cases, no “specific regulatory scheme” exists regarding sunlamps or indoor tanning that would indicate congressional intent to prevent claims against the indoor tanning industry in general.

CONCLUSION

The indoor tanning industry has firmly established its presence in the U.S. consumer market. Simultaneously, doctors and health organizations have emphasized its dangerousness. As a result, one lawsuit has already been filed and more litigation against the indoor tanning industry seems likely in the future. Plaintiffs bringing tort claims against indoor tanning manufacturers and salons face a challenging battle as the application of tort law to this particular area is unexplored. Nevertheless, by utilizing the arguments and tactics used by plaintiffs who brought successful cases against the cigarette industry, indoor tanning plaintiffs can state the strongest possible claims and have the best chance of finding success in the courtroom.

163. There is a counterargument, however, that lack of federal legislation indicates Congress’s failure to recognize indoor tanning as a problem. Plaintiffs can argue that state and local legislation concerning indoor tanning, as well as statements by various organizations regarding indoor tanning’s dangers, provide evidence to the contrary. *See supra* text accompanying notes 9–16, 24.

164. 21 C.F.R. § 1040.20 (2007).

165. *Id.* § 1040.20(c).

166. *Id.* § 1040.20(d).

167. *Id.*

168. VISCUSI, *supra* note 39, at 138.