Suing the Salon: Are Indoor Tanning Salons the Next Big Tobacco Litigation?

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Indoor tanning salons have become quite popular over the past few years. Scientific research has established a clear link between skin cancer and ultraviolet light exposure from indoor tanning lamps. Despite these dangers, federal regulations on the labeling of indoor tanning lamps have been minimal. Existing regulations include restricted access to indoor tanning salons for individuals younger than 18 years old and eye protection requirements (Francis et al., 2005). Indoor tanning salons have been aggressive in disputing links between skin cancer and tanning beds, sometimes even claiming that there are various health benefits to the practice. In this endeavor, the Indoor Tanning Association has represented all tanning salons and released misinformation about both the safety of tanning and the validity of skin cancer claims raised by the American Dermatology Association and the American Cancer Society. Specifically, the Indoor Tanning Association has claimed that “tanning produces a psychologic sense of well-being, and induces vitamin D production, which lowers one’s overall cancer risk” (Francis, et al., 2005, p. 1040).

The first lawsuit for injuries resulting from indoor tanning was filed several years ago, and while that case remains unsettled, similar litigation is likely to follow (Loh, 2008; Nafar v. Hollywood Tanning Sys., Inc.). Regulatory blind spots have led to tort litigation against the indoor tanning industry. In 2006, a class action plaintiff brought the first lawsuit of this kind, presenting claims against an indoor tanning salon operator and citing the salon’s failures to warn consumers of the dangers of indoor tanning, breaches of warranty, and fraud (Nafar v. Hollywood Tanning Sys., Inc., 2006). Tanning litigation presents unique situations that raise interesting questions as to how litigation fits within the framework of similar tort claims against consumer companies.

Pursuing a case against the indoor tanning industry will prove just as difficult as recent efforts to pursue litigation against the tobacco industry. The issue is that in lifestyle commodities, such as tanning, beauty products, and consumed goods, both end product users (people undergoing tanning treatment) and manufacturers (people running indoor tanning salons) benefit from the lack of
regulations. Digging deeper into this overlap, the present paper draws parallels between the cigarette and tanning industries in order to uncover predictive correlations between both cases.

Dangers and Risks of Indoor Tanning

For some time now, the coveted physical appearance has been quite the opposite of the light-skinned hue that enthralled Americans in the early twentieth century. This change is largely due to the fact that darkly tanned individuals today are often perceived as the healthiest, wealthiest, and most attractive in American society (Rawe, 2006). The tanning industry capitalizes on this norm by perpetuating the idea that tanning is a psychological palliative for the onset of aging and death in the sense that tanning cultivates self-esteem and thereby counters the psychologically threatening aspects of mortality (Arndt et al., 2009). As consumers increasingly conclude that natural exposure to sunlight does not satisfy their tanning needs and self-appearance standards, they have turned to alternative sources to achieve a year-round tan. One of the most popular choices is the indoor, artificial-light tanning salon. These salons provide individual tanning beds in which users may expose themselves to high intensities of ultraviolet (UV) rays in short doses to attain a bronze tone (Rawe, 2006). Since its inception nearly thirty years ago, the tanning salon business has grown into a five billion dollar industry, with over thirty million indoor tanning salon users nationwide (Rawe, 2006).

While the use of tanning beds remains quite popular, it also presents a multitude of dangers, including an increased risk of skin cancer, eye damage, premature wrinkling, and skin rashes (FTC, 1997). Research shows that frequent use of tanning salons contributes to exponentially higher increases in skin cancer rates, particularly among young women (Rawe, 2006). The Food and Drug Administration (FDA), the Federal Trade Commission (FTC), the American Academy of Dermatology, the Centers for Disease Control and Prevention, the Department of Health and Human Services, the World Health Organization, and the American Medical Association have all presented evidence that shows that “increases in UV exposure, such as those received through the use of indoor tanning beds, damages the immune system and causes skin cancer.” Data compiled since 1975 also shows that the most lethal form of skin cancer, melanoma, has doubled in women fifteen to twenty-nine years old (American Academy of Dermatology, 1997). As a doctor at New York City’s Mount Sinai School of Medicine commented, “skin cancer used to be something old people got, but not a month goes by that I don’t see somebody in their 20s now. That was unheard of 10 years ago” (Rawe, 2006, p. 54). These national and regulatory organizations have essentially argued that there is no such thing as a safe tan and have discouraged any use of indoor tanning equipment. Nevertheless, indoor tanning salon operators continue to present their products as completely safe. Many companies in the industry explicitly advertise that indoor tanning does not cause cancer. Claims like these are propagated alongside those that merely imply
or indicate that there is no solid proof substantiating links between tanning beds and cancer.

States’ Regulations and Minors

The tanning salons’ false claims in advertisements are exacerbated by minimal federal regulations. Current regulations of the manufacturers of the tanning equipment are ineffectual, as they regulate only issues related to “radiation emissions and general warning labels” (21 C.F.R. § 1040.20 (2007)). Once the tanning machines reach the individual tanning salons, the regulation of the enterprises is largely left to individual states, less than thirty of which currently regulate tanning salon operators. Furthermore, many states lack requirements relating to tanning equipment registration, training of salon operators, and even equipment usage. The states that impose regulations include Alabama, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Virginia, West Virginia, and Wyoming (National Conference of State Legislatures). The state laws for banning tanning restrictions for minors are listed below (National Conference of State Legislators, 2014).

<table>
<thead>
<tr>
<th>Ban</th>
<th>States</th>
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<tbody>
<tr>
<td>Under 14 Ban – 8 states</td>
<td>Delaware, District of Columbia, Georgia, Maine, New Hampshire, North Carolina, North Dakota, and West Virginia</td>
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<tr>
<td>Under 15 Ban – 1 state</td>
<td>Alabama</td>
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<tr>
<td>Under 16 Ban – 2 states</td>
<td>Pennsylvania, and Wisconsin</td>
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<tr>
<td>Under 17 Ban – 3 states</td>
<td>Connecticut, New Jersey, and New York</td>
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<tr>
<td>Under 18 Ban – 7 states</td>
<td>California, Illinois, Minnesota, Nevada, Oregon, Texas, Vermont</td>
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Only 17 states have parental accompaniment laws, with nearly 65% listed as “under 14” (Ibid, 2014). Parental accompaniment laws are not much better, with barely 20% mandating parental permission for those under 18 (Ibid, 2014). As of August 1, 2014, only twenty-one states have bans, and even fewer mandate eye protection during indoor tanning sessions.

If they exist at all, state regulations relating to advertising or restrictions for minors are not universal, as documented by the National Council of State Legislatures, a situation that often results in tanning bed misuse. It should be noted that since it is illegal to allow minors to use tanning beds, data on how many minors are able to bypass regulations is scarce because of the inability to
question both the tanning salon operators and the minors about the incidence of underage use.

Similarities between cigarette smoking and indoor tanning

Successful litigation against cigarette companies reveals a number of striking similarities and shared characteristics with tort claims against indoor tanning salons. Cigarette smoking and indoor tanning are both nonessential, non-food-related, acquired behaviors (American Cancer Society, 2008). Consumption of either product at even low levels has been scientifically proven to cause disease, specifically cancer (American Cancer Society, 2008). When confronted with scientific evidence affirming a link between diseases and indoor tanning or cigarette consumption, companies from both industries have adamantly denied any connection to disease (Boeken v. Philip Morris Inc., 2005). Both industries have encouraged youth consumption, and consumers have filed lawsuits against companies producing both products, claiming injuries resulted from their consumption (Wolfson, 2001). The claims in both circumstances included failure to warn, fraud, and products liability as causes of action. Many commentators have made comparisons between the cigarette and indoor tanning industries; below, I analyze successful cases, categorized by type of claim, brought against the cigarette industry. In doing so, the present study will propose the strongest legal arguments for future indoor tanning litigation against tanning salons (Wolfson, 2001).

Fraud Claims

Tanning plaintiffs should have success in court when bringing fraud claims against tanning salons. Cigarette plaintiffs were successful in their fraud claims because they showed clear instances of tobacco company misconduct. The tobacco industry worked on a methodical and collaborative basis, but proving mere collusion is not enough for a fraud claim to be successfully lodged against the tanning industry. The exact language of the standard for fraudulent misrepresentation varies from state to state, but most states follow the Second Restatement approach:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other . . . for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation. (Restatement (Second) of Torts § 525, 1965)

Numerous cigarette plaintiffs were successful on fraud claims against the tobacco companies by presenting evidence that companies lied about the perils of cigarette smoking (Whiteley v. Philip Morris Inc., 2004). Courts have detailed how the tobacco companies presented arguments that attempted to deny evidence that smoking causes lung cancer. For instance, the California Court of Appeal noted:
Tobacco companies knowingly engaged in a deliberate scheme to deceive the public . . . about the health effects of smoking . . . In concert with others, defendants issued numerous false denials regarding the health hazards of smoking, manufactured a false controversy as to whether smoking cigarettes actually caused cancer . . . and falsely assured the public that they were diligently engaging in research to find the truth about any health risks of smoking. (Whiteley v. Philip Morris Inc., 2004, p. 843)

Courts deciding tobacco cases focused on the ways tobacco companies collaborated with each other. The tobacco companies colluded to argue publicly that cigarettes were not harmful to smokers’ health. For example, the companies aligned to issue a full-page ad entitled “A Frank Statement to Cigarette Smokers” that stated smoking was “not injurious to health” and that “no proof” existed that smoking caused lung cancer (New York Times, 1954).

By focusing on the factors that made tobacco-fraud claims particularly successful, indoor tanning plaintiffs can also make legitimate claims against indoor tanning salons’ PR practices. Plaintiffs should focus on instances of coordinated behavior on the part of tanning salon operators that demonstrates intent to deceive customers. While the levels of fraud seen in tobacco cases may not be identical to those of tanning salon cases, extreme fraud is not a necessary component in finding a defendant liable. The most significant consideration hinges on whether or not indoor tanning companies have continued to make fraudulent representations over a sustained period of time as part of discernible business strategies.

The advertisements regarding the health benefits of indoor tanning are clear examples of actionable fraud claims. The FTC expressly prohibits health claims unless they can be substantiated by scientific evidence (Cal. SunCare Inc., 1996). In 1996, the FTC reached a settlement with California SunCare, Inc. for health claims the company made about indoor tanning. The settlement agreement included a cease and desist order and required the company to spend $1.5 million on advertisements “cautioning consumers that tanning even without burning can cause skin cancer and premature skin aging” (FTC Press Release, November 19, 1996). This precedent clearly suggests that potential plaintiffs against the tanning salon industry should look to such FTC rulings for guidance, particularly on cases of fraud.

Failure to Warn

In addition to fraud claims, potential plaintiffs should also focus on failure-to-warn claims. The initial indoor tanning plaintiffs argued that tanning salons failed to warn consumers of known dangers associated with indoor tanning, including the risk of cancer (Lim, 2005). One factor in a failure-to-warn claim is a
plaintiff’s ability to argue ignorance of the product’s danger, a standard that dictates whether or not the plaintiff voluntarily assumed the risk of injury upon use. Successful cigarette plaintiffs did precisely this, arguing that the link between cigarette consumption and cancer was not common knowledge. They prevailed by pointing to both a lack of adequate warnings concerning tobacco’s dangers and affirmative industry statements denying that cigarettes were linked to disease (Whiteley v. Philip Morris Inc., 2004). The specific elements of failure to warn claims vary, but most states require that the plaintiff show: “(1) the defendant had reason to know of the dangers of using the product; (2) the warnings fell short of those reasonably required, breaching the duty of care; and (3) the lack of an adequate warning caused the plaintiff’s injuries” (Tuttle v. Lorillard Tobacco Co., 2004). The idea is that the plaintiff must prove that the ordinary consumer would not have known of the risks that defendants should have included on a warning. This consideration is known as the “common knowledge” doctrine, which releases the defendant from a duty to warn if the danger is “so well known to the community as to be beyond dispute” (Allgood v. R.J. Reynolds Tobacco Co., 1996).

Prior successful cases against cigarette companies demonstrate the necessity of overcoming the common-knowledge notion in a failure-to-warn case. At the same time, tanning salon patrons, crucially, do not share early cigarette consumers’ lack of knowledge concerning the link between smoking and cancer. This situation may constitute a hurdle for plaintiffs to overcome. Courts will likely conclude that a reasonable person should know that excessive use of indoor tanning is harmful to one’s health.

Indoor tanning plaintiffs can, however, overcome this common-knowledge hurdle by stating that they were unaware of the harm associated with each indoor tanning session. In making such a failure-to-warn argument, plaintiffs could explain that they had no knowledge concerning the true power of UV rays in an indoor tanning bed during a single session (Loh, 2008). In short, plaintiffs would claim that because of vague advertisements, they erroneously believed that the UV-ray intensity of indoor tanning beds would be equal in safety (if not safer) to those of an outdoor tanning session. Thus, had they been warned of the actual dangers of each indoor tanning session—dangers known by the indoor tanning salons and manufacturers—plaintiffs would have scaled back their use and the injury would not have occurred.

In reality, indoor tanning is much more harmful to consumers overall than outdoor tanning (Carruth, 2008). The UV exposure received from a single indoor tanning session is up to five times as powerful as the sun at the equator, but warnings relating to the increased power of UV rays in an indoor tanning session as compared to an outdoor session of the same length are noticeably absent in indoor tanning bed advertisements (Murray & Turner, 2004). This means that a single 15- to 30-minute salon session exposes the body to the same amount of harmful UV sunlight as an entire day at the beach.
Design-Defect Claims

In addition to bringing fraud and failure-to-warn claims, indoor tanning consumers might consider design-defect claims. Plaintiffs arguing this cause of action would argue that the tanning bed manufacturer sold a defective product that was unreasonably dangerous and caused injury. Plaintiffs who brought successful design-defect claims against the tobacco companies all had similar arguments. These plaintiffs identified the presence of specific defects in a particular brand of cigarettes rather than defects in all cigarettes in general. The plaintiffs suggested a reasonable alternative design for cigarettes that the manufacturers have adopted. These factors led to the ultimate success of cigarette plaintiffs, and these successes may be useful in formulating future indoor tanning design-defect claims.

Design-defect claims against tobacco manufacturers were successful because they showed that one cigarette brand in particular was defective due to its higher levels of carcinogenic tar than other brands and its lack of an effective filter technology that other companies used (Boerner v. Brown & Williamson Tobacco Co., 2005). Under the second, “unreasonably dangerous” element of the design-defect claim, successful cigarette plaintiffs also had to prove that they had no knowledge of the danger of smoking a cigarette during its use. The Restatement of Torts articulates a standard of unreasonable dangerousness: “The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. . . . Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful” (Restatement (Second) of Torts § 402A, 1965). In other words, the tendency to cause harm to one’s health does not automatically render a product unreasonably dangerous; plaintiffs will accordingly need to prove that certain tanning salons use products that are not up to industry standards and are thus dangerous beyond even the normal risks associated with tanning in the first place.

Lessons from Tobacco

Future indoor tanning plaintiffs should heed the lessons of these cigarette cases. Rather than make a broad attack on the general industry of indoor tanning beds, plaintiffs should aim to satisfy the initial “defective” requirement by looking at the specific deficiencies of a particular indoor tanning manufacturer. Whether this weakness is related to indoor tanning lamps failing to comply with federal regulations or continuing to emit higher levels of UVA or UVB rays than permitted, a design-defect claim would be viable. Such a claim would also fit within courts’ interpretations of the Restatement because the claim would allege a defect particular to one brand of indoor tanning equipment.

Plaintiffs should also argue that the social utility of indoor tanning is outweighed by the danger the practice poses. Since the indoor tanning industry
lacks congressional support, the industry must determine how to gain momentum in the debate. Society’s overall volume of indoor tanning may influence court’s decisions in the future: studies show that in 1965, near the peak of cigarette use, almost 52% of adult men and 34% of all adult women were smokers (Hoffman, 1997). Given its popularity, the cigarette industry was incredibly important to the U.S. economy, a consideration the courts rarely ignore. Despite the growing popularity of indoor tanning, its usage has not risen to the level of cigarette smoking. Strengthening this lack-of-social-utility claim, plaintiffs could point out that in addition to lower levels of use, indoor tanning is practiced solely for cosmetic reasons rather than fulfilling therapeutic needs.

Conclusion

Over the past ten years, the indoor tanning industry has grown exponentially. The industry has aggressively attempted to establish its presence in the American consumer market, often on the basis that artificial tanning is a necessity for healthy skin and a healthy body. Simultaneously, doctors and health organizations have emphasized the dangers of indoor tanning. Armed with data, much of which has been amassed since indoor tanning beds first began growing in popularity, doctors and health organizations unequivocally posit that indoor tanning is harmful to one’s health and ultimately increases the risk of cancer. As a result, lawsuits have begun to be filed, and it is likely that we will see more litigation against the indoor tanning industry in the future. Plaintiffs bringing tort claims against indoor tanning manufacturers and salons face a challenging battle, as the application of tort law in this area lacks clear precedent. However, by utilizing the arguments and tactics used by plaintiffs who successfully brought similar cases against the cigarette industry, indoor tanning plaintiffs could find a strong probability of finding success in the courtroom.

References


Cases and Codes


*Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, (5th Cir. 1996)


Restatement (Second) of Torts § 525, (1965).

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


About the Author

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