TOBACCO LITIGATION WITHOUT THE SMOKE? CIGARETTE COMPANIES IN THE SMOKELESS TOBACCO INDUSTRY

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INTRODUCTION

Faced with declining domestic cigarette sales and the rapid proliferation of laws prohibiting smoking in indoor workplaces, the two largest U.S. cigarette producers, Philip Morris and R.J. Reynolds, have both made the strategic decision to enter the smokeless tobacco market.[1] In April 2006, Reynolds-American (parent company of R.J. Reynolds) purchased Conwood Smokeless Tobacco Company, the second largest smokeless tobacco company in the U.S.[2] The following month, R.J. Reynolds announced that it would test-market Camel Snus, a "spit-free" smokeless tobacco product, in Austin, Texas and Portland, Oregon.[3] Shortly thereafter, Philip Morris announced that it would be introducing its own smokeless tobacco product called Taboka.[4] Philip Morris is currently test-marketing this "spit-free" product in Indianapolis, Indiana.[5] Then, in June 2007, Philip Morris lent its flagship cigarette brand name to the smokeless effort, announcing that it would test-market a new "spit-free" product called Marlboro Snus in the Dallas, Texas area.[6]

This article will focus on the role that litigation may play in addressing the cigarette companies' entrance into the smokeless tobacco market.[7] Litigation has, at least in the view of some, been an invaluable tool in the arsenal of anti-smoking

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1. Jane L. Levere, *No Smoke, No Foul? Critics Disagree*, N.Y. TIMES, Aug. 9, 2006, at C5.

2. *With Purchase, Reynolds Moves into Smokeless Tobacco Market*, N.Y. TIMES, Apr. 26, 2006, at C9.

3. Levere, *supra* note 1.

4. *Id.*

5. Barnaby J. Feder, *Philip Morris Tries Smokeless Tobacco Product in Texas*, N.Y. TIMES, June 9, 2007, at C3.

6. *Id.*

7. Although the new developments in the smokeless tobacco market have implications for legislation and regulation as well, such measures are beyond the scope of this article.

advocates.[8] Does it have an analogous role to play in reducing the negative effects of smokeless tobacco? Can litigation push producers to make smokeless tobacco products safer? Further, what impact will the cigarette companies' entrance into the smokeless market have on ongoing smoking-related litigation? These are all questions that public health advocates and attorneys are struggling to answer in response to a rapidly-changing tobacco market.

Answering these questions is made more difficult by the ongoing debate in public health circles about whether smokeless tobacco can be a form of "harm reduction."[9] The concept of harm reduction as applied to smokeless tobacco posits that the population-wide levels of harm caused by cigarettes could be reduced by encouraging smokers (or at least smokers who have difficulty quitting by other means) to switch to smokeless tobacco products.[10] Many tobacco control advocates, however, are strongly opposed to encouraging smokers to switch to smokeless tobacco products for reasons that may be historical, strategic, or simply visceral. Recently, the discussion and debate has only intensified, as exemplified by the University of Maryland School of Law's symposium in April 2007 entitled "'Safer' Tobacco Products: Reducing Harm or Giving False Hope?" As was clear at the symposium (and in this symposium edition of the Journal), tobacco control advocates on the two sides of this issue have starkly divergent views as to how to proceed. This ongoing debate about the merits of a harm reduction strategy has inhibited the ability of tobacco control advocates to develop a unified response to the cigarette companies' decision to enter the smokeless tobacco market.

Without resolving the ultimate issues behind the debate, this article hopes to find some common ground between harm reduction proponents and opponents on the issue of litigation strategy. Litigation may be able to push the tobacco industry towards safer smokeless tobacco products and more restrained marketing practices —goals which should be universally shared by tobacco control advocates. Moreover, the debate about the merits of harm reduction is enhanced—and, from my perspective, becomes a closer call—if tobacco control advocates first work together to eliminate unnecessary risks from smokeless tobacco products and curtail irresponsible marketing practices.

This article proceeds in five parts. Part I briefly provides some background on smokeless tobacco and the harm reduction debate. Part II discusses the marketing of smokeless tobacco, since the way the product is marketed may have implications for both litigation and potential harm reduction. The final sections of the article

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8. *E.g.*, Elizabeth Olson, *U.N. Agency Tells Nations to Use the Courts to Combat Tobacco*, N.Y. TIMES, Mar. 21, 2002, at A15.

9. As it relates to tobacco, a "harm reduction" product is one that "lowers total tobacco-related mortality and morbidity even though use of that product may involve continued exposure to tobacco-related toxicants." INST. OF MED., CLEARING THE SMOKE: ASSESSING THE SCIENCE BASE FOR TOBACCO HARM REDUCTION 2 (Kathleen Stratton et al. eds., 2001).

10. *See id.* at 39.

examine three distinct legal issues raised by Philip Morris's and R.J. Reynolds's entrance into the smokeless tobacco arena. Part III reviews the terms of the Master Settlement Agreement (MSA) and its applicability to smokeless tobacco sales, as litigation to enforce the MSA's provisions may help reduce some of the potential harms of smokeless tobacco. Part IV then considers potential legal liability that tobacco companies could face for marketing smokeless tobacco products. Finally, Part V discusses how the cigarette companies' entrance into the smokeless tobacco market may end up impacting cigarette-related litigation.

I. HEALTH EFFECTS AND HARM REDUCTION

Both R.J. Reynolds and Philip Morris are test-marketing "spit-free" products (Camel Snus (RJR), Taboka (PM), and Marlboro Snus (PM)), a new type of smokeless tobacco that comes in small, teabag-like pouches that are held between the cheek and the gum.[11] Unlike other types of smokeless tobacco, these products do not require spitting, thus making discreet usage much easier.[12] As these products are new, relatively little is known about how their impact on health may differ from other smokeless tobacco products already on the market.[13]

For smokeless tobacco in general, the U.S. Surgeon General has maintained for more than twenty years that:

> [O]ral use of smokeless tobacco represents a significant health risk. It is not a safe substitute for smoking cigarettes. It can cause cancer and a number of noncancerous oral conditions and can lead to nicotine addiction and dependence.[14]

In 2003, then-Surgeon General Richard Carmona reiterated in congressional testimony that "smokeless tobacco remains a known threat to public health just as it

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11. Feder, *supra* note 5. U.S. Smokeless Tobacco—still the market leader in the smokeless tobacco field—is testing its own spit-free products, Skoal Dry and Revel. Levere, *supra* note 1.

12. *See* Levere, *supra* note 1.

13. Although beyond the scope of this article, there are other forms of noncombustible oral tobacco now entering the market that raise similar issues, such as Star Scientific Inc.'s Ariva tobacco lozenge. According to the Campaign for Tobacco-Free Kids, Ariva "comes in the shape of a candy-like product and is packaged and marketed like a smoking cessation product." Press Release from Mathew L. Myers, President, Campaign for Tobacco-Free Kids, FDA Refuses to Act to Stop Sales of Ariva Tobacco Mints Ruling Points Out Gaping Hole in Consumer Protection (Aug. 29, 2003), *available at* http://tobaccofreekids.org/Script/DisplayPressRelease.php3?Display=683. R.J. Reynolds and Philip Morris have not yet introduced similar products, but may do so in the future.

14. U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF USING SMOKELESS TOBACCO: A REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL, at vii (1986), *available at* http://profiles.nlm.nih.gov/NN/B/B/F/C/_/nnbbfc.pdf. Fact sheets on the web pages of the Centers for Disease Control and the National Cancer Institute likewise emphasize the carcinogenic effects of smokeless tobacco. Ctrs. for Disease Control & Prevention, Fact Sheet, Smokeless Tobacco Use, http://www.cdc.gov/tobacco/data_statistics/Factsheets/smokeless_tobacco.htm (last visited Nov. 18, 2007). Nat'l Cancer Inst., Fact Sheet, Smokeless Tobacco and Cancer: Questions and Answers, http://www.cancer.gov/cancertopics/factsheet/Tobacco/smokeless (last visited Nov. 18, 2007).

was when Congress acted in 1986."[15] He added that "[the] national toxicology program of the National Institutes of Health (NIH) continues to classify smokeless tobacco as a known human carcinogen, proven to cause cancer in people."[16]

Although smokeless tobacco is clearly a threat to oral hygiene and increases the risk of oral cancer (though the degree of increased risk is subject to debate), it is also undoubtedly less deadly than smoking.[17] To put it simply, although mouth disease and oral cancers can be disfiguring and severely unpleasant, they are not fatal to nearly the same degree as lung cancer and other cancers caused by smoking.[18] Moreover, although it is unclear how much smokeless tobacco increases the risk of heart disease, its impact on the cardiovascular system is less than that of smoking.[19] Thus, for any individual cigarette smoker, switching from smoking to smokeless tobacco would unquestionably reduce the odds of tobacco-related mortality.[20] However, quitting entirely or switching to a "clean nicotine" product (like nicotine gum or nicotine patches) would, of course, be even safer.[21]

There is substantial debate as to whether smokeless tobacco can serve as a cessation aid for existing smokers, and thus reduce tobacco-related mortality on a population-wide basis. According to the NIH's recent State-of-the-Science statement, "[d]ata about the effectiveness of smokeless tobacco in facilitating smoking cessation and associated population harm reduction are very limited."[22] Indeed, there have been no randomized clinical trials testing the use of smokeless

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15. *Can Tobacco Cure Smoking? A Review of Tobacco Harm Reduction: Hearing Before the Subcomm. on Commerce, Trade, & Consumer Protection, Comm. on Energy & Commerce*, 108th Cong. 40–41 (2003) (statement of Vice Admiral Richard H. Carmona, Surgeon General of the United States), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:87489.pdf.

16. *Id.* at 41.

17. *See, e.g.*, Neil A. Accortt et al., *Chronic Disease Mortality in a Cohort of Smokeless Tobacco Users*, 156 AM. J. EPIDEMIOLOGY 730, 736 (2002) ("Mortality for exclusive smokeless tobacco users is considerably less than mortality for exclusive smokers for all cancer (especially lung cancer) . . . .").

18. *Compare* Brad W. Neville & Terry A. Day, *Oral Cancer and Precancerous Lesions*, 52 CA CANCER J. CLIN. 195, 196–98 (2002) (5-year survival rate for oral cancer in the U.S. is 50–55%, but survival rate is substantially higher when diagnosed at an early stage), *with* D. Max Parkin et al., *Global Cancer Statistics, 2002*, 55 CA CANCER J. CLIN. 75, 83 (2005) (5-year survival rate for lung cancer in the U.S. is 15%).

19. Kjell Asplund, *Smokeless Tobacco and Cardiovascular Disease*, 45 PROGRESS IN CARDIOVASCULAR DISEASES 383, 390 (2003).

20. Dorothy K. Hatsukami et al., *Changing Smokeless Tobacco Products: New Tobacco-Delivery Systems*, 33 AM. J. PREVENTIVE MED. (SUPP.) S368, S369 (2007) ("In a report by the Tobacco Advisory Group of the Royal College of Physicians, smokeless tobacco use is considered 10–1000 times less hazardous than cigarette smoking, depending on the product.").

21. S. Jane Henley et al., *Tobacco-Related Disease Mortality Among Men Who Switched from Cigarettes to Spit Tobacco*, 16 TOBACCO CONTROL 22, 27 (2007).

22. NAT'L INSTS. OF HEALTH, NIH STATE-OF-THE-SCIENCE CONFERENCE STATEMENT ON TOBACCO USE: PREVENTION, CESSATION AND CONTROL 13 (2006), *available at* http://consensus.nih.gov/2006/TobaccoStatementFinal090506.pdf.

tobacco as a cessation aid.[23] The experience in Sweden—where an increase in snus usage has been accompanied by a decrease in smoking rates—is suggestive, but the NIH cautions that "Scandinavian studies do not reflect the range of smokeless tobacco products used or the diverse populations exposed to these products in the United States."[24]

Although the concept of smokeless tobacco harm reduction remains controversial, it has been warmly embraced by some tobacco control advocates. For example, Coral Gartner and Wayne Hall recently wrote:

> Based on the Swedish experience, there is a strong prima facie case on public health and ethical grounds for recommending snus to inveterate smokers who want to reduce their health risks and for considering policies (such as lower taxes for snus and public information campaigns) to promote its use by smokers.[25]

David Sweanor, Philip Alcabes, and Ernest Drucker are even more emphatic about the potential benefits of tobacco harm reduction:

> We can reduce tobacco related death and disease far more rapidly than we can reasonably expect to reduce nicotine use by focusing on the fact that people smoke for the nicotine but die from the smoke. Applying harm reduction principles to public health policies on tobacco/nicotine is more than simply a rational and humane policy. It is more than a pragmatic response to a market that is, anyway, already in the process of undergoing significant changes. It has the potential to lead to one of the greatest public health breakthroughs in human history by fundamentally changing the forecast of a billion cigarette-caused deaths this century.[26]

The other side of the debate does not dispute that smokeless tobacco is significantly less harmful than cigarettes.[27] However, there are at least two significant reservations. First is the question of *how much safer is it*? The potential benefits of a harm reduction policy depend largely on the relative risk of smokeless

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23. Scott L. Tomar, *Epidemiologic Perspectives on Smokeless Tobacco Marketing and Population Harm*, 33 AM. J. PREVENTIVE MED. S387, S392 (2007) ("To date, there are no published randomized clinical trials for smokeless tobacco as a smoking-cessation method.").

24. NAT'L INSTS. OF HEALTH, *supra* note 22, at 13; *cf.* David A. Savitz et al., *Public Health Implications of Smokeless Tobacco Use as a Harm Reduction Strategy*, 96 AM. J. PUB. HEALTH 1934, 1935 (2006) ("The low smoking prevalence rate and the high rate of use of *snus* in Sweden may be related, but this association has not been established with certainty.").

25. Coral E. Gartner et al., *Should the Public Health Community Promote Smokeless Tobacco (Snus) as a Harm Reduction Measure?*, 4 PLOS MED. 1138, 1139 (2007), *available at* http://medicine.plosjournals.org/perlserv/?request=get-document&doi=10.1371%2Fjournal.pmed.0040185.

26. David Sweanor et al., Editorial, *Tobacco Harm Reduction: How Rational Public Policy Could Transform a Pandemic*, 18 INT'L J. DRUG POL'Y 70, 74 (2006), *available at* http://download.journals.elsevierhealth.com/pdfs/journals/0955-3959/PIIS0955395906002416.pdf.

27. Dorothy K. Hatsukami et al., *Smokeless Tobacco Use: Harm Reduction or Induction Approach?*, 38 PREVENTIVE MED. 309, 314 (2004).

tobacco versus cigarette smoking, and also upon the relative risk of potential alternatives.[28] Many of these factual questions remain unanswered, as Dorothy Hatsukami and others suggest:

> The extent to which [smokeless tobacco] imposes significantly greater risk than current or future medications for smoking cessation is unknown. Therefore, . . . the adverse effects and risk benefit ratio of [smokeless tobacco] products and existing medications need to be tested and determined, including the abuse liability and its effects on sustained use of the products.[29]

In addition, given that the snus products being sold in the U.S. are new, untested, and unregulated, some skepticism about their risk profile seems warranted.[30]

The second concern is that the tobacco companies' promotion of their smokeless tobacco products could end up *increasing* overall tobacco exposure by attracting new tobacco users or prompting "dual use" of cigarettes and smokeless tobacco.[31] In particular, cigarette companies could use their smokeless tobacco products (and the new spit-free "snus" products in particular) to (a) provide smokers who would otherwise quit tobacco use entirely with a product that will keep them using tobacco in another form;[32] (b) supply smokers who work in smoke-free workplaces with a "bridge" product to get them through the day and thus prevent them from quitting;[33] and/or (c) attract non-tobacco users (potentially including kids and young adults) to habitual tobacco use which may or may not lead to smoking.[34] Any of these results could contribute to an overall increase in population-level harm, despite the fact that switching from cigarette use to smokeless tobacco would be a safer option for any individual tobacco user.[35] Simon Chapman and Becky Freedman put the concern in blunt terms:

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28. *See* Sweanor et al., *supra* note 26, at 72.

29. Hatsukami et al., *supra* note 27, at 314. "Abuse liability" refers to the likelihood that use of a product will lead to addiction and dependence. INST. OF MED., *supra* note 9, at 258.

30. *See* Juhua Luo et al., *Oral Use of Swedish Moist Snuff (Snus) and Risk for Cancer of the Mouth, Lung, and Pancreas in Male Construction Workers: A Retrospective Cohort Study*, 369 LANCET 2015, 2019 (2007) (finding that snus is associated with an increased risk of pancreatic cancer, but concluding that "additional studies in populations with other patterns of use, not the least in women" are necessary to properly assess the impact that increased snus use may have on public health).

31. Gartner et al., *supra* note 25, at 1139–40.

32. *Id.*

33. *Id.* at 1139. It is surely no coincidence that R.J. Reynolds and Philip Morris are test marketing their products in Austin and Indianapolis, two cities that recently enacted smoke-free workplace laws. INDIANAPOLIS, IND., REV. ORDINANCES ch. 616, art. I–V (2005); AUSTIN, TEX., REV. ORDINANCES ch. 10, art. I (2004). Indeed, an R.J. Reynolds spokesperson, discussing the company's investment in smokeless tobacco, told *USA Today*, "We're meeting consumer demand . . . . Smoking bans are making it more difficult for adult smokers to enjoy a tobacco product." Wendy Koch, *Tobacco Giants Test Smoke-Free Products*, USA TODAY, June 8, 2006, at 1A.

34. *See* Gartner et al., *supra* note 25, at 1138.

35. *Id.* at 1139.

> Given the tobacco industry's long history of mendacity, we can be certain that snus advertising will be used for the wider benefit of the industry. For as long as both cigarettes and smokeless products are marketed by the same companies, collateral benefits to be obtained from riding the harm reduction moral imperative (such as dual use . . .) will be the foremost in cynical industry plans.[36]

Indeed, as discussed in the following section, recent tobacco industry marketing suggests that the potential benefits of harm reduction may be illusory so long as the tobacco companies are in charge of marketing their products.

II. SMOKELESS TOBACCO MARKETING AND ITS RELATIONSHIP TO HARM REDUCTION

The debate about smokeless tobacco harm reduction must be framed by a realistic analysis of the ways in which smokeless tobacco products are being advertised. The case for tobacco harm reduction is undermined when youth (and especially youth who would otherwise not have smoked) are attracted to smokeless tobacco.[37] Likewise, the potential benefits of harm reduction disappear when cigarette smokers use smokeless tobacco *in addition* to smoking, rather than *instead of* smoking. Industry advertising suggests that both of these outcomes are likely and intended results of current campaigns.[38]

A. R.J. Reynolds

Camel Snus comes in three flavors: original, frost, and spice.[39] This echoes R.J. Reynolds's past attempts to use flavored cigarettes as a way to attract a younger audience.[40] As discussed in Part III below, R.J. Reynolds recently reached a settlement agreement with the attorneys general of thirty-eight states in which R.J. Reynolds agreed to discontinue the marketing of candy, fruit, and alcohol-

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36. *Id.* at 1140. Opponents of smokeless tobacco harm reduction also argue that encouraging smokeless tobacco use makes little sense when "clean nicotine" alternatives available do not carry the same health risks. *See, e.g.*, Hatsukami et al., *supra* note 27, at 315 (discussing the benefits of using a "clean nicotine" alternative such as medicinal nicotine for tobacco addiction treatment).

37. Savitz et al., *supra* note 24, at 1937 ("The legitimacy of harm reduction is predicated on effective targeting of *active* smokers . . . . Ideally, a product should not be promoted or adopted among either nonusers of tobacco or active smokers capable of quitting . . . . If it is not possible to isolate and market to the group of smokers who could benefit, there may be net harm from these products.").

38. Gartner et al., *supra* note 25, at 1140.

39. Camel Snus, http://www.camelsnus.com (last visited Nov. 14, 2007). Although the website purports to limit access to adults, the age verification methods used are easily evaded. The website appears to require only self-certification of one's age. Even if more rigorous procedures were used, minors could easily avoid them by, for example, entering a parent's name.

40. AM. LUNG ASS'N, TOBACCO POLICY TREND ALERT, FROM JOE CAMEL TO KAUAI KOLADA-THE MARKETING OF CANDY-FLAVORED CIGARETTES 1–4 (2006), *available at* http://www.lungusa.org/atf/cf/%7B7A8D42C2-FCCA-4604-8ADE-7F5D5E762256%7D/candyreport.pdf.

flavored cigarettes.[41] The terms of the agreement, however, do not apply to flavored smokeless tobacco products.[42]

The Camel Snus website uses imagery and wording that appears geared towards teens and young adults. The latest version of the website features a blonde Swedish swimsuit model named "Inga" who provides a video introduction to Camel Snus and translates suggested phrases such as "Where is the nearest bar?" into Swedish.[43] Inga's introduction boasts that the idea of Camel Snus came from Sweden, which is better known for "deep tissue massage[s], those delicious meatballs, dancing queens, and swimsuit models."[44] As for where Camel Snus can be used, Inga helpfully suggests that "Snus doesn't require you to use your hands, so you can snus while doing the samba."[45] Similarly, Camel's marketing materials recommend using Camel Snus while engaging in various activities such as "bicycling somewhere," "waiting in line to buy tickets to a comedy film," and "sipping tropical drinks and pretending you are at a resort in Martinique."[46] Clearly, Camel Snus is not limiting its marketing to adult smokers.[47]

B. Philip Morris

Philip Morris, in line with its ongoing efforts to make itself over as a more "responsible" tobacco company, has a much more restrained smokeless tobacco website that does not contain music or animation similar to the Camel Snus site.[48] It prominently presents links to discussions of "Preventing Youth Tobacco Use" and "Health Issues."[49] In the section of its smokeless tobacco website entitled "Marketing Approach," Philip Morris states that Taboka and Marlboro Snus are

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41. Press Release, N.Y. Att'y Gen., Attorneys General and R.J. Reynolds Reach Historic Settlement to End the Sale of Flavored Cigarettes (Oct. 11, 2006), http://www.oag.state.ny.us/press/2006/oct/oct11a_06.html.

42. R.J. Reynolds Tobacco Co., Settlement Agreement Regarding Investigated Cigarette Brand Styles, at 1–2 (2006), http://www.oag.state.ny.us/press/2006/oct/flavored%20settlement.final.pdf [hereinafter Settlement Agreement Regarding Investigated Cigarette Brand Styles].

43. Camel Snus, *supra* note 39 (follow "All About Snus" hyperlink; then follow "Swedish Translator" hyperlink) (last visited Dec. 20, 2007).

44. *Id.* (follow "Meet Inga" hyperlink; then follow "Inga's Introduction to Snus" hyperlink) (last visited Dec. 20, 2007).

45. *Id.*

46. R.J. Reynolds Tobacco Co. Advertisement, *The Abridged Guide to Snusing* (distributed with copies of THE OTHER PAPER, a weekly alternative newspaper in Columbus, Ohio) (copy on file with author).

47. Current advertising strategies appear to be targeted at young men. Young women, however, may be the next targeted demographic. The *New York Times* recently reported that Swedish Match is planning to introduce "a dainty lavender-colored can, packed with cassis and menthol-flavored snus." Mark Landler & Andrew Martin, *Smokeless from Sweden*, N.Y. TIMES, Oct. 3, 2007, at C1.

48. Philip Morris USA, Information About Smokeless Tobacco, http://www.philipmorrisusa.com/en/smokeless (last visited Nov. 18, 2007).

49. *Id.*

"designed to appeal to the primary audience for these products: adult smokers who are interested in smokeless tobacco alternatives to cigarettes."[50]

Taboka's marketing, while it does not appear to be as youth-oriented, does seem to suggest that its product can be used "to tide smokers over when they are in places they are not permitted to smoke."[51] For example, one of its direct mail pieces stated, "Taboka is the smoke-free, spit-free tobacco pleasure you can enjoy almost anywhere, anytime. Fancy that!"[52] Notably, the mail piece also included a coupon for a free pack of Taboka *with* any cigarette purchase.[53] If the goal of the advertising was to encourage smokers to substitute smokeless tobacco for cigarettes, it would be odd to require the purchase of cigarettes in order to get a free package of Taboka.[54]

For its newer product, Marlboro Snus, Philip Morris is reportedly contemplating the tagline "flavor anytime," which also highlights the idea that smokeless tobacco can be used where smoking is no longer permitted.[55] Moreover, Philip Morris appears to be copying some of R.J. Reynolds's marketing tactics. Its new product will use the Marlboro brand name (which may allow for easy cross-promotion between cigarettes and smokeless products) and will come in four flavors—rich, mild, mint, and spice.[56] (Taboka is offered only in "original" and "green menthol" flavors.)[57]

C. United States Smokeless Tobacco (USST)

USST's advertising is also important because, as the market leader in the smokeless tobacco industry,[58] both R.J. Reynolds and Philip Morris will be watching its actions closely. As discussed in Part III below, USST has a long

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50. Philip Morris USA, Information About Smokeless Tobacco: Marketing Approach, http://www.philipmorrisusa.com/en/smokeless/marketing_approach.asp (last visited Nov. 18, 2007).

51. Joe Nocera, *If It's Good for Philip Morris, Can It Also Be Good for Public Health?*, N.Y. TIMES MAG., June 18, 2006, at 77 (citation omitted).

52. E-mail from Karla Sneegas, Executive Director, Indiana Tobacco Prevention & Cessation (Sept. 21, 2006, 8:38 PM) (on file with author).

53. *Id.*

54. Likewise, Camel Snus's site does not discourage consumers from using both smokeless tobacco and cigarettes. Its website asks "Can I Snus while smoking?" and answers, "[w]e do not recommend that. You should enjoy all tobacco products in moderation." Camel Snus, *supra* note 39 (follow "All About Snus" hyperlink; then follow "Got Questions?" hyperlink; then follow "Can I Use Snus While Smoking?" hyperlink).

55. Vanessa O'Connell, *Marlboro Brand Goes Smokeless: Philip Morris Takes a Risk By Selling Tobacco Pouch; 'Reduced Exposure' Claim?*, WALL ST. J., June 9, 2007, at A3. Camel Snus employs the similar tagline, "Pleasure for Wherever!" Camel Snus, *supra* note 39.

56. Philip Morris USA, Information About Smokeless Tobacco: Product Facts, http://www.philipmorrisusa.com/en/smokeless/product_facts.asp?source=smokeless_left_nav (last visited Nov. 18, 2007).

57. *Id.*

58. Levere, *supra* note 1.

history of marketing to youth, which has resulted in several rounds of legal battles with the California Attorney General.[59] USST still promotes an astounding variety of kid-tempting flavors of smokeless tobacco, including mint, wintergreen, cherry, and apple.[60] Its recent ads have clearly targeted smokers dealing with the proliferation of smoke-free laws and policies. For example, one print ad says, "Enjoy tobacco in the office? You bet."[61] Likewise, USST's marketing for its new "spit-free" product, Revel, has included the tag line "a fresh new way to enjoy tobacco when you can't smoke."[62] Whether these ads are intended to promote a switch from smoking to smokeless tobacco use or the use of smokeless tobacco as a bridge product in smoke-free settings is unclear. In 2000, however, USST's president wrote that one of the company's objectives was "[p]romoting [d]ual [c]onsumption" of smokeless tobacco and cigarettes among smokers adapting to smoke-free laws.[63]

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59. *E.g.*, Press Release, Cal. Office of Att'y Gen., Attorney General Lockyer Settles Lawsuit Over Illegal Distribution of Smokeless Tobacco Products (Oct. 17, 2002), http://ag.ca.gov/newsalerts/release.php?id=1005&category=tobacco [hereinafter Press Release, Cal. Office of Att'y Gen. (Oct. 17, 2002)] (announcing settlement with company for illegally distributing tobacco products on public grounds stating "free . . . smokeless tobacco products inevitably wind up in the hands of children"); Press Release, Cal. Office of Att'y Gen., Attorney General Reaches Settlement with United States Tobacco Company Over Alleged Advertisement Violations (Dec. 6, 2000), http://ag.ca.gov/newsalerts/release.php?id=760&category=tobacco [hereinafter Press Release, Cal. Office of Att'y Gen. (Dec. 6, 2000)].

60. UST Skoal, http://www.ustinc.com/smokeless/skoal/ (last visited Oct. 29, 2007).

61. U.S. Smokeless Tobacco Inc. Advertisement, NEWSWEEK, July 4, 2005, *available at* http://www.trinketsandtrash.org/tearsheet.asp?ItemNum=210952. Another USST ad was equally direct, stating, "[w]ith all the smoking areas removed from the building, Phil knew his best option was to head straight for [smokeless tobacco]." U.S. Smokeless Tobacco Co. Advertisement, NEWSWEEK, Jan. 24, 2005, *available at* http://www.trinketsandtrash.org/tearsheet.asp?ItemNum=210567.

62. STAFF OF H.R. COMM. ON GOV'T REFORM, 108TH CONG., THE LESSONS OF "LIGHT" AND "LOW TAR" CIGARETTES: WITHOUT EFFECTIVE REGULATION, "REDUCED RISK" TOBACCO PRODUCTS THREATEN PUBLIC HEALTH, at ii–iii (Comm. Print 2003), *available at* http://oversight.house.gov/documents/20040629082458-34684.pdf. Note that unlike R.J. Reynolds and Philip Morris, USST does not have to worry about its smokeless products cannibalizing its cigarette business. This likely explains why only USST has directly asked the U.S. government for permission to advertise smokeless tobacco as a "harm reduction" product. Letter from Daniel C. Schwartz, Att'y for U.S. Smokeless Tobacco Co., to Donald S. Clark, Sec'y, Fed. Trade Comm'n (Feb. 5, 2002), http://www.ftc.gov/os/comments/smokelesscomments/reqadvisoryop.pdf; U.S. Smokeless Tobacco Co., Comments of U.S. Smokeless Tobacco Co. Regarding Tobacco Harm Reduction Submitted to the U.S. Dep't of Health and Human Servs., 1–2 (Sept. 15, 2005), *available at* http://www.ustinc.com/files/regulatory/Comments_Tobacco-HR.pdf ("USSTC believes that there is support in the scientific and public health communities for the proposition that any comprehensive evidence-based tobacco control program should include a tobacco harm reduction strategy [providing that] . . . cigarette smokers who do not quit and do not use medicinal nicotine products should be encouraged to switch completely to smokeless tobacco . . . .").

63. STAFF OF H.R. COMM. ON GOV'T REFORM, *supra* note 62, at 12.

The point here is not to criticize the tobacco companies for marketing strategies that undercut the goal of population-wide harm reduction. Their job is to recruit new customers and sell more of their products, not to advance public health goals. As long as their marketing is not deceptive, untruthful, or targeted to minors, it is not unlawful.[64] But this brief review of marketing strategies is meant to highlight that as long as tobacco companies remain responsible for the marketing of their products, it appears likely that the introduction of new smokeless tobacco products (and the accompanying marketing campaigns) are more likely to increase population-wide harm than decrease it.[65] As shown, the tobacco companies are not marketing smokeless tobacco as a product that will help current smokers quit.[66] Instead, they are trying to increase their customer base for tobacco products while at the same time suggesting that current smokers may be able to use smokeless tobacco *and* cigarettes.[67] The tobacco companies are simply following the dictates of their own commercial interests, but these interests are often—if not always—in conflict with the goals of tobacco harm reduction.

Nonetheless, this review of tobacco industry marketing suggests that harm reduction advocates and opponents may be able to find some common ground in the discussion of potential legal and regulatory responses to the cigarette companies' smokeless sales. In particular, marketing geared towards youth and advertising suggesting that smokeless tobacco and cigarettes can be used in combination should be carefully monitored by tobacco control advocates for compliance with all relevant laws and regulations. Such advertising could also be the subject of future regulatory and litigation efforts. Although tobacco companies will always have an incentive to increase their profits to the greatest degree possible, legislation, regulation, and litigation can still help set limits around acceptable tobacco company behavior. Tobacco control advocates have long called for—and continue to call for—stricter limits on tobacco advertising for reasons unrelated to harm reduction.[68] But supporters of harm reduction may see that in

64. Lawrence O. Gostin & Gail H. Javitt, *Health Promotion and the First Amendment: Government Control of the Informational Environment*, 79 MILLBANK Q. 547, 562–63 (2001).

65. *Cf.* COMM. ON REDUCING TOBACCO USE: STRATEGIES, BARRIERS, AND CONSEQUENCES, INST. OF MED., ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION, at 6-35 (2007 Prepublication Copy) ("The evidence clearly shows that youth exposure to images that create a positive association with smoking is associated with a higher likelihood of smoking."). The IOM added that "[a] review of tobacco industry documents confirmed that the companies have actively researched the determinants of cessation, and based upon their findings, they engaged in marketing efforts expressly designed to discourage current smokers from quitting and to encourage former smokers to relapse." *Id.* There is no reason to believe that the impact of tobacco advertising—or the conduct of the tobacco industry—would be any different with respect to smokeless tobacco. *See id.* at S-2.

66. *See* STAFF OF H.R. COMM. ON GOV'T REFORM, *supra* note 62, at 12.

67. *Id.*

68. *See, e.g.*, COMM. ON REDUCING TOBACCO USE: STRATEGIES, BARRIERS, AND CONSEQUENCES, *supra* note 65, at 6-39 to 6-41 (recommending restrictions on tobacco advertising without mentioning harm reduction).

addition to the inherent benefits of such measures, limits on smokeless tobacco advertising strengthen the case for harm reduction by making it less likely that tobacco marketing will increase population-level harm.

The following three sections of this article will focus on how the cigarette companies' entrance into the smokeless tobacco market may have implications for litigation. How should attorneys interested in public health respond to this development? Can litigation play a role in reducing harm caused by smokeless tobacco—either by reducing product advertising or encouraging safer products? Moreover, will the cigarette companies' move into the smokeless tobacco market strengthen or weaken their position in smoking-related litigation? First, though, the next section will consider how the MSA (which resulted from previous litigation against the tobacco industry) may constrain the tobacco companies' actions as they move into the smokeless tobacco arena.

III. THE MASTER SETTLEMENT AGREEMENT

Although there is substantial debate about whether litigation is an effective tool to reduce the harms of tobacco, there is no disagreement that tobacco companies should be required to abide by their commitments in existing settlement agreements. The largest and most significant agreement that applies to cigarette companies is the MSA.[69]

In 1998, the major cigarette manufacturers signed the MSA—the largest civil litigation settlement in history—in order to settle litigation brought by the attorneys general of forty-six states.[70] The attorneys general, beginning with the Attorney General of Mississippi in 1994, filed suits against the cigarette manufacturers seeking to enforce state laws and recover the medical costs incurred in treating sick and dying cigarette smokers.[71]

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69. *E.g.*, Tobacco Pub. Policy Ctr., Capital Univ. Law Sch., Master Settlement Agreement, http://www.law.capital.edu/Tobacco/federal_master.asp [hereinafter Tobacco Pub. Policy Ctr.] (last visited Nov. 7, 2007).

70. Nat'l Ass'n of Att'ys Gen., Master Settlement Agreement (1998), *available at* http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/ [hereinafter Master Settlement Agreement] (follow "Master Settlement Agreement" hyperlink) (see signature pages for list of states that signed the agreement). Florida, Minnesota, Mississippi, and Texas had previously reached separate settlement agreements. JOY JOHNSON WILSON, NAT'L CONFERENCE OF STATE LEGISLATURES, SUMMARY OF THE ATTORNEYS GENERAL MASTER TOBACCO SETTLEMENT AGREEMENT (1999), http://www.ncsl.org/statefed/tmsasumm.htm#Intro.

71. Tobacco Pub. Policy Ctr., *supra* note 69. The MSA was signed by the largest cigarette manufacturers at the time: Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated, and R.J. Reynolds Tobacco Company. Other cigarette manufacturers have subsequently signed onto the agreement. Nat'l Ass'n of Att'ys Gen., Project Tobacco, Participating Manufacturers, http://www.naag.org/backpages/naag/tobacco/msa/participating_manu/ (follow "List of Participating Manufacturers (updated September 24)" hyperlink).

Under the agreement, the cigarette manufacturers agreed to pay the states more than $200 billion over the first twenty-five years of the agreement and to abide by certain advertising and marketing restrictions.[72] In return, the states gave up their legal claims against the cigarette manufacturers—including claims that the manufacturers had been violating state consumer protection and antitrust laws for decades.[73]

A. Does the Master Settlement Agreement Apply to Smokeless Tobacco Marketing by Cigarette Companies?

"Tobacco products" are defined in the MSA as "[c]igarettes and smokeless tobacco products."[74] Thus, the limitations on the promotion of "tobacco products" detailed in Section III of the agreement—such as the prohibitions on youth targeting and most outdoor advertising—apply to the advertising of both cigarettes and smokeless tobacco, *but* only if the entity manufacturing the product is a party to the agreement.[75]

Are the cigarette company affiliates now marketing smokeless tobacco products bound by the MSA? The terms of the agreement apply to any "Participating Manufacturer," which is defined as "a Tobacco Product Manufacturer that is or becomes a signatory to this agreement" and its successors.[76] "Tobacco Product Manufacturer" is then defined as:

> [A]n entity that after the MSA Execution Date directly (and not exclusively through an Affiliate):
> (1) manufactures *Cigarettes* anywhere that such manufacturer intends to be sold in the States . . . ;
> (2) is the first purchaser anywhere for resale in the States of *Cigarettes* manufactured anywhere that the manufacturer does not intend to be sold in the states; or
> (3) becomes a successor of an entity described in subsection (1) or (2) above.
> *The term "Tobacco Product Manufacturer" shall not include an Affiliate of a Tobacco Product Manufacturer unless such Affiliate itself falls within any of subsections (1) – (3) above.*[77]

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72. Tobacco Pub. Policy Ctr., *supra* note 69.

73. *Id.*

74. Master Settlement Agreement, *supra* note 70, § II(vv), at 13.

75. *Id.* § III(a), (d), at 14–17.

76. *Id.* § II(jj), at 8–9.

77. *Id.* § II(uu), at 12–13 (emphasis added). Notably, "released party"—those against whom the state released its potential claims, was defined more broadly as "all Participating Manufacturers, their past, present and future Affiliates, and the respective divisions, officers, directors, employees, representatives, insurers, lenders, underwriters, Tobacco-Related Organizations, trade associations, suppliers, agents, auditors, advertising agencies, public relations entities, attorneys, retailers and distributors of any Participating Manufacturer or of any such Affiliate (and the predecessors, heirs,

In other words, if smokeless tobacco products are manufactured by the same entity that manufactures cigarettes, then smokeless tobacco marketing is subject to the terms of the MSA. But if smokeless tobacco products are manufactured by an affiliate that does not manufacture cigarettes, then the terms of the MSA do not apply.[78]

In the case of R.J. Reynolds, the new Camel Snus product is being test-marketed by R.J. Reynolds Tobacco Company (RJRT), an MSA signatory and the same company that manufacturers Camel cigarettes and other cigarette brands.[79] Thus, the MSA terms should apply to the marketing of Camel Snus. However, the Conwood Smokeless Tobacco Company, which was purchased by Reynolds-American International (RJRT's parent company), is being held as a separate subsidiary which sells only smokeless tobacco and other non-cigarette tobacco products.[80] Thus, it does not appear that Conwood is bound by the MSA's terms.

As for Philip Morris, Taboka and Marlboro Snus are being marketed by Philip Morris USA, the same corporate entity that manufactures and sells Philip Morris's multiple brands of cigarettes (Marlboro, Virginia Slims, Benson & Hedges, Merit, etc.) in the U.S.[81] Therefore, the marketing of Taboka is subject to the terms of the MSA, and Philip Morris has acknowledged this fact on its website.[82]

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executors, administrators, successors and assigns of each of the foregoing)[.]" *Id.* § II(oo). Thus, as discussed in Part IV(B) below, the potential for future smokeless tobacco-related government suits against cigarette manufacturers is quite limited, even though those companies were not manufacturing smokeless tobacco at the time of the MSA.

78. Note that the Smokeless Tobacco Master Settlement Agreement (STMSA) provides that if USST (a company that only manufactures smokeless tobacco) decides to enter the cigarette market, it must become a signatory to the MSA. Nat'l Ass'n of Att'ys Gen., Smokeless Tobacco Master Settlement Agreement 58–59, *available at* http://ag.ca.gov/tobacco/pdf/1stmsa.pdf [hereinafter Smokeless Tobacco Master Settlement Agreement]. The MSA does not include a similar provision requiring signatories to become parties to the STMSA if they market smokeless tobacco products. *See* Master Settlement Agreement, *supra* note 70.

79. *See* WILSON, *supra* note 70 (indicating that R.J. Reynolds Tobacco Company is a MSA signatory); Camel Snus, *supra* note 39 (indicating that R.J. Reynolds Tobacco Company markets Camel Snus); CamelSmokes.com, http://www.smokerswelcome.com/CAM/dtclogin.jsp?brand=CAM (last visited on Nov. 8, 2007) (indicating that R.J. Reynolds Tobacco Company produces Camel Cigarettes).

80. *See* Reynolds Am. Inc., Annual Report (Form 10-K), at 5, 7 (Feb. 27, 2007).

81. *See* Philip Morris USA, Marlboro Snus, New Product Fact Sheet, http://www.philipmorrisusa.com/en/popup_marlboro_snus_fact_sheet.asp?source=smokeless_right_nav (last visited Nov. 18, 2007); Letter from Richard Cox, Vice President, Scientific Technical Servs., to Jan Malcolm, Comm'r, Minn. Dept. of Health (Feb. 15, 2000), *available at* http://www.philipmorrisusa.com/en/product_facts/regulatory_reporting_requirements.asp (follow "2000 Report" hyperlink).

82. Philip Morris USA, Information About Smokeless Tobacco: Marketing Approach, *supra* note 50 ("PM USA already is a party to the Master Settlement Agreement (MSA) and the prior settlement agreements with Florida, Texas, Minnesota and Mississippi. The scope of these tobacco settlement agreements (TSAs) and many of their provisions extend both to cigarettes and smokeless tobacco products. For example, the [TSA]'s advertising, marketing and promotion restrictions extend to both cigarettes and smokeless tobacco products.").

In short, the MSA applies to most of the smokeless tobacco products now being marketed by the two largest cigarette companies, but not to all. This obviously makes it difficult for tobacco control advocates and enforcement agencies to track compliance with the agreement. In order to watch for violations, they must know which products are manufactured by which parent company and whether that parent company is subject to the MSA's terms.

This confusing landscape is further muddled by the fact that USST, the market leader in smokeless tobacco sales, is the only signatory to the Smokeless Tobacco Master Settlement Agreement (STMSA).[83] The STMSA imposes essentially identical conduct restrictions on USST as the MSA, though it does not require annual payments to the states.[84] Thus, USST's brands—Skoal, Copenhagen, Revel[85]—must comply with the STMSA's marketing and advertising restrictions, but other smokeless tobacco companies (unless they are also a cigarette company bound by the MSA) need not.

An additional complicating factor is that the cigarette companies could conceivably transfer their smokeless tobacco operations to separate affiliates to evade the MSA's marketing restrictions. Active enforcement of the MSA's terms may lead cigarette companies to consider this option.

B. Relevant Provisions

For those smokeless tobacco products sold by R.J. Reynolds and Philip Morris that are subject to the MSA's terms—namely Taboka, Marlboro Snus, and Camel Snus—past experience suggests that there are several areas where marketing should be closely monitored for potential MSA violations.

The need for vigilance is clear. In Judge Gladys Kessler's decision in the U.S. Department of Justice's lawsuit against the major cigarette manufacturers, she noted that "[t]he states' Attorneys General have complained to Philip Morris that more than forty types of activities violate the MSA," and that "[s]everal courts have held that RJR violated the MSA."[86] She added that "[d]efendants have not fully complied with the letter or spirit of the MSA" and that future violations were likely.[87]

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83. Smokeless Tobacco Settlement Agreement, *supra* note 78 (see signature pages for list of manufacturers that signed the agreement).

84. The STMSA does require payments to the American Legacy Foundation. *Id.* § VI(a), at 34.

85. *See* UST Inc. Company Profile, http://www.ustinc.com/smokeless/skoal (last visited Nov. 8, 2007).

86. United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 845–46 (D.D.C. 2006).

87. *Id.* at 912–14.

1. Youth Targeting

As discussed above, preventing smokeless tobacco companies from targeting youth should be a goal shared by all, as no public health or harm reduction purpose is served when youth who would otherwise not have used tobacco become addicted to smokeless tobacco. The MSA broadly prohibits directly or indirectly targeting underage youth in the "advertising, promotion or marketing of Tobacco Products" (and, as discussed above, the definition of "Tobacco Products" includes smokeless tobacco).[88] Not surprisingly, however, the meaning of this "youth targeting" provision has been the subject of substantial dispute, with the tobacco companies frequently claiming that advertising which may appeal to youth is actually intended to target young adults.[89]

R.J. Reynolds, which is now producing Camel Snus, was involved in the most heavily litigated case interpreting this provision. In 2001, the Attorney General of California sued R.J. Reynolds, alleging that it was continuing to target youth by advertising in magazines with substantial teen readership.[90] In 2002, the trial court ruled against R.J. Reynolds, ordering it to pay a $20 million fine to the state.[91] The judgment was upheld on appeal (although the amount of the award was not),[92] and the two sides settled in December 2004.[93] In the settlement agreement, R.J. Reynolds agreed not to advertise in publications where teens comprise more than fifteen percent of the total readership, and it agreed to pay the state more than $17 million in fines and costs.[94] The terms of the agreement, however, apply only to *cigarette* advertising; they do not apply to the advertising of smokeless tobacco products.[95]

One would hope that R.J. Reynolds learned its lesson in its litigation with California and would not want to replay that episode. On the other hand, the

88. Master Settlement Agreement, *supra* note 70, § III(a), at 14.

89. Press Release, Ctr. for the Advancement of Health, Study Suggests Cigarette Companies Target Youth (Dec. 20, 1999), http://www.hbns.org/newsrelease/study12-20-99.cfm.

90. People *ex rel.* Lockyer v. R.J. Reynolds Tobacco Co., No. GIC 764118, 2002 WL 1292994, at *1 (Cal. Super. Ct. June 6, 2002), *aff'd*, 11 Cal. Rptr. 3d 317 (Cal. Ct. App. 2004). Before the lawsuit against R.J. Reynolds was filed, several other cigarette manufacturers modified or ended advertising campaigns (such as Brown & Williamson's "B Kool" campaign) after a multi-state investigation by attorneys general indicated that they appeared to be engaged in youth targeting. *See* DENNIS ECKHART, TOBACCO CONTROL LEGAL CONSORTIUM, THE TOBACCO MASTER SETTLEMENT AGREEMENT: ENFORCEMENT OF MARKETING RESTRICTIONS 5 (2004), *available at* http://www.wmitchell.edu/tobaccolaw/resources/eckhart.pdf.

91. *R.J. Reynolds Tobacco Co.*, 2002 WL 1292994, at *10–11.

92. *R.J. Reynolds Tobacco Co.*, 11 Cal.Rptr. 3d at 321.

93. Press Release, Cal. Office of Att'y Gen., Attorney General Lockyer Announces Settlement with R.J. Reynolds to Reduce Tobacco Ads Targeting Youths (Dec. 22, 2004), http://ag.ca.gov/newsalerts/release.php?id=852&category=tobacco.

94. Settlement Agreement regarding *People v. R.J. Reynolds Tobacco Co.*, §§ 16, 22 (Dec. 22, 2004), http://ag.ca.gov/newsalerts/cms04/04-147.pdf.

95. *Id.* at 4.

company might seek to take advantage of the fact that its settlement agreement does not cover smokeless tobacco, hoping that the states are no longer closely monitoring advertising statistics. The states should carefully track the advertising of Camel Snus (and Philip Morris's Taboka and Marlboro Snus) to ensure that R.J. Reynolds does not return to its old ways.[96] Although the California appellate court ruled that the state must show *intent* to target youth in order to prove a violation of this section, it also found that marketing data can provide circumstantial evidence of intent.[97] It concluded that R.J. Reynolds had violated the youth targeting provision because it "knew to a substantial certainty that its advertising was exposed to youth to the same extent it was exposed to young adults."[98]

Another type of youth targeting states that should monitor is the use of flavorings to entice minors to try tobacco products. Following an extensive investigation into R.J. Reynolds's marketing of flavored cigarettes, the attorneys general of thirty-eight states reached a settlement agreement with R.J. Reynolds in which it agreed to stop marketing a long list of flavored cigarette products (such as Camel's "Dark Mint" and Kool's "Midnight Berry").[99] The attorneys general had alleged that marketing of these products violated the youth targeting provision of the MSA.[100] Research of tobacco industry documents as well as product usage statistics suggested that R.J. Reynolds was well aware that the flavored products were of particular appeal to youth.[101]

Despite this recent settlement, R.J. Reynolds is still planning to market its Camel Snus product in "frost" and "spice" flavors.[102] The orientation of its website suggests that these flavors are targeted at young adults, if not minors. Using youth-oriented slang, the website states, "Chill Out, FROST's 100% Fresh on

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96. According to the Campaign for Tobacco-Free Kids, "despite the restrictions placed on youth advertising by the [STMSA], [USST] has continued to heavily advertise in youth-oriented magazines." CAMPAIGN FOR TOBACCO-FREE KIDS, SMOKELESS TOBACCO IN THE UNITED STATES 3, http://www.tobaccofreekids.org/research/factsheets/pdf/0231.pdf. Because they are now directly competing, this may put pressure on R.J. Reynolds and Philip Morris to respond in kind.

97. *R.J. Reynolds*, 11 Cal. Rptr. 3d at 327.

98. *Id.* at 327–28.

99. Settlement Agreement Regarding Investigated Cigarette Brand Styles, *supra* note 42, § II, at 4–7.

100. *Id.* at 1.

101. *E.g.*, Carrie M. Carpenter et al., *New Cigarette Brands with Flavors that Appeal to Youth: Tobacco Marketing Strategies*, 24 HEALTH AFF. 1601, 1601–03 (2006) (reviewing internal tobacco industry documents discussing flavored cigarettes); M. Jane Lewis & Olivia Wackowski, *Dealing with an Innovative Industry: A Look at Flavored Cigarettes Promoted by Mainstream Brands*, 96 AM. J. PUB. HEALTH 244, 244 (2006) ("Recent studies show that [flavored cigarette products produced by major cigarette brands] are being used primarily by young people."); *see generally* AM. LUNG ASS'N, *supra* note 40.

102. *See* CAMPAIGN FOR TOBACCO-FREE KIDS, IS R.J. REYNOLDS TOBACCO COMPANY A GOOD CORPORATE CITIZEN? RECENT HISTORY SAYS NO 3 (2007), http://tobaccofreekids.org/research/factsheets/pdf/0124.pdf.

Purpose."[103] Philip Morris—though its website does not contain the same youth-oriented imagery—is also planning to sell Marlboro Snus in flavors like "mint" and "spice," which may be targeted at minors.[104]

USST's internal documents have shown that the company views flavored products as "starter" products, and that smokeless tobacco users should be "graduated" to more traditional smokeless tobacco products like Copenhagen (*See* Fig. 1).[105] As one former USST sales representatives not-so-subtly told the *Wall Street Journal*, "Cherry Skoal is for somebody who likes the taste of candy, if you know what I'm saying."[106]

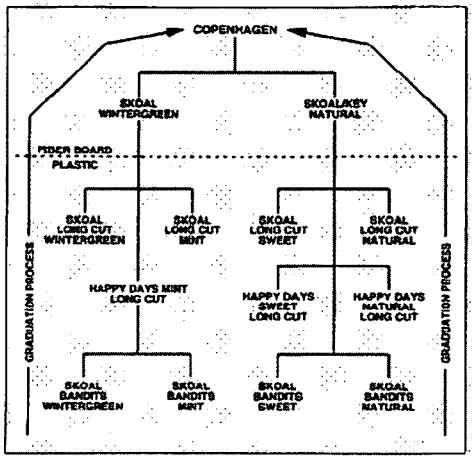

Fig. 1: United States Tobacco's (UST) "Graduation Process" (Source: *Marsee v. United States Tobacco Co.*, 639 F. Supp. 466 (W.D. Okla. 1986) (UST Document No. 12017104; Court Exhibit No. 100), *aff'd*, 866 F.2d 319 (10th Cir. 1989)).

Given the past activities of both R.J. Reynolds and USST—and particularly given the recent settlement agreement signed by R.J. Reynolds—the flavoring of smokeless tobacco would be an appropriate issue for the attorneys general to investigate. The smokeless tobacco companies may argue that their flavorings are merely intended to provide options for young adults, not to entice minors to start

103. Camel Snus, *supra* note 39 (follow "All About Snus" hyperlink; then follow "What is Snus" hyperlink and watch flash presentation; then follow "Camel Snus frost" hyperlink).

104. Philip Morris USA, Marlboro Snus Fact Sheet, http://www.philipmorrisusa.com/en/popup_marlboro_snus_fact_sheet.asp?source=smokeless_right_nav (last visited Nov. 10, 2007).

105. *E.g.*, Alix M. Freedman, *Juiced Up: How a Tobacco Giant Doctors Snuff Brands to Boost Their 'Kick*,' WALL ST. J., Oct. 26, 1994, at A1. If R.J. Reynolds and Philip Morris are now planning to "graduate" college-age tobacco users from flavored snus products to cigarette smoking, that would clearly be a serious public health problem. Concerns that this may be part of the cigarette companies' plans are heightened by their use of the Camel and Marlboro brand names to advertise their new snus products.

106. *Id.* Like the MSA, the STMSA prohibits youth targeting. *See* Smokeless Tobacco Master Settlement Agreement, *supra* note 78, § III(a), at 16.

tobacco use.[107] Nonetheless, R.J. Reynolds's agreement to settle with the attorneys general indicates that it considers itself somewhat vulnerable on this issue. An enforcement action by the attorneys general may well lead to a similar settlement that applies to smokeless tobacco products, and, at the very least, it would bring public attention to the issue of targeting youth with flavored tobacco products.

In sum, there are significant grounds for concern that the cigarette companies (R.J. Reynolds in particular) may market their new smokeless tobacco products in ways that target youth in violation of Section III(a) of the MSA. Indeed, such violations may already be ongoing. As stated by Judge Kessler in her decision in *United States v. Philip Morris U.S.A., Inc.*:

> Defendants continue to engage in many practices which target youth, and deny that they do so. Despite the provisions of the MSA, Defendants continue to track youth behavior and preferences and market to youth using imagery which appeals to the needs and desires of adolescents. Defendants are well aware that over eighty percent of adult smokers began smoking before the age of 18, and therefore know that securing the youth market is critical to their survival. There is therefore no reason, especially given their long history of denial and deceit, to trust their assurances that they will not continue committing [racketeering] violations denying their marketing to youth.[108]

Although Judge Kessler was referring to the cigarette market, there is a clear need for vigilance to ensure that similar misconduct does not take place in the smokeless tobacco market.

2. *Free Giveaways*

A separate part of Section III of the MSA prohibits the distribution of "any free samples of Tobacco Products except in an Adult-Only Facility."[109] Smokeless tobacco companies, including USST and Swedish Match, have engaged in the distribution of free smokeless tobacco products in "adults-only" tents at rodeos, car races, fairs, and other public events.[110] Though these tents do not violate the MSA

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107. The full text of MSA § III(a) states that "[n]o Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase in incidence of Youth *smoking* within any Settling State." Master Settlement Agreement, *supra* note 70, § III(a), at 14 (emphasis added). The tobacco companies may argue that the flavorings of the products do not come within the terms of the first prohibition (because the language is limited to "advertising, promotion or marketing") and that the second part of the prohibition only applies to *smoking*. However, by focusing on the advertising and marketing of flavored products (rather than on the flavoring of the products themselves), the attorneys general could likely overcome this objection.

108. 449 F. Supp. 2d 1, 912 (D.D.C. 2006).

109. Master Settlement Agreement, *supra* note 70, § III(g), at 19.

110. *See, e.g.*, SUSAN ALEXANDER, SPIT TOBACCO SPONSORSHIP OF RODEOS: A LITERATURE REVIEW 3–5 (2002), *available at* http://www.bucktobacco.org/resources/docs/LitRev.pdf ("Often these

or STMSA's "free giveaway" provisions if only adults are allowed access, they would be prohibited if minors are allowed in.[111] If Philip Morris and R.J. Reynolds engage in similar promotional practices, states' attorneys general should ensure that they abide by the terms of the MSA.

In 2001 and 2002, Swedish Match and USST reached separate settlements with the State of California, which brought suits claiming that the companies had violated state law by distributing free smokeless tobacco products at rodeos, fairs, and car races.[112] The companies agreed to pay fines totaling more than $500,000 to settle the suits.[113] Although at least in the case of USST, the free giveaways were in adults-only tents or facilities (and thus violations of state law, but not of the MSA), these settlements suggest that state or local laws could be effectively used to limit the free distribution of smokeless tobacco products.[114] State and local laws would also have the benefit of being more easily enforced than MSA violations.[115]

3. Health Claims

The MSA also provides that "[n]o [p]articipating [m]anufacturer may make any material misrepresentation of fact regarding the health consequences of using any Tobacco Product . . . ."[116] As Judge Kessler's decision found, both R.J. Reynolds and Philip Morris participated in a decades-long scheme to deceive the public with regard to the dangers of cigarette smoking, the addictiveness of nicotine, the health effects of "light" cigarettes and secondhand smoke, and

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tents are quite elaborate with mechanical bulls to increase attendance and create an even more appealing 'forbidden fruit' to children and adolescents unable to enter.").

111. Master Settlement Agreement, *supra* note 70, § III(g), at 19; Smokeless Tobacco Master Settlement Agreement, *supra* note 78, § III, at 23–24.

112. Press Release, Cal. Office Att'y Gen., Attorney General Lockyer Announces Settlement of Free Tobacco Samples Lawsuit (Jul. 13, 2001), http://ag.ca.gov/newsalerts/release.php?id=1322; Press Release, Cal. Office of Att'y Gen. (Oct. 17, 2002), *supra* note 59. In 2000, USST settled a separate claim brought by the State of California. Press Release, Cal. Office Att'y Gen., Attorney General Reaches Settlement with United States Tobacco Company Over Alleged Advertisement Violations (Dec. 6, 2000), http://ag.ca.gov/newsalerts/release.php?id=760. The claim accused the company of violating state law by including a coupon for smokeless tobacco in advertisements printed in a California State University student newspaper. *Id.*

113. Press Release, Cal. Office of Att'y Gen. (Oct. 17, 2002), *supra* note 59.

114. The recent decision in *R.J. Reynolds Tobacco Co. v. Seattle-King County Dept. of Health*, 473 F. Supp. 2d 1105 (W.D. Wash. 2007) brings into question the viability of local laws prohibiting *cigarette* giveaways. The Court found the Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C. § 1334 (2000), preempts such laws. *Id.* at 1110. However, the FCLAA applies only to cigarettes. *Id.* The Comprehensive Smokeless Tobacco Health Education Act of 1986 has a much narrower preemption provision. 15 U.S.C. § 4406 (2000). Thus, even if the Court of Appeals affirms the decision, states and localities should still be free to enact laws that prohibit free giveaways of *smokeless* tobacco products.

115. *See* discussion *infra* Part.III.C.

116. Master Settlement Agreement, *supra* note 70, § III(r), at 28.

more.[117] Moreover, the judge concluded that these fraudulent activities continued well after the MSA was signed.[118]

Given this history, any hope that R.J. Reynolds and Philip Morris can be relied on to provide truthful and non-misleading information about the health-related risks of their smokeless tobacco products would have to be based on the dubious proposition that these companies have radically reformed themselves.[119] Indeed, only recently, the State of Vermont sued R.J. Reynolds alleging that it had violated the MSA's provisions by making false and misleading health claims about "Eclipse" cigarettes (which heat, rather than burn, tobacco).[120] Litigation in that case is still ongoing.[121]

Thus far, both Philip Morris and R.J. Reynolds have been cautious about making health claims about their smokeless tobacco products. A previous version of Camel Snus's website stated that there were only "potential" risks involved in the use of smokeless tobacco, as opposed to "inherent" risks in the use of cigarettes.[122] That section of the website has now been modified to say, "[w]e're not making any health claims about this product. There are inherent risks with the use of both cigarettes and smokeless tobacco products."[123] Philip Morris has been

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117. United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 910 (D.D.C. 2006).

118. *See, e.g., id.* at 801 ("Defendants still continue to deny the full extent to which ETS can harm nonsmokers and smokers."); *id.* at 208 ("From at least 1953 until at least 2000, each and every one of these Defendants repeatedly, consistently, vigorously -- and falsely -- denied the existence of any adverse health effects from smoking.").

119. *Id.* at 848 ("Defendants' assertions that, as a result of the MSA, they are now new companies headed by changed management are simply not accurate.").

120. Compl. for Vermont v. R.J. Reynolds Tobacco Co., No. 744-97 CNC & S-0816-98 (Vt. Super. Ct. filed July 26, 2005), at ¶ 1, http://www.atg.state.vt.us/upload/1125510625_Vermonts_Complaint_and_Petition.pdf.

121. In 1999, USST settled the State of Rhode Island's claim that it violated the STMSA by claiming that smokeless tobacco had not been proven to cause oral cancer or other diseases. Laura Meade Kirk, *State Wins Admission from Tobacco Firm*, PROVIDENCE J. BULL., May 11, 1999, at 1B. In the settlement agreement, USST withdrew the statement and agreed not to make similar statements in the future. *Id.*

122. Camel Snus, *supra* note 39 (prior version visited June 13, 2007) (copy on file with author). In June 2007, Reynolds American Incorporated (R.J. Reynolds's parent company) issued a carefully worded statement suggesting that "[t]he growing body of scientific evidence on the continuum of risks of the use of cigarettes, smokeless tobacco products and other nicotine products requires serious consideration . . . ." Reynolds Am. Inc., Reynolds American to the Campaign for Tobacco-Free Kids: Stick to the Facts II (June 13, 2007), http://www.reynoldsamerican.com/Newsroom/ViewHTML.aspx?postID=1228. The statement did not explicitly make any health-related claims for smokeless tobacco (though it cited a *Lancet* study suggesting that the risk of pancreatic cancer was lower in smokeless tobacco users than in smokers). *Id.* It added that "[R.J. Reynolds] believes that no tobacco product has been shown to be safe, and that minors should never use tobacco products and adults who do not use or have quit using tobacco products should not start." *Id.*

123. Camel Snus, *supra* note 39 (follow "Is snus safer than smoking cigarettes? Is snus safe?" hyperlink) (last visited Dec. 5, 2007).

more circumspect all along, stating on its website (and in its public statements) that "[s]mokeless tobacco products are addictive and cause serious diseases."[124]

As discussed above, though smokeless tobacco carries its own health risks, it is clearly less harmful (and certainly less fatal) than smoking.[125] Nonetheless, no public health or harm reduction purpose would be served by allowing tobacco companies to make false or unverified claims about their smokeless tobacco products. Nothing should bar the tobacco companies from accurately providing information about the relative risks of smokeless tobacco versus smoking, but given the troubling past actions of both R.J. Reynolds and Philip Morris, the statements of both of these companies should be carefully monitored for potential false or misleading health claims.[126] The fact remains that spit-free tobacco products are relatively new (extremely new in the U.S.) and may pose longer-term risks that are not yet evident. The history of "light" and "low tar" cigarettes (discussed in Part IV below) provides clear evidence of the need to exercise caution and demand verifiable proof of any health-related claims.

C. The MSA Enforcement Process

Although MSA enforcement can be an effective mechanism for restraining tobacco industry misconduct, its utility is limited by the facts that (1) enforcement actions can only be brought by attorneys general of settling states (who may or may not have the resources and time to conduct investigations and bring enforcement actions), and (2) the MSA enforcement process is time-consuming, in part because the agreement requires informal discussions with the company before an enforcement action can be filed, and in part because any litigation against the tobacco industry is likely to be an expensive and drawn-out affair.[127]

Nonetheless, the discussion in this section highlights the need for tobacco control advocates to understand the terms of the MSA and its application to

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124. Philip Morris USA, Information About Smokeless Tobacco: Health Issues, http://www.philipmorrisusa.com/en/smokeless/health_issues.asp?source=smokeless_left_nav (last visited Nov. 18, 2007). The statement on the website is ambiguous. It is unclear whether Philip Morris endorses the statement or merely relays what the Surgeon General said about smokeless tobacco. In either case, a Philip Morris spokesperson told the *Wall Street Journal* that "[s]mokeless tobacco causes serious diseases and is addictive." Kevin Helliker, *Changing Habits: Should Snuff Be Used as a Tool to Quit Smoking?*, WALL ST. J., Sept. 16, 2006, at A1. USST has been much more brazen in its health claims, continuing to maintain (despite the Rhode Island settlement) that "it is [USST's] position that smokeless tobacco has not been shown to be a cause of any human disease." Letter from Daniel C. Schwartz, Att'y for U.S. Smokeless Tobacco Co., to Donald S. Clark, Sec'y, Fed. Trade Comm'n (Feb. 5, 2002), http://www.ftc.gov/os/comments/smokelesscomments/reqadvisoryop.pdf.

125. *See* Accortt et al, *supra* note 17.

126. *See* United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 383–84 (D.D.C. 2006) (detailing numerous false statements made by company).

127. *Id.* at 914–15 (noting that MSA enforcement actions have taken four to five years to resolve in some cases); *see generally* ECKHART, supra note 90, at 3–4 (discussing the enforcement process for marketing restrictions under the Master Settlement Agreement).

smokeless tobacco products. Tobacco control advocates should familiarize themselves with the process for reporting MSA violations to the state attorney general and should be willing to push for action when it is clear that MSA violations have occurred. The need for active and aggressive enforcement has only increased with the cigarette companies' entrance into the smokeless tobacco market.

The conduct restrictions imposed by the MSA may not be as comprehensive as necessary, but they provide a starting point for future regulatory efforts.[128] As the increasing willingness of tobacco companies to settle MSA enforcement actions suggests, the MSA—if aggressively enforced—can successfully reduce youth targeting, misleading advertising, and other practices that harm public health.[129] Again, these are measures that both supporters and opponents of smokeless tobacco harm reduction can endorse. Regardless of one's position on harm reduction, all tobacco control advocates can agree that the cigarette companies should be held to their prior commitments. The more difficult question is whether the cigarette companies' entrance into smokeless tobacco will lead to a new wave of tobacco litigation.

IV. POTENTIAL LITIGATION AGAINST SMOKELESS TOBACCO PRODUCERS

With R.J. Reynolds and Philip Morris rolling out new smokeless tobacco products, it is an appropriate time to examine whether they are taking on additional litigation risks, and if so, how much effort tobacco control advocates should invest in smokeless tobacco-related litigation. Can litigation play a part in helping to reduce the usage of (and the harm from) smokeless tobacco products?[130] Can it prevent tobacco companies from engaging in the type of misconduct evident in their promotion of cigarettes? Can it push producers to make smokeless tobacco products safer? Past experience from the smoking-related litigation suggests a few areas where tobacco control advocates and public health attorneys may want to focus their efforts.

Though they have received little attention, there have been several lawsuits filed against smokeless tobacco producers for health-related claims, including

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128. ECKHART, *supra* note 90, at 3.

129. *See* R. Daynard, Editorial, *Why Tobacco Litigation?*, 12 TOBACCO CONTROL 1, 1 (2003).

130. There has been substantial debate about how much litigation can reduce or has reduced harms caused by smoking. *Compare* Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, *in* REGULATING TOBACCO 176, 200 (Robert L. Rabin & Stephen D. Sugarman eds., 2001) ("At no time . . . have litigation-associated costs operated as a rational scheme, from a regulatory perspective, in affecting the demand for the product."), *with* Daynard, *supra* note 129, at 2 ("Litigation has achieved benefits for tobacco control that were simply not obtainable otherwise. So long as the threat of litigation remains viable, tobacco companies may be deterred from pursuing outrageous schemes that do not violate specific laws or regulations."). There is sure to be a similar academic debate about smokeless tobacco litigation.

several cases filed in the past couple of years.[131] To this point, smokeless tobacco companies have vigorously defended all claims, and they have not lost any major case involving a health-related claim.

Since R.J. Reynolds and Philip Morris are new to the smokeless tobacco field, it does not appear that any litigation has been filed against them for health-related claims (with the exception of pending cases against Conwood that are now the responsibility of R.J. Reynolds).[132] Therefore, the discussion in this section relies heavily on litigation filed against smokeless tobacco market leader USST as well as precedents developed in cigarette litigation.

A. Class Actions

There are currently no pending health-related class action lawsuits against USST or other smokeless tobacco companies. Dozens of smoking-related class actions were filed against cigarette producers in the 1990s, but the tobacco industry eventually succeeded in decertifying nearly all of them (requiring them to be filed as individual cases, rather than as class actions).[133] The extremely expensive failure of these lawsuits may explain why there are no pending class actions against smokeless tobacco product manufacturers.

Vassallo v. United States Tobacco Co.[134] provides an example of the challenges that face potential class action suits against smokeless tobacco manufacturers. *Vassallo* was filed in Florida state court in 2002 on behalf of all of the state's residents who had been injured by smokeless tobacco.[135] The suit —filed by a high school coach who had developed oral cancer at age 27—included claims for "negligence, strict liability, fraud and misrepresentation, civil conspiracy, intentional infliction of emotional distress, medical monitoring, and violation of Florida's Deceptive and Unfair Trade Practices Act."[136] The attorneys in the case consciously modeled their complaint on *Engle v. R.J. Reynolds Tobacco Co.*, the Miami case in which a jury awarded $145 billion in punitive damages to a class comprised of injured Florida smokers.[137] The class in *Engle*, however, was ultimately decertified and the massive punitive damages award was vacated.[138] The

131. *E.g.*, Tuttle v. Lorillard Tobacco Co., 377 F.3d 917, 920–21 (8th Cir. 2004); Marsee v. United States Tobacco Co., 639 F. Supp. 466 (W.D. Okla. 1986); *In re* Tobacco Litig., 624 S.E.2d 738 (W. Va. 2005).

132. Reynolds Am. Inc., Quarterly Report (Form 10-Q), at 42 (May 4, 2007), http://sec.edgar-online.com/2007/05/04/0000950144-07-004240/Section2.asp.

133. *See* Rabin, *supra* note 130, at 186–89.

134. Case No. 2002-28397-CA-01 (Fla. Miami-Dade County Ct. filed Nov. 12, 2002).

135. Rebecca Porter, *First Class Action Filed Against Makers of Smokeless Tobacco Products*, TRIAL, Feb. 2003, at 80.

136. *Id.*

137. *Id.* at 81.

138. Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1277 (Fla. 2006).

Florida Supreme Court—while allowing individual lawsuits by injured smokers to go forward—wrote that class action treatment was inappropriate "because individualized issues such as legal causation, comparative fault, and damages predominate."[139] *Vassallo* suffered a similar fate. The court decertified the class in 2005, but allowed the lawsuit to proceed as an individual claim.[140] Discovery in the case is still ongoing.[141]

Although several other types of class action claims have been brought against USST, none have reached trial.[142] Just as concerns about individual issues of causation, reliance, and damages have doomed nearly all smoking-related class actions, it appears likely that tobacco companies will succeed in decertifying smokeless tobacco-related class actions with the same types of arguments.[143] Thus, it appears that by entering the smokeless tobacco market, R.J. Reynolds and Philip Morris are not substantially increasing their potential exposure to high-stakes class action lawsuits.

B. Government (Public) Suits

R.J. Reynolds and Philip Morris also have little to fear from public suits seeking to recover the costs of treating smokeless tobacco-related illnesses. The states that signed the MSA have already released the companies from all

> monetary [c]laims [including future claims] directly or indirectly based on, arising out of or in any way related to, in whole or in part, the use of or exposure to [t]obacco [p]roducts manufactured in the ordinary course of business, including without limitation any future [c]laims for reimbursement of health care costs allegedly associated with the use of or exposure to [t]obacco [p]roducts.[144]

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139. *Id.* at 1268 (citing FLA. R. CIV. P. § 1.220(b)(3)).

140. Vassallo v. U.S. Tobacco Co., No. 2002-28937-CA-01 (Fla. Miami-Dade County Ct. filed Nov. 12, 2002), *available at* http://www.miami-dadeclerk.com/civil/docketinfo.asp?pCase_Year=2002&pCase_Seq=28397&pCase_Code=CA&pCase_Loc=01&id=AAAA8tAAIAAAWJXAA8.

141. Docket for Vassallo v. U.S. Tobacco Co., No. 2002-28937-CA-01, entry on Aug. 23, 2007 (Fla. Miami-Dade County Ct. filed Nov. 12, 2002), http://www.miami-dadeclerk.com/civil/docketinfo.asp?pCase_Year=2002&pCase_Seq=28397&pCase_Code=CA&pCase_Loc=01&id=AAAA8tAAIAAAWJXAA8.

142. *See, e.g.*, Perry v. Am. Tobacco Co., 324 F.3d 845, 847–48 (6th Cir. 2003) (upholding dismissal of plaintiffs' claims alleging that subscribers had to pay increased insurance premiums due to tobacco companies' actions); Brown v. Philip Morris, Inc., No. 98-5518, 1999 U.S. Dist. LEXIS 14495, at *4, *15 (E.D. Pa. Sept. 22, 1999) (dismissing complaint alleging that tobacco companies, including USST, had illegally targeted African-American customers).

143. For a recent example, see Benedict v. Altria Group, Inc., No. 05-2306-CM, 2007 U.S. Dist. LEXIS 24823, at *11, *13 (D. Kan. Mar. 30, 2007), where the court denied class certification because each individual plaintiff is required to establish reliance on tobacco industry misrepresentations.

144. Master Settlement Agreement, *supra* note 70, § II(nn)(2), at 10 (definition of "Released Claims").

Again, the definition of "Tobacco Products" includes smokeless tobacco products.[145] Thus, even though R.J. Reynolds and Philip Morris did not produce smokeless tobacco at the time the MSA was signed, the states have nonetheless released those companies from liability related to health care costs associated with the use of smokeless tobacco products.

Moreover, since concluding the MSA, the tobacco companies have been able to successfully defend against claims by municipal governments and other third party payors whose claims were not settled in the MSA.[146] In general, courts have found that third-party payors cannot recover for tobacco-related expenses because their injuries are "too remote" from the tobacco industry's misconduct.[147] The courts' legal reasoning is that the individuals injured by tobacco use are the most appropriate parties to bring legal claims against the tobacco industry, not the third party payors who ultimately pay for much of the healthcare.[148] It seems likely that smokeless tobacco producers would be able to defend analogous suits on the same legal grounds.

At the federal level, the U.S. government's Medicare cost-recovery suit against cigarette manufacturers (the analogue to state suits that were settled in the MSA) was dismissed on statutory grounds, which suggests that a similar suit against smokeless tobacco manufacturers would result in the same outcome.[149] The federal government did succeed in obtaining a judgment that the cigarette manufacturers had committed racketeering offenses in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), but that ruling was based on evidence that the cigarette companies had engaged in a series of decades-long

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145. *Id.* § 2(vv), at 13 (definition of "Tobacco Products").

146. *E.g.*, County of Cook v. Philip Morris, Inc., 817 N.E.2d 1039, 1041, 1047–48 (Ill. App. Ct. 2004) (upholding lower court's decision to bar claims already settled by the MSA and rejecting the remaining claims by plaintiffs not covered by the MSA on remoteness grounds). There are minor exceptions to this general rule. For example, in 2001, USST and other smokeless tobacco companies agreed to pay $2.75 million to settle a suit brought by the City of San Francisco alleging that the companies had failed to post warnings required by California law. Press Release, Office of S.F. City Att'y, City, Environmental Law Foundation in Landmark Tobacco Settlement (Dec. 18, 2001), http://www.ci.sf.ca.us/site/cityattorney_page.asp?id=657. The tobacco industry settled with Blue Cross/Blue Shield of Minnesota in 1998, but subsequent health care insurers' lawsuits against the tobacco industry were unsuccessful. Press Release, Blue Cross/Blue Shield of Minn., Blue Cross' Historic Action Against Tobacco Industry Finally Concludes (Dec. 5, 2005), http://www.preventionminnesota.com/objects/pdfs/NR_PM%20launch%20_012006.pdf

147. Blue Cross & Blue Shield, Inc. v. Philip Morris USA Inc., 818 N.E.2d 1140, 1145 (N.Y. 2004); *see also* International Brotherhood of Teamsters, Local 734 v. Philip Morris, Inc., 196 F.3d 818, 825–26 (7th Cir. 1999).

148. *Blue Cross & Blue Shield, Inc.*, 818 N.E.2d at 1145; *International Brotherhood of Teamsters, Local 734*, 196 F.3d 818 at 822. In practice, of course, individuals can rarely afford to pursue such lawsuits. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 867–68 (1992).

149. United States v. Philip Morris USA, Inc., 116 F. Supp. 2d 131, 135 (D.D.C. 2000).

conspiracies to mislead the public.[150] The fact that R.J. Reynolds and Philip Morris are new to the smokeless tobacco market suggests that they have not engaged in any long-running scheme to defraud consumers with respect to smokeless cigarette products.

Thus, it seems unlikely that high-profile public lawsuits will play a major role in defining the trajectory of smokeless tobacco litigation, as they have with cigarette-related litigation. Nonetheless, state attorneys general can still help to ensure that harms resulting from smokeless tobacco are limited by enforcing the terms of the MSA (as discussed above) and other relevant state consumer protection statutes. Such cases are generally easier to prove than suits brought by private individuals, because the attorneys general need only establish that the prohibited conduct occurred—not that individual consumers were injured or relied on misrepresentations.[151] However, mustering the political will and the resources to pursue action against the tobacco companies always remains a challenge.

C. Individual Lawsuits

1. Previous Smokeless Tobacco Litigation

Although there have been numerous successes in litigation against cigarette producers, individual lawsuits against USST and other smokeless tobacco producers have been entirely unsuccessful up to this point. If that trend continues, it may be that R.J. Reynolds and Philip Morris are not assuming any additional litigation risk by moving into the smokeless tobacco industry. However, as discussed below, there is reason to believe that the smokeless tobacco companies' unblemished record in litigation will not hold up indefinitely.

The only smokeless tobacco case to reach a jury, *Marsee v. United States Tobacco Co.*, occurred more than twenty years ago and resulted in a verdict for the defendant tobacco company.[152] In *Marsee*, the plaintiff was a mother bringing a products liability action on behalf of her deceased son, who had developed oral cancer at the age of eighteen and died less than a year later.[153] USST successfully defended the case on the grounds that the decedent's cancer was not caused by smokeless tobacco use.[154] Specifically, it argued that "plaintiff's use of snuff did

150. United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 851–53 (D.D.C. 2006).

151. *See, e.g.*, CAL. BUS. & PROF. CODE § 17537.3 (West 2007) (prohibiting smokeless tobacco promotional offers or advertising programs that involve the distribution of free samples of smokeless tobacco products "within a two block radius of . . . schools, clubhouses, and youth centers . . . .").

152. 866 F.2d 319, 321 (10th Cir. 1989). The trial occurred in 1986. Marsee v. U.S. Tobacco Co., 639 F. Supp. 466 (W.D. Okla. 1986).

153. *Marsee*, 866 F.2d at 321.

154. *See id.*

not coincide with the location of his tongue cancer."[155] Despite the adverse ruling, it was notable that the plaintiff was able to take the case all the way to trial, and tobacco litigation expert Robert Rabin suggested that the negative outcome of the case was merely the result of poor case selection.[156] The partial success of *Marsee* would seem to have presaged additional legal attacks on the smokeless tobacco industry, but twenty years later, no other health-related case has made it to trial.

The 2004 decision by the Eighth Circuit in *Tuttle v. Lorillard Tobacco Co.*[157] provides a good outline of some of the difficulties plaintiffs encounter in such cases. Gloria Tuttle filed suit in 1999 in Minnesota state court as trustee of her late husband's estate.[158] Her husband, Bill Tuttle, had begun chewing smokeless tobacco as a young professional baseball player in 1955.[159] His brand of choice was Beech-Nut, which for a time was owned by Lorillard.[160] He developed oral cancer in 1993 and died of related complications in 1998.[161] The lawsuit alleged "common law claims of negligence, fraud, and civil conspiracy, as well as statutory claims based on several Minnesota consumer protection statutes."[162]

After the case was removed to federal court, the district court granted summary judgment for the defendants, finding that many of the claims were barred by the applicable statutes of limitation.[163] On appeal, the Eighth Circuit granted summary judgment for the defendants, finding that even if Ms. Tuttle's statutory claims were not time-barred, the claims "fail for want of proof of a causal nexus between the defendants' conduct and [Mr.] Tuttle's injuries."[164] Specifically, Tuttle had alleged that the defendants "negligently misrepresented the addictive and injurious effects of using smokeless tobacco," starting with the "Frank Statement" in 1954.[165] The Court wrote that even if such allegations were true, Mrs. Tuttle

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155. Sharon Milberger et al., *Tobacco Manufacturers' Defense Against Plaintiffs' Claims of Cancer Causation: Throwing Mud at the Wall and Hoping Some of It Will Stick*, 15 TOBACCO CONTROL iv17, iv21 (2006).

156. Rabin, *supra* note 130, at 870.

157. 377 F.3d 917 (8th Cir. 2004).

158. Tuttle v. Lorillard Tobacco Co., 118 F. Supp. 2d 954, 957 (D. Minn. 2000), *aff'd in part, rev'd in part*, 377 F.3d 917 (8th Cir. 2004).

159. *Tuttle*, 377 F.3d at 919.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Tuttle*, 118 F. Supp. 2d at 961–65. The district court found that the limitations period for the plaintiff's strict liability and warranty claims had expired. *Id.* at 963. Additionally, the court held that the plainttiff failed to plead her fraud claims with sufficient particularity and failed to establish that Lorillard had a duty to smokeless tobacco users. *Id.* at 963–65.

164. *Tuttle*, 377 F.3d at 926–27.

165. *Id.* at 922–23. In the "Frank Statement," published as a full-page ad in more than 300 newspapers around the country in January 1954, the tobacco industry (including Lorillard, Philip Morris, R.J. Reynolds and USST's predecessor) wrote, "[w]e accept an interest in people's health as a basic

could not prove that her husband had actually read and relied upon such statements.[166] The negligent failure to warn claims were likewise rejected because Mrs. Tuttle could not offer "admissible evidence [that he] would have acted differently had the manufacturers provided adequate warnings."[167] The Court—dismissing without thought the issue of addiction—added in a footnote that since Tuttle continued to use smokeless tobacco after federal law required warning labels on such products in 1987, the claim that he relied on the tobacco companies' lack of warnings was undercut.[168] Finally, the fraud and conspiracy claims were rejected on similar grounds: Tuttle could not prove reliance on any allegedly fraudulent statements, and she could not prove "a causal nexus between the defendants' conduct and Tuttle's injuries."[169]

Such concerns—in tort law terms, *reliance* and *causation*—have been insurmountable stumbling blocks in countless smoking-related cases.[170] In short, even if misconduct by the smokeless tobacco producers can be sufficiently alleged, the plaintiff must show that he or she actually *relied* on those actions and that the result would have been different (e.g., the plaintiff would not have used the product and developed cancer) had the company acted differently.[171] Such counterfactual propositions are notoriously difficult to prove. Moreover, even if these barriers can be overcome, the "try the plaintiff" strategy that cigarette companies have used to

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responsibility, paramount to every other consideration in our business. We believe the products we make are not injurious to health." *Id.*

166. *Id.* at 923–24.

167. *Id.* at 924.

168. *Id.* at 925 n.6.

169. *Id.* at 926–27.

170. *E.g.*, Glassner v. R.J. Reynolds Tobacco Co., 223 F.3d 343, 353 (6th Cir. 2000) (affirming dismissal of smoking-related case for failure to establish reliance on alleged misrepresentations); Insolia v. Philip Morris, Inc., 216 F.3d 596, 606 (7th Cir. 2000) ("Because none of the plaintiffs could recall a single statement from the tobacco industry about the effects of smoking, [the District Court] stamped out their original fraud claims for lack of proof of reliance and causation."); Alvarez v. R.J. Reynolds Tobacco Co., 313 F. Supp. 2d 61, 77 (D.P.R. 2004) ("Plaintiffs' fraud claim is without merit because (1) there is no evidence that the Decedent ever heard any allegedly false statements made by Reynolds; (2) there is no evidence that the Decedent relied on any alleged misstatements made by Reynolds in his decision to begin or continue smoking; and (3) even if there were some evidence that Decedent had relied on some allegedly false statement, any such reliance would be unreasonable in light of (a) the long-standing common knowledge of the health risks, including cancer, associated with smoking, (b) the Surgeon General's Warnings that have appeared on all Reynolds's cigarette packages since 1966, and (c) the warnings the Decedent himself read regarding the health hazards and addictiveness of smoking.").

171. *E.g.*, *Tuttle*, 377 F.3d at 924.

such success can still be employed.[172] The plaintiff can be charged with "assuming the risk" of injury by choosing to use an inherently dangerous product.[173]

Although it is certainly possible that plaintiffs in a similar case such as *Vassallo* (described above and now proceeding as an individual claim) may prevail, it seems likely that claims based on tobacco industry misconduct face long odds. In smoking-related cases, victories for plaintiffs came only after an avalanche of documentation demonstrated a clearly intentional, decades-long conspiracy to deceive the public about the dangers of smoking.[174] Although USST has made questionable claims about the health effects of smokeless tobacco, no comparable conspiracy has been established with regard to smokeless tobacco. Moreover, R.J. Reynolds and Philip Morris are new to the smokeless tobacco market and appear to be issuing only carefully guarded statements about the health impact of their products.[175] Thus, causes of action against R.J. Reynolds and Philip Morris alleging negligent misrepresentation, fraud, negligent failure to warn, or similar claims are unlikely to succeed in the absence of the disclosure of damaging internal documents.

2. *The Lessons of "Light" and "Low Tar" Cigarettes*

Although the prospects for class action lawsuits and most individual cases against smokeless tobacco manufacturers look bleak, it may be useful to keep a

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172. Sara D. Guardino & Richard A. Daynard, *Punishing Tobacco Industry Misconduct: The Case for Exceeding a Single Digit Ratio Between Punitive and Compensatory Damages*, 67 U. PITT. L. REV. 1, 36–37 (2005) ("[The tobacco] industry routinely puts the plaintiff in a smoking and health case on trial . . . . Essentially, the companies 'muck around in the past until they find something damaging,' and '[t]hen they play on it until the suit is dropped.'") (citation omitted).

173. Unlike in cigarette cases, negligent failure to warn claims with regard to smokeless tobacco products are not preempted by federal law. Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, § 1, 7, 100 Stat. 30, 34 (1989) (codified as amended at 15 U.S.C. § 4406 (2000)) ("Nothing in this Act shall relieve any person from liability at common law or under State statutory law to any other person."). However, as footnote 6 in *Tuttle* suggests, such claims would be nearly impossible to win for individuals who started using smokeless tobacco products after 1987 (and even, perhaps for those who continued using smokeless tobacco products after 1987). *See supra* note 168 and accompanying text.

174. *See, e.g.*, United States v. Philip Morris U.S.A., Inc., 449 F. Supp. 2d 1, 852 (D.D.C. 2006) ("[O]ver the course of more than 50 years, Defendants lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as "replacement smokers," about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting, and they abused the legal system in order to achieve their goal—to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.").

175. For example, the Camel Snus website states, "[w]e're not making any health claims about this product. There are inherent risks with the use of both cigarettes and smokeless tobacco products. U.S. Surgeon General Warnings are required to be printed on packaging for both categories of products." Camel Snus, *supra* note 39 (follow "Is snus safer than smoking cigarettes? Is snus safe? (Any similar health-related question.)" hyperlink) (last visited Nov. 14, 2007).

longer-term, historically-informed perspective in mind. In particular, the disastrous history of "light" and "low tar" cigarettes should give pause to both the industry's attorneys and harm reduction advocates who view Philip Morris and R.J. Reynolds as potential partners.

Faced with mounting evidence of the connection between smoking and disease, the cigarette manufacturers developed "light" and "low tar" cigarettes in the late 1960s to allay health fears.[176] Many public health groups saw this as a positive development and urged smokers who were unable to quit to switch to "light" or "low tar" cigarettes.[177] As late as 1981, the Surgeon General's report stated that "smokers who are unwilling or as yet unable to quit are well advised to switch to cigarettes yielding less 'tar' and nicotine, provided they do not increase their smoking or change their smoking in other ways."[178] The cigarette companies, however, were well aware that smokers of "light" and "low tar" cigarettes would "compensate" for reduced nicotine levels by "breathing more deeply, taking more puffs, or blocking the ventilation holes of cigarette filters," thus negating any potential health benefits.[179] Nonetheless, their marketing "featured claims of lowered tar and nicotine accompanied by written statements that implied a health benefit as a result of the lowered tar levels."[180] As Judge Kessler concluded in the Justice Department lawsuit:

> By engaging in this deception, Defendants dramatically increased their sales of low tar/light cigarettes, assuaged the fears of smokers about the health risks of smoking, and sustained corporate revenues in the face of mounting evidence about the health dangers of smoking.[181]

The result was nothing short of a public health catastrophe.

The history of "light" and "low tar" cigarettes has implications for both litigation and harm reduction. In terms of litigation, the tobacco companies have faced a significant number of lawsuits over their "light" and "low tar" deception during the last decade.[182] Though the industry has prevailed in most of these cases, it has lost several sizeable verdicts and there are still several class action lawsuits pending.[183] These litigation costs could not have been foreseen (at least by

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176. *E.g.*, Christopher N. Banthin, *Potentially Reduced Exposure Cigarettes: The Need for a Public Health Policy*, 8 MINN. J.L. SCI. & TECH. 127, 139 (2007).

177. Amy Fairchild & James Colgrove, *Out of the Ashes: The Life, Death, and Rebirth of the "Safer" Cigarette in the United States*, 94 AM. J. PUB. HEALTH 192, 193–194 (2004).

178. OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: THE CHANGING CIGARETTE, at v (1981), *available at* http://www.cdc.gov/tobacco/data_statistics/sgr/sgr_2004/chapters.htm.

179. STAFF OF H.R. COMM. ON GOV'T REFORM, *supra* note 62, at 6.

180. United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 508 (D.D.C. 2006).

181. *Id.* at 561.

182. *E.g.*, United States v. Philip Morris Inc., 116 F. Supp. 2d 131, 137–38 (D.D.C. 2000).

183. *See generally* Allison Torres Burtka, *Courts Stamp Out Industry Claims About 'Light' Cigarettes*, TRIAL, Dec. 1, 2006, at 14, 16–18 (reviewing adjudicated and pending tobacco litigation

observers outside of the tobacco industry itself) when the industry began marketing "light" and "low tar" cigarettes, as it took decades for the public health community to fully realize that "light" and "low tar" cigarettes were not safer than conventional cigarettes.[184] Similarly, the dangers of new smokeless tobacco products cannot be fully determined for decades. If the new smokeless tobacco products are hazardous in ways that take years or decades to become visible, then there may be substantial costs—both in terms of litigation and public health—that will materialize in the future. R.J. Reynolds and Philip Morris (and their attorneys) have presumably considered this possibility and nonetheless opted to enter the smokeless tobacco market.

The history of "light" and "low tar" cigarettes also impacts the debate regarding harm reduction promotion. Not only is there an issue of latent risks, but the tobacco companies have already shown themselves to be skilled producers of deliberately misleading advertising. In addition, they have previously undermined cessation efforts by encouraging tobacco users to migrate towards alternative products. Whether the involvement of Philip Morris and R.J. Reynolds in perpetrating the "light" and "low tar" fraud should disqualify those companies from working with the public health community in pursuit of harm reduction objectives is a subject of debate. At the very least, the historical background should make public health advocates wary of heading down that road.

3. *Product Liability Cases and Prospects for Future Lawsuits*

As discussed above, R.J. Reynolds and Philip Morris do not appear to be assuming much short-term litigation exposure with their entry into the smokeless tobacco industry. But the coast is not entirely clear. An ongoing Connecticut case, *Hill v. U.S. Smokeless Tobacco Co.*,[185] suggests some areas where private lawsuits against smokeless tobacco producers may yield more success—and where litigation may produce public health benefits as well.

Although the complaint in *Hill* includes many elements that sound in negligence or fraud, it is essentially a products liability claim based on Connecticut's Product Liability Act.[186] The suit was filed in March 2005 by Kelly June Hill on behalf of the estate of her deceased husband, Bobby Hill.[187] According to the complaint, Bobby Hill began using smokeless tobacco at the age of 13 in

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cases involving "light" cigarettes). The most notable pending case is *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006). The judge in that case certified a nationwide class of "light" cigarette smokers. *Id.* at 1131–32. If that class certification is upheld and the tobacco industry is found liable, the judgment could amount to billions of dollars.

184. Fairchild & Colgrove, *supra* note 177, at 197–98.

185. No. X05CV054003788S, 2006 Conn. Super. LEXIS 1842 (Conn. Super. Ct. June 19, 2006).

186. *See* Am. Compl. for Hill, 2006 Conn. Super LEXIS 1842 [hereinafter Am. Hill Compl.].

187. *Id.* ¶¶ 2-3; Docket for Hill v. U.S. Smokeless Tobacco Co., No. FST-CV-05-003788-S (Conn. Super. Ct. filed March 7, 2005).

1974.[188] He continued using smokeless tobacco until he was diagnosed with tongue cancer in 2002.[189] He died a year later from related complications at the age of 41.[190] In June 2006, the judge denied USST's motion to dismiss the complaint (although some of the counts were dismissed), and the case is currently in the discovery phase.[191]

In addition to theories alleged in cases like *Marsee* and *Tuttle*, much of the complaint is focused on the smokeless tobacco *product* itself.[192] In order to prevail on a products liability cause of action, Hill will have to establish that the smokeless tobacco "was in a defective condition unreasonably dangerous to the consumer or user" and that such a defect was responsible for Hill's injuries.[193] Moreover, with a product like smokeless tobacco—which is known to carry a health risk (and indeed has since 1987 had warning labels printed on the packaging)—the plaintiff is typically required to show that the product was dangerous "beyond that which would be contemplated by the ordinary consumer who purchases it."[194]

In *Hill*, the complaint alleges:

> UST Inc. [USST's parent company] intentionally failed and refused to implement changes in the design, formulation and preparation of the spit tobacco used by Bobby Hill that it knew would have, and that in fact would have, reduced the addictive, harmful and deadly nature of the product.
>
> UST Inc. failed and refused to reduce nicotine specific nitrosamines (NNN) in spit tobacco products, including products used by Bobby Hill, even though it was well known to the company's senior management and research chemists that nitrosamines were associated with cancer and that UST Inc.'s spit tobacco products contained large amounts of nitrosamines . . . .
>
> . . . .
>
> Even though UST Inc.'s own chemists knew that it may be possible to prevent additional formation of NNN in tobacco with time, and even though it was, in fact, possible to reduce the amount of NNN in its spit tobacco products, UST Inc. failed and refused to do so.[195]

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188. Am. Hill Compl., *supra* note 186, ¶ 8.

189. *See id.* ¶¶ 9–12.

190. *Id.* ¶¶ 12, 24.

191. Hill v. U.S. Smokeless Tobacco Co., No. X05CV054003788S, 2006 Conn. Super. LEXIS 1842, at *1, *5 (Conn. Super. Ct. June 19, 2006).

192. Am. Hill Compl., *supra* note 186, ¶¶ 34–92.

193. Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1330 (Conn. 1997) (interpreting Connecticut's products liability law).

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

195. Am. Hill Compl., *supra* note 186, at ¶¶ 60, 61, 64.

The complaint further claims that UST (a) manipulated the pH balances in its products in order to increase the level of "free nicotine" (nicotine that can be easily absorbed), and (b) knew that the pH level of UST's products would increase while it aged on store shelves.[196]

These allegations in the complaint closely echo claims made by the plaintiff in one of the successful "light" cigarette actions, *Schwarz v. Philip Morris*.[197] In *Schwarz*, the plaintiff won a jury verdict of more than $150 million in a case alleging both fraud and products liability causes of action against Philip Morris for its sale of the "light" cigarettes that ultimately caused Richard Schwarz's lung cancer.[198] Although the award of damages was overturned by the appellate court because of faulty jury instructions, the findings of liability were upheld.[199]

In its product liability cause of action, the plaintiff in *Schwarz* had alleged:

> At all material times, the cigarettes sold by defendant were defective and unreasonably dangerous in one or more of the following respects:
> a. The cigarettes contained added ammonia to increase the effects of nicotine;
> b. The cigarettes or their smoke contained altered pH so as to increase the effects of nicotine;
> c. At the time defendant's light cigarettes were sold, the product was dangerous and in a condition not contemplated by the ultimate consumer in that it was manufactured, marketed, and sold as a less harmful alternative to ordinary cigarettes.[200]

The appellate court in *Schwarz* upheld the jury's finding that Philip Morris had violated Oregon's product liability statute by engaging in the conduct alleged in the complaint.[201] The court wrote that "a reasonable consumer would expect cigarette products to be dangerous, in part because of the federally required

196. *Id.* at ¶¶ 34–45. Some similar claims (though alleged with less detail) were made in *Smith v. UST, Inc.*, No. 04-CV-00170-BLW-MHW (D. Idaho, filed April 5, 2004). That case was brought by Susan Smith, wife of deceased rodeo rider Kent Cooper. *Smith* Complaint, ¶ 1.1–1.3. Cooper died at age 47 from throat cancer, after using Copenhagen from the time he was 13 years old. *Id.* ¶ 2.2. Smith alleged that "Copenhagen snuff has an extraordinarily high concentration of those components of spit tobacco that carry the greatest risk of causing cancer to users of their products and Copenhagen snuff poses an unreasonable risk of disease to users, and is in fact more likely to cause disease to users than almost any other brand of moist snuff available to U.S. customers." *Id.* ¶ 2.13. Despite predictions that the *Smith* case would "blow the doors open on the relationship between this drug and [rodeo]," the *Smith* case quietly settled in April 2007. Timothy Egan, *Taking Aim at the Professional Rodeo Circuit's Drug of Choice*, N.Y. TIMES, June 11, 2004, at A14 (citation omitted). UST agreed to pay Smith's attorneys' fees; other terms of the agreement are sealed. UST Inc., Quarterly Report (Form 10-Q), at 41 (May 4, 2007).

197. 135 P.3d 409, 415 (Or. Ct. App. 2006).

198. *Id.* at 415.

199. *Id.* at 425, 433.

200. *Id.* at 436 (citation omitted).

201. *Id.* at 437–38.

warnings and in part because of other readily available information."[202] Nonetheless, liability still existed in this case because the "light" cigarettes were "dangerous to an extent *beyond* that which . . . consumer[s] would have [reasonably] expected" because of the defendant's manipulation of the product.[203]

In general, *Schwarz* remains the exception to the rule, in that several other "lights" cases have either been dismissed or had jury verdicts overturned by appellate courts.[204] It does suggest, however, that narrowly focused legal actions that attack the "defective design" of the product may be able to overcome issues of reliance and causation that have hampered negligence-focused or fraud-focused actions.

Moreover, in the case of *Hill* and other similar smokeless tobacco cases, product liability claims based on an "unreasonably dangerous design" may be even more persuasive, given the emerging evidence suggesting that snus products in Sweden are in fact lower in carcinogens than their U.S. counterparts.[205] Such findings suggest that there is a "feasible alternative design" that is readily available to U.S. manufacturers.[206] In states that use the "risk-utility test" to determine whether a product is unreasonably dangerous, evidence of a "feasible alternative design" can help push the balance in the plaintiff's favor.[207]

As Dorothy Hatsukami and others have written, "[t]he rate of oral cancer is highly likely to be contingent upon the level of tobacco specific N-nitrosamines (TSNAs) in the [smokeless tobacco] products. Some countries such as Sweden have [smokeless tobacco] products with relatively low nitrosamine levels compared to other nations such as the United States."[208] The difference is apparently the result of different manufacturing processes. Swedish snus is dried and heat treated, and

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202. *Id.* at 437.

203. *Id.*

204. *E.g.*, Price v. Philip Morris, Inc., 848 N.E.2d 1, 6 (Ill. 2005) (overturning $10 billion verdict in "lights" case); Good v. Altria Group, Inc., 436 F. Supp. 2d 132, 133 (D. Me. 2006) (granting summary judgment for defendants in "lights" case due to federal preemption).

205. Hatsukami et al., *supra* note 27, at 310.

206. The comparison between smokeless tobacco manufactured in the United States and the less carcinogenic smokeless tobacco manufactured in Sweden could be a useful tool in prospective litigation. *Cf.* Connally v. Sears Roebuck & Co., 86 F. Supp. 2d 1133, 1137 (S.D. Ala. 1999) ("A manufacturer is liable for injuries resulting from an inherently dangerous product, such as a saw, only if the plaintiff can prove 'that a safer, practical, alternative design was available to the manufacturer at the time it manufactured the product.'") (quoting Beech v. Outboard Marine Corp., 584 So.2d 447, 450 (Ala. 1991)). Ultimately, the plaintiff must present evidence that "the utility of the alternative design outweighed the utility of the alternative actually used." *Id.* at 1138 (quoting *Beech*, 584 So.2d at 450).

207. Artis v. Corona Corp. of Japan, 703 A.2d 1214, 1217 (D.C. 1997) ("[T]he plaintiff must 'show the risks, costs, and benefits of the product in question and alternative designs', and 'that the magnitude of the danger from the product outweighed the costs of avoiding danger[.]" ((alteration in original) (quoting Warner Fruehauf Trailer Co. v. Boston, 654 A.2d 1272, 1275 (D.C. 1995)).

208. Hatsukami et al., *supra* note 27, at 310.

then refrigerated until sale.[209] Moist snuff sold in the U.S., by contrast, is generally fire cured and fermented, which "allow[s] the continued formation of TSNAs."[210] In addition, U.S. smokeless tobacco is generally not stored in refrigerated displays.[211] As a result, a 2001 study conducted for the Massachusetts Tobacco Control Program found:

> The TSNA levels in the two leading U.S. snuff brands, accounting for 69% of the 1999 U.S. market, were found to increase during 6 months storage at room temperature between 30 and 130%, while the TSNA concentration in the Swedish brand increased inconsequentially.[212]

The Massachusetts study concluded, "[t]he technology clearly exists to manufacture snuff with low levels of TSNA, as shown by the Swedish [snus products]."[213]

While safer alternative designs clearly exist, this does not suggest that it will be easy to prevail on claims against smokeless tobacco manufacturers. The outcomes will likely vary by state, as some states will find that the common knowledge that smokeless tobacco is generally "unsafe" provides a complete defense, or that consumers of smokeless tobacco "assumed the risk" of harm.[214] In some states, statutory bars that have been erected to limit tobacco litigation will prove an insurmountable hurdle.[215] And of course, the individual plaintiff still must establish that the product's defective design was responsible for his or her disease.

Despite these significant obstacles, however, product liability claims may prove more viable than fraud-based claims and are more likely to produce public health benefits. Regardless of the merits of a harm reduction strategy, no public health purpose is served if smokeless tobacco products are more carcinogenic or addictive than necessary. Lawsuits that make design defect claims will not get smokeless tobacco products off the market, but they may push smokeless tobacco

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209. J. Foulds et al., *Effect of Smokeless Tobacco (Snus) on Smoking and Public Health in Sweden*, 12 TOBACCO CONTROL 349, 349 (2003).

210. *Id.* at 349–50.

211. *Id.* at 350. Note that Camel Snus is being sold in refrigerated displays, unlike most smokeless tobacco sold in the U.S. Taboka and Marlboro Snus are not refrigerated until sale. *See* Camel Snus, *supra* note 39, (follow "All About Snus" hyperlink; then follow "Got Questions?" hyperlink; then follow "Camel SNUS products are kept refrigerated at retail. Do you have to keep the product refrigerated to ensure freshness?" hyperlink) (last visited Nov. 17, 2007).

212. K.D. BRUNNEMANN ET AL., AGING OF ORAL MOIST SNUFF AND THE YIELDS OF TOBACCO-SPECIFIC N-NITROSAMINES (TSNA) 5 (2001), *available at* http://www.tobacco.org/News/010622BostonRE.html.

213. *Id.*; *see also* Savitz et al., *supra* note 24, at 1937 ("Reduction of nitrosamine levels in smokeless tobacco should markedly reduce carcinogenicity.").

214. *See, e.g.*, Am. Tobacco Co., Inc. v. Grinnell, 951 S.W.2d 420, 424, 432 (Tex. 1997) (finding that a cigarette company had a defense of common knowledge for wrongful death action).

215. *E.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 82.004(a) (Vernon 2005) ("[A] manufacturer or seller shall not be liable if . . . the product is inherently unsafe and the product is known to be unsafe by the ordinary consumer . . . .").

producers to adopt feasible design changes—like ending fermentation, refrigerating unsold products, and ceasing the practice of manipulating pH levels—that will make their products significantly safer.[216]

* * *

In all, Philip Morris and R.J. Reynolds appear to be assuming little additional litigation exposure by entering the smokeless tobacco market. In fact, the successful record of USST in defending litigation may have been one of the encouraging signs that prompted the cigarette companies to move towards smokeless tobacco production.[217] For any smokeless tobacco litigation that they face, Philip Morris and R.J. Reynolds are sure to adopt the same "scorched earth" litigation tactics they have used to successfully defend smoking-related cases.[218] The litigation record and reputation of these two companies is enough on its own to scare off most potential plaintiffs.

Just as with smoking-related lawsuits, litigation is clearly not a panacea that will drive the smokeless tobacco industry into bankruptcy or provide adequate compensation for those injured by smokeless tobacco use. Meaningful regulation of the smokeless tobacco industry will have to come from legislation, not litigation.[219] Nonetheless, in the cigarette context, litigation has served an important purpose in educating the public about the dangers of tobacco use and bringing the past abuses of the tobacco industry to light.[220] In the case of smokeless tobacco, narrowly-focused litigation may serve to educate the public about the harms of smokeless

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216. Where possible, regulatory strategies should also promote these same objectives. There is evidence that in the past, the tobacco companies avoided exploring "safer" cigarette alternatives because of the fear that it might increase their legal liability. Jess Alderman & Richard A. Daynard, *Applying Lessons from Tobacco Litigation to Obesity Lawsuits*, 30 AM. J. PREVENTIVE MED. 82, 86 (2006) ("An attorney warned R.J. Reynolds not to tell consumers about its efforts to produce a safe cigarette 'because of two words: product liability.'"). Regulations requiring feasible changes to smokeless tobacco products could keep the tobacco companies from making similar decisions in response to smokeless tobacco lawsuits.

217. *See supra* notes 150–54 and accompanying text.

218. Guardino & Daynard, *supra* note 172, at 64 ("The industry long has employed 'scorched earth' litigation tactics designed to intimidate, embarrass, and bankrupt plaintiffs in smoking and health litigation. . . . As a result, many are deterred from bringing claims against the companies whose products have caused their own illness or their family member's death.").

219. A discussion of the merits of the bill currently pending in Congress to provide the Food and Drug Administration with limited authority to regulate tobacco products is beyond the scope of this paper. Likewise, this paper does not discuss the impact that such a bill might have on tobacco-related litigation. Note, however, that some tobacco control advocates fear that FDA regulation of the tobacco industry could be used as a shield by the industry in future litigation. M. Siegel, *Food and Drug Administration Regulation of Tobacco: Snatching Defeat from the Jaws of Victory*, 13 TOBACCO CONTROL 439, 439 (2004) ("[T]he Bill will end any serious threat to the tobacco companies posed by current and future litigation. Tobacco companies will be able to successfully argue that they are already regulated and that there is therefore no need for any further substantial punitive damages or injunctive relief.").

220. Daynard, *supra* note 129, at 1.

tobacco and the fact that the tobacco industry has made—and continues to make—deliberate choices that increase the toxicity of smokeless tobacco products. Such lawsuits may create pressure, even in the absence of large jury verdicts, for R.J. Reynolds and Philip Morris to develop less toxic smokeless tobacco products.[221] These goals—accurately educating the public and reducing the lethality of smokeless tobacco products currently on the market—are ones that both supporters and opponents of smokeless tobacco harm reduction can endorse.

V. IMPACT ON CIGARETTE LITIGATION

In addition to considering whether litigation has a role to play in reducing the harms from smokeless tobacco, a parallel consideration is whether R.J. Reynolds and Philip Morris are increasing their potential exposure to *cigarette-related* litigation by moving into the smokeless tobacco market. If the harm reduction argument is taken seriously, it suggests that smokeless tobacco can be used as a substitute for cigarettes and thereby reduce harm. If this is correct, would that mean that smokeless tobacco is a "safer alternative design" for cigarette products? If so, could that increase cigarette producers' vulnerability to products liability claims?

This is, of course, an issue of concern only to R.J. Reynolds and Philip Morris, because none of the other smokeless tobacco producers also manufacture cigarettes.[222] The other smokeless tobacco companies can freely argue that smokeless tobacco is a substitute (indeed, a safer substitute) for cigarettes without having to worry about the potential impact on cigarette litigation. R.J. Reynolds and Philip Morris must worry, however, that any arguments they use to promote their smokeless tobacco product may be used against them in tobacco-related litigation.

A. Is Smokeless Tobacco a "Feasible Alternative Design"?

The inability to prove the existence of a "feasible alternative design" has caused numerous products liability actions against cigarette manufacturers to

221. *Cf.* Michelle M. Mello et al., *The McLawsuit: The Fast-Food Industry and Legal Accountability for Obesity*, 22 HEALTH AFFAIRS, Nov.–Dec. 2003, at 207, 212 (writing that "[e]ven if not successful, fast-food litigation could motivate food makers to introduce voluntary changes in their business practices," and suggesting that some such changes have already occurred). Wendy Wagner has also suggested that private litigation can play the useful role of uncovering information that can later be used to make better-informed regulatory decisions. *See* Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 710 (2007) ("Litigation . . . serves a vital role in dropping inflated information costs and sparking public understanding and debate that in turn jump-starts the market and political process.").

222. *See supra* Part III.A.

fail.[223] For example, the Texas Supreme Court, discussing a negligent design claim in *American Tobacco Co. v. Grinnell*, wrote:

> Negligent design and manufacturing claims are predicated on the existence of a safer alternative design for the product. Absent an alternative design, a claim for negligent design or manufacturing fails as a matter of law. As we previously discussed, American conclusively proved that no reasonably safer alternative design exists for its cigarettes. Accordingly, the Grinnells cannot maintain their claims for negligent manufacturing and design as a matter of law.[224]

Likewise, in *Varney v. R.J. Reynolds Tobacco Co.*, the court dismissed negligent design and breach of warranty claims, writing that "[a]lthough the plaintiff states . . . that safer alternative designs for cigarettes were available, there is not the slightest description of what those designs were or why they would have avoided causing harm to the plaintiff if adopted."[225]

As discussed above, there may be "feasible alternative designs" available that would make smokeless tobacco a safer product.[226] But there is also the related question of whether smokeless tobacco itself may be a "feasible alternative design" for cigarettes.

The answer turns on whether smokeless tobacco products are an "alternative design" for cigarettes or an entirely different product. Although it might seem self-evident that smokeless tobacco is a different product than cigarettes, the claim that it is actually an alternative design is not as implausible as it might appear at first blush. Consider, for example, these statements made years ago in the tobacco companies' internal documents:

> In a sense, the tobacco industry may be thought of as being a specialized, highly ritualized and stylized segment of the pharmaceutical industry. Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects . . . Nicotine is known to be a habit-forming alkaloid, hence the confirmed user of tobacco products is primarily seeking the physiological "satisfaction" derived from nicotine—and perhaps other active compounds . . . . Thus a tobacco product is, in essence, a vehicle for delivery of nicotine, designed to deliver the nicotine in a generally acceptable and attractive form.[227] (R.J. Reynolds)

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223. Am. Tobacco Co. Inc., v. Grinnell, 951 S.W.2d 420, 433 (Tex. 1997); Varney v. R.J. Reynolds Tobacco Co., 118 F. Supp. 2d 63, 70 (D.Mass. 2000); *see also* MATTHEW BENDER & CO., PRODUCTS LIABILITY § 56.05 (ed. 2006).

224. 951 S.W.2d at 437 (citations omitted).

225. 118 F. Supp 2d at 70.

226. *See supra* notes 209–14 and accompanying text.

227. Memorandum from Claude E. Teague, Jr., R.J. Reynolds, Research Planning Memorandum on the Nature of the Tobacco Business and the Crucial Role of Nicotine Therein (Apr. 14, 1972) (emphasis added), http://ltdlimages.library.ucsf.edu/imagesd/d/w/y/dwy61c00/Sdwy61c00.pdf.

> The cigarette should be conceived not as a product but as a package. The product is nicotine . . . . Think of a cigarette pack as a storage container for a day's supply of nicotine . . . . Think of a cigarette as a dispenser for a dose unit of nicotine.[228] (Philip Morris)

> Moreover, nicotine is addictive. *We are, then, in the business of selling nicotine*, an addictive drug effective in the release of stress mechanisms.[229] (Brown & Williamson)

If the "product" at issue is defined as a delivery device for nicotine—as the tobacco companies' own documents suggest and as the FDA argued in the mid-1990s[230]—then smokeless tobacco could reasonably be considered a safer alternative design for cigarettes.

In *Kimball v. R.J. Reynolds Tobacco Co.*, an ongoing lawsuit involving lung cancer developed from smoking "light" cigarettes, the judge wrote that the issue of what constitutes a "feasible alternative design" and what constitutes an "entirely different product" should be left to the jury.[231] In rejecting R.J. Reynolds's motion *in limine* to exclude evidence of alternative cigarette designs, the judge wrote:

> RJR argues that Mr. Kimball cannot present evidence of alternative cigarette designs that are "not cigarettes" or are safer only because no one would use them. RJR raises an interesting question, but it is one that the jury must decide. What is a cigarette? Is it a "Nicotine-Delivery Device," as the Food and Drug Administration proposed in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 129, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000)? Is it a product for inhaling burning tobacco? Some combination of the two? Something else entirely? These questions are important, because Mr. Kimball cannot point to an entirely different product as an alternative design. *Cf. Ruiz-Guzman v. Amvac Chem. Corp.*, 141 Wn.2d 493, 7 P.3d 795, 800 (Wash. 2000) ("If another product can more safely serve the same purpose as the challenged product at a comparable cost and in a similar manner, a jury should be able to conclude that the risks of the challenged product outweigh its utility."). For example, a plaintiff injured in a motorcycle accident cannot argue that if the manufacturer had installed four wheels on the motorcycle, it would have been safer. "Two-wheeledness" is an

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228. WILLIAM L. DUNN, JR., PHILIP MORRIS RESEARCH CENTER, MOTIVES AND INCENTIVES IN CIGARETTE SMOKING 5 (n.d.), *available at* http://ltdlimages.library.ucsf.edu/imagesw/w/l/o/wlo90f00/Swlo90f00.pdf.

229. Memorandum from Addison Yeaman, Brown and Williamson Tobacco Corp., The Implications of Battelle Hippo I & II and The Griffith Filter (July 17, 1963) (emphasis added), *available at* http://ltdlimages.library.ucsf.edu/imagesx/x/r/c/xrc72d00/Sxrc72d00.pdf.

230. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 127 (2000) ("The FDA determined that nicotine is a 'drug' and that cigarettes and smokeless tobacco are 'drug delivery devices . . . .'").

231. No. C03-664JLR, 2006 U.S. Dist. LEXIS 27138, at *7–8 (W.D. Wash. Apr. 26, 2006).

> essential characteristic of a motorcycle. What are the essential characteristics of a cigarette? The court can only hypothesize. The jury will decide the issue, and will thus decide whether any alternative design that Mr. Kimball proffers is a feasible alternative.[232]

In *Kimball*, the evidence the plaintiff was seeking to introduce involved "low combustion" cigarette products such as Premier or Eclipse.[233] The judge's comments, however, suggest that the discussion of what constitutes a "feasible alternative design" could be broadened to include smokeless tobacco products or even nicotine replacement therapy. Indeed, at least one case has allowed evidence of a nicotine inhaler to be introduced as an example of a feasible alternative design.[234]

The tobacco companies' marketing of their new smokeless tobacco products may make the "feasible alternative design" argument even more plausible. For example, Philip Morris is using the marketing slogan "Instead of a Smoke . . . tuck a Taboka,"[235] and its fact sheet for Taboka says that the product is "designed especially for adult smokers interested in smokeless tobacco alternatives to smoking."[236] R.J. Reynolds, for its part, has stated that "we should not delay in allowing snus to compete with cigarettes for market share,"[237] and some of its advertisements have targeted current smokers.[238] And although R.J. Reynolds and Philip Morris have not made any explicit harm reduction claims on behalf of their smokeless tobacco products, USST has argued to the U.S. Department of Health and Human Services that "any comprehensive evidence-based tobacco control program should include a tobacco harm reduction strategy [providing that] cigarette smokers who do not quit and do not use medical nicotine products should be encouraged to switch completely to smokeless tobacco . . . ."[239] Such advertising and public statements make it substantially easier for plaintiffs to argue that

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232. *Id.*

233. *Id.* at *4–7.

234. Little v. Brown & Williamson Tobacco Corp., 243 F. Supp 2d 480, 496–97 (D.S.C. 2001). In that case, the jury ultimately issued a verdict for the defense.

235. John Reid Blackwell, *Philip Morris to Test Smokeless, Spit-Free Product*, RICHMOND TIMES-DISPATCH, May 3, 2006, at A1.

236. Philip Morris USA, Taboka Fact Sheet, http://www.philipmorrisusa.com/en/smokeless/popup_taboka_fact_sheet.asp (last visited Nov. 17, 2007).

237. Reynolds Am. Inc., *supra* note 122.

238. Some of its direct mail pieces have offered free samples of snus in exchange for cigarette proofs of purchase. Camel Snus Advertisements (on file with author). This could be seen as an attempt to get current smokers to switch to smokeless tobacco, or, as noted above, it could also be seen as an attempt to promote dual use.

239. Comments of U.S. Smokeless Tobacco Co. Regarding Tobacco Harm Reduction Submitted to the U.S. Dep't of Health and Human Servs., *supra* note 62, at 9.

smokeless tobacco is an "alternative" to cigarettes and not a completely different product.[240]

Of course, to win a verdict, a plaintiff would still have to persuade a jury that smokeless tobacco is a "feasible alternative design" for cigarettes, and juries may well resist accepting an argument that goes against their first instincts. To date, no such argument has succeeded. But as smokeless tobacco producers (and harm reduction advocates) push for smokeless tobacco to be considered an alternative option for smokers, this argument will become easier over time.[241] Note, though, that even with success in establishing smokeless tobacco as a "feasible alternative design," it would still be extraordinarily difficult to win a smoking-related case (in part because of issues like causation and reliance, as discussed above).[242] At the very least, though, success on that issue would allow plaintiffs to get past one major obstacle to recovery in smoking liability cases.

B. Public Health Implications

Would it advance the interests of public health to argue that smokeless tobacco is a "feasible alternative design" for cigarettes? In theory, successful litigation that focused on smokeless tobacco as a "feasible alternative design" would eventually force tobacco companies to produce smokeless tobacco instead of cigarettes (or else face escalating legal costs and judgments). The public health benefits of such a result would be undeniable. However, the end of cigarette production is not a likely outcome or even a realistic possibility in the short term.

If such litigation did not succeed in ending cigarette production, then what purpose would it serve? At least in the case of R.J. Reynolds and Philip Morris, it may make the companies wary of asserting any marketing claims that would position smokeless tobacco as an alternative option for smokers. They might become more cautious about making any public statements that could later be used to support a "feasible alternative design" argument.

To date, though, these companies have not shown any concern about the possible litigation ramifications of offering "spit-free" smokeless products as an alternative to cigarettes—indeed, this is precisely how they have been pitching their products. Philip Morris, for example, says that "Marlboro Snus pouches were designed especially for adult smokers who are interested in *smokeless tobacco*

240. Moreover, the development of "spit-free" products that can be used in any setting also makes such an argument easier. One could argue that traditional moist snuff products are not an acceptable alternative because of the social stigma that may be attached to spitting tobacco. The fact that new products are "spit-free" may undercut that line of reasoning.

241. Use of cigarette brand names to advertise smokeless tobacco products may also make jurors more willing to accept the "feasible alternative design argument."

242. *See supra* Part IV.

alternatives to cigarettes."[243] Likewise, Inga, the Camel Snus spokesmodel, makes this statement on the Camel Snus website: "In our society, there are many public spaces where smoking is not acceptable. These are the perfect places to make like a Swede and snus."[244] Indeed, the simple fact that both companies are using cigarette brand names (Marlboro and Camel, respectively) to promote these products suggests that they view cigarettes and smokeless products as alternatives to one another.[245]

From a public health point of view, a legal strategy that would threaten the ability of tobacco companies to market smokeless tobacco products to current smokers (as an alternative to cigarettes) could be counterproductive. Viewed from a harm reduction perspective, these are *exactly* the customers (indeed, the *only* customers) that should be encouraged to consider smokeless tobacco as an option.

On the other hand, such a litigation strategy could benefit public health if it significantly reduced the overall amount of smokeless tobacco marketing by Philip Morris and R.J. Reynolds. This is especially important as both companies are now using cigarette brand names to market their smokeless tobacco products. Any smokeless tobacco advertising will have the negative side-effect of cross-promoting the cigarette brands. Likewise, smokeless tobacco advertising, even if directed to current smokers, will surely miss the intended audience to some degree and encourage others (such as youth or non-smokers) to use smokeless tobacco.[246] As discussed above in Part II, current marketing by R.J. Reynolds and Philip Morris is not carefully focused on existing smokers, and it would be foolish to expect companies with their track records to market their products responsibly. Thus, any strategy which serves to discourage smokeless tobacco advertising will likely benefit public health.

Moreover, if tobacco companies were discouraged from advertising smokeless tobacco to current smokers, public health professionals and tobacco control advocates would be freer to communicate directly with current tobacco users without as much competition from industry-funded mixed messages. Such communications would obviously present counseling, nicotine replacement therapy, and other tobacco cessation options as preferable to smokeless tobacco use (as indeed they are).[247]

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243. Philip Morris USA, Marlboro Snus New Product Fact Sheet (emphasis added), http://www.philipmorrisusa.com/en/popup_marlboro_snus_fact_sheet.asp (last visited Nov. 17, 2007).

244. Camel Snus, *supra* note 39 (follow "Meet Inga" hyperlink; then follow "Inga's Introduction to Snus" hyperlink) (last visited Dec. 20, 2007).

245. *Id.*; Philip Morris USA, *supra* note 48.

246. *See* Savitz et al., *supra* note 24, at 1937.

247. Some tobacco control advocates would prefer to leave smokeless tobacco out of the conversation entirely. These advocates are concerned that any discussion of the relative risks of smoking and smokeless tobacco, could be misinterpreted as an endorsement of smokeless tobacco use. But ignoring the topic completely is no longer practical, and tobacco control advocates should not shy away

The lawsuits themselves—if granted a high enough profile in the media—may also serve to educate the public about the relative risks of smoking, smokeless tobacco, and nicotine replacement products, just as previous rounds of litigation have educated the public about the dangers of cigarettes.[248] Public health advocates should welcome such a result. There are still major misperceptions among cigarette smokers about the comparative risks of these products, and in some cases these misperceptions are used as justifications to continue smoking.[249]

Finally, if the "feasible alternative design" argument makes it easier to win verdicts against the cigarette manufacturers, such legal victories will build upon the successes of previous cigarette litigation—enhanced awareness of the dangers of smoking, delegitimization of the tobacco industry in the public sphere, compensation for at least some victims of the tobacco industry's wrongdoings, and increased legal costs for the cigarette producers (which could eventually result in higher cigarette prices that reduce use). That such legal tactics might short-circuit tobacco industry advertising intended to encourage cigarette smokers to switch to smokeless tobacco seems to be a risk worth taking, particularly given the unlikelihood that tobacco industry advertisements will be narrowly targeted to current smokers.[250]

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from this topic. Failure to acknowledge the disparity in risk between cigarettes and smokeless tobacco—as some public health websites have done—undermines the credibility of tobacco control advocates and allows tobacco companies to claim the moral high ground on this issue. *See generally* Carl V. Philips et al., *You Might as Well Smoke; The Misleading and Harmful Public Message About Smokeless Tobacco*, 5 BMC PUB. HEALTH 31 (2005), *available at* http://www.biomedcentral.com/1417-2458/5/31/ (providing examples of public health websites with inaccurate information about the relative risks of smokeless tobacco, such as the World Health Organization website which states that "smokeless tobacco is just as addictive and fatal as cigarettes). It is far better to accurately communicate the risks of smokeless tobacco while also discussing the relative safety of nicotine replacement therapy and other cessation products. Communication of accurate information need not imply endorsement of a tobacco harm reduction approach.

248. *See supra* note 220 and accompanying text.

249. *See, e.g.*, K. Michael Cummings et al., *Are Smokers Adequately Informed About the Health Risks of Smoking and Medicinal Nicotine?*, 6 NICOTINE & TOBACCO RESEARCH (SUPP.) S333, S336–37 tbl.3 (2004) (surveying smokers and finding that only 33% knew that nicotine is not a cause of cancer and only 35% knew nicotine patches are less likely to cause a heart attack than smoking cigarettes); Richard J. O'Connor et al., *Smoker Awareness of and Beliefs About Supposedly Less-Harmful Tobacco Products*, 29 AM. J. PREVENTIVE MED. 85, 88 (2005) (surveying current smokers and finding that of those who were aware of smokeless tobacco products, 83% did not believe that smokeless tobacco use was less harmful than smoking).

250. *See* CAMPAIGN FOR TOBACCO-FREE KIDS, SMOKELESS TOBACCO AND KIDS (May 25, 2006), http://tobaccofreekids.org/research/factsheets/pdf/0003.pdf (describing ways tobacco companies continue to market to youth despite settlement agreements including sponsorship at a number of sporting events and advertisements in college newspapers for smokeless tobacco products). One other possible downside of this litigation strategy is the potential for legislative backlash. Both Philip Morris and R.J. Reynolds are politically powerful companies, and they might attempt to short circuit this litigation strategy by seeking enactment of protective legislation. *Cf.* Peter D. Jacobson and Soheil Soliman, *Litigation as Public Health Policy: Theory or Reality?*, 30 J.L. MED. & ETHICS 224, 231–32 (2002)

C. *Will Smokeless Tobacco Sales Strengthen the Cigarette Companies' Position in Cigarette Litigation?*

Although the "feasible alternative design" argument may make it easier for plaintiffs to prevail in cigarette-related litigation, some have made the contrary suggestion that cigarette companies are entering the smokeless tobacco market because they believe it will *reduce* their exposure in cigarette-related litigation. For example, Jonathan Foulds has suggested that Philip Morris has designed smokeless tobacco products that are intended to be market failures, simply for the purpose of reducing the company's litigation exposure (and maintaining its hold on the cigarette market).[251] He writes:

> Philip Morris has by far the largest share (around 50%) of the US cigarette market. Philip Morris wants the status quo to continue. It therefore may not want lots of smokers switching from its deadly cigarettes to a much less harmful smokeless product. But it doesn't want to run the legal risk of losing a court case on the basis that it needlessly caused people to die of lung cancer when they could have sold tobacco products that don't cause lung cancer . . . So how do they minimize the risks? . . . [T]hey claim to have spent millions of dollars trying to get smokers to switch to a less harmful smokeless product, but unfortunately find that smokers don't really like the much less harmful (and less addictive) smokeless product they offered. So the product dies a death, smokers keep smoking one of the dozens of varieties of lethal Marlboro cigarettes, and the company can claim in court that they tried, but smokers really just want to keep puffing on their yummy cigarettes.[252]

Putting aside the question of whether the cigarette companies' products are intentionally designed to fail (which is nearly impossible to determine at this point), Foulds raises the question of whether the tobacco companies' entrance into the smokeless tobacco market is at least in part a public relations gambit intended to protect the company from legal liability.[253] By offering lower-risk tobacco products, the tobacco companies can claim that people who chose to smoke cigarettes are responsible for their own choice to use the most dangerous tobacco option available (i.e., they "assumed the risk"). Such an argument could be used to appeal to juries in cigarette cases, or it could be targeted more broadly at potential

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(discussing how municipal suits against the gun industry were met by state laws that prohibited such lawsuits).

251. Posting of Jonathan Foulds to Healthline, Why Did Philip Morris's New Smokeless Tobacco Product ("Taboka") Deliver Almost No Nicotine?, http://www.healthline.com/blogs/smoking_cessation/2007/06/why-did-philip-morriss-new-smokeless.html (June 12, 2007).

252. *Id.*

253. *Id.*

future jurors through the media and advertising. A recent press release by R.J. Reynolds, for example, repeatedly used the term "relative risk" in describing the range tobacco products it now offers.[254] The company stated, "we should not delay in allowing snus to compete with cigarettes for market share, and we should be prepared to accurately inform smokers about the relative risks of cigarettes, snus, and approved smoking-cessation medications."[255] Such statements could be used in the future by R.J. Reynolds to indicate that it has worked to educate smokers about the relative risk of tobacco products, and thus should not be responsible when people choose to use cigarettes.

If this is indeed the cigarette companies' strategy, it may succeed as a public relations matter. The companies have already invested heavily—for decades—in promoting the idea that smoking is an "adult choice" and a "right."[256] As McDaniel and Malone write, Philip Morris's regulatory and public relations strategy has long been focused on:

> [R]efram[ing] tobacco from a public health problem to an issue of individual choice. This strategy taps into American ideals of individual freedom, and in turn portrays public health advocates as extremists who support government intrusion into private decision making.[257]

Such arguments have been internalized by the American public. Most Americans now "agree that the public should have a right to smoke," even though there is often a public clamor to ban products that pose far less of a public health risk.[258] (As McDaniel and Malone note, the dietary supplement Ephedra was banned after being linked to the deaths of 155 people.[259]) Thus, as a public relations strategy, highlighting the "continuum of risk" of various tobacco products may help

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254. Reynolds Am. Inc., *supra* note 122.

255. *Id.*

256. *E.g.*, R.J. Reynolds Tobacco Company – Smoker's Rights, http://www.rjrt.com/rights/legSmokers.asp (last visited Nov. 17, 2007).

257. P.A. McDaniel & R.E. Malone, *Understanding Philip Morris's Pursuit of U.S. Government Regulation of Tobacco*, 14 TOBACCO CONTROL 193, 197 (2005); *accord* Michael S. Givel & Stanton A. Glantz, *Tobacco Lobby Political Influence on US State Legislatures in the 1990s*, 10 TOBACCO CONTROL, 124, 125 (2001); Claudia L. Menashe & Michael Siegel, *The Power of a Frame: An Analysis of Newspaper Coverage of Tobacco Issues*, 3 J. HEALTH COMM. 307, 321 (1998) ("[T]he tobacco industry has been steadfast in consistently targeting core human values as its dominant framing tactic. The three dominant tobacco interest frames (*positive economic force, moralizing/hostility/prohibition*, and *free speech/legal product*) conjure up images of an America whose citizens are free to pursue happiness and the American dream by making their own choices in an environment of economic prosperity.").

258. James Shanahan et al., *Cultivation and Spiral of Silence Effects: The Case of Smoking*, 7 MASS COMM. & SOC. 413, 425 (2004).

259. McDaniel & Malone, *supra* note 257, at 197.

the cigarette companies in their continuing quest to rehabilitate their public image.[260]

As a legal matter, though, an argument that a company should be excused from legal liability for its most deadly products because it also produces alternative products that are less deadly is not terribly compelling.[261] As suggested above, tobacco companies would be in a stronger position if they could argue that there is no available alternative to cigarettes and that they should be therefore excused from liability because they produce an "inherently unsafe" product.[262] The availability of a safer alternative is generally grounds for making a finding of liability more likely, not less likely.[263] Indeed, a comment to the Third Restatement of Torts explicitly provides that "[w]arnings are not . . . a substitute for the provision of a reasonably safe design."[264] A contrary rule would only encourage the proliferation of dangerous products by "finding products to be not defective that could easily have been designed safer without great expense or effect on the benefits or functions to be served by the product."[265]

Moreover, whether or not R.J. Reynolds's and Philip Morris's new smokeless products flop in the marketplace, plaintiffs can still present the general category of smokeless tobacco products as a feasible alternative design. Even though there are some early negative reports of Taboka sales, smokeless tobacco sales continue to increase overall by three or four percent each year.[266] Thus, if the tobacco

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260. Reynolds Am. Inc., *supra* note 122. Alternatively, given the fact that most Americans believe that smokeless tobacco is as harmful as smoking, it is questionable how effective highlighting the risk would be as a public relations strategy. C. Keith Haddock et al., *Modified Tobacco Use and Lifestyle Change in Risk-Reducing Beliefs About Smoking*, 27 AM. J. PREVENTIVE MED. 35, 37 (2004) ("[More than] 75% of men and 80% of women believed there was no health advantage of smokeless tobacco use over smoking.").

261. *Cf.* Perez v. Michael Weinig, Inc., No. Civ.A. 304CV0448, 2005 WL 1630018, at *6 (D. La. July 7, 2005) (declining to adopt a defense that would allow manufacturers to place the blame on the consumer for choosing an unsafe product in stead of selecting the safer, but still unsafe, alternative).

262. RESTATEMENT (SECOND) OF TORTS, § 402A cmt. k (1965). Some states have provided statutory immunity for products that are "inherently unsafe." *See* Anne M. Payne, Annotation, *Products Liability: Cigarettes and Other Tobacco Products*, 36 A.L.R. 5TH 541, 588–89 (1996).

263. Indeed, several courts held that once a prime facie products liability case has been established, "the manufacturer has the burden of proving the nonexistence of a feasible, safe alternative design." *Burden of Proving Feasibility of Alternative Safe Design in Products Liability Action Based on Defective Design*, 78 A.L.R. 4TH 154, § 2a (2007) (listing cases in § 7).

264. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. l (1998). The comment further states that "[i]n general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks." *Id.*

265. W. P. KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 99 (5th ed. 1984).

266. *Philip Morris' Taboka Snuff Has Sold Poorly, Analyst Says*, WINSTON-SALEM J., May 26, 2007 at D1; Vanessa O'Connell, *Marlboro Brand Goes Smokeless*, WALL ST. J., June 9, 2007, at A3 ("Unlike the cigarette market, where volume sales have fallen every year since the 1970s, smokeless-tobacco volumes have been growing at an average annual rate of 3% to 4% for more than a decade . . . .").

companies' goal was to reduce potential legal liability, setting up their smokeless products to fail would seem to be a poor strategy.

Of course, tobacco companies will continue to argue in court, as they have in the past, that smoking is an "adult choice" (despite the fact that most smokers became addicted to cigarettes as minors) and that the public is well-informed of the health risks of smoking (despite the companies' decades-long conspiracy to mislead the public about the dangers of smoking).[267] These arguments, however, do not rely on the cigarette companies' efforts to enter the smokeless tobacco market, and the fact that they are now producing such products will not significantly add to or detract from the force of their arguments. Indeed, the legal impact of the tobacco companies' entrance into the smokeless tobacco market, if any, is likely to be on the side of the plaintiffs.

CONCLUSION

The debate about smokeless tobacco harm reduction is just heating up and is likely to go on for some time. In June 2007, *The Lancet* brought some additional visibility to the issue, publishing two articles and an editorial about snus use.[268] One of the articles, by Coral Gartner and others, concluded that "smokers who switch to snus rather than continuing to smoke can realise substantial health gains" and that "[i]t is unlikely that these health gains would be offset by the adverse health effects of snus use."[269] *The Lancet*'s editorial, however, disagreed with Gartner's suggestion that health departments should promote snus, instead recommending that "clinicians advise their smoking patients on more flexible ways to quit smoking with existing approved medicines, rather than with snus."[270]

Despite the strong opinions on both sides of this debate, differences of opinion should not prevent tobacco control advocates from working together on points of agreement. The cigarette companies' entrance into the smokeless tobacco market is a clear sign that the issue of smokeless tobacco is of growing importance, and it is critically important for public health voices to respond to this latest development. As outlined in this article, tobacco control advocates should, at a minimum, be able to agree that smokeless tobacco products should not be marketed to minors and that tobacco producers should not be allowed to market smokeless tobacco products that are deliberately engineered to be more toxic than necessary. Public health advocates and attorneys can develop regulatory and litigation

267. Milberger et al., *supra* note 155, at iv22.

268. *See* Jonathan Foulds & Lynn Kozlowski, Comment, *Snus–What Should the Public-Health Response Be?*, 369 LANCET 1976 (2007); Coral E. Gartner et al., *Assessment of Swedish Snus for Tobacco Harm Reduction: An Epidemiological Modeling Study*, 369 LANCET 2010 (2007); Juhua Luo et al., *Oral Use of Swedish Moist Snuff (Snus) and Risk for Cancer of the Mouth, Lung, and Pancreas in Male Construction Workers: A Retrospective Cohort Study*, 369 LANCET 2015 (2007).

269. Gartner et al., *supra* note 268, at 2014.

270. *Id.* at 1977.

responses that further these goals, including active enforcement of the MSA and product liability cases that take aim at the design of smokeless tobacco products.

What (if any) impact the growing focus on smokeless tobacco may have on cigarette-related litigation is less certain. In theory, pointing to smokeless tobacco as a "feasible alternative design" may open up a crack in the tobacco companies' defenses that will allow more lawsuits to succeed. The way in which the major cigarette companies are marketing their smokeless tobacco products may even help facilitate this development. In the short term, it is unlikely that judges and juries will be overly receptive to such an argument. But unless legislators act first, it is inevitable that judges and juries will eventually conclude that a less harmful alternative should replace the most deadly consumer product ever produced. Whether the less harmful alternative will be smokeless tobacco is yet to be determined.