

WHAT IS A CIGARETTE? ELECTRONIC CIGARETTES AND THE TOBACCO MASTER SETTLEMENT AGREEMENT

“WE’RE ALL ADULTS HERE”¹

For us smokers, times have changed. But a few things remain the same: our desire to explore, to adventure, to roam without boundaries. With Blu, we can still be ourselves. After all, this country was founded on free will. Embrace it. Chase it. Blu eCigs. Take back your freedom.

—Stephen Dorff, Spokesman, Blue E-Cigs²

Sounds pretty great. What kind of country would America be without its freedom? To exercise that freedom, you should buy this product. This is an age-old tactic used to sell items ranging from automobiles all the way to guacamole.³ And it certainly is not the first time that this tactic has been used to sell products like electronic cigarettes. Tobacco companies have been encouraging people to exercise their purchasing freedom for decades, using slogans like American Tobacco Company’s now-infamous “torches of freedom” of the late 1920s or Virginia Slims’ 1968 “You’ve come a long way, Baby.”⁴ Ads promoting cigarettes appeared on television frequently in the 1950s and ’60s with catchy jingles, and many cigarette companies funded their own programs, such as *The Camel News Caravan* funded by Camel on NBC.⁵ These advertisements came to a halt after the revelation of cigarettes’ direct link to lung cancer⁶ and the television

1. Blu Cigs, *Take Back Your Freedom Featuring Stephen Dorff—Brought to You by Blu Electronic Cigarettes*, YOUTUBE (Mar. 5, 2013), <https://www.youtube.com/watch?v=gGAhXv23MEs>.

2. Blu Cigs, *Blu eCigs—Chase It*, YOUTUBE (Dec. 9, 2013), <https://www.youtube.com/watch?v=60rsOj3-9fI>.

3. These examples are from Dodge’s ad campaign for the Challenger, with the tag line, “Here are a couple things America got right: cars and freedom,” and Qdoba’s recent ad campaign, “Freedom tastes like guacamole.” Nicole Kohler, *Improve Your Marketing by Addressing Customer Pain Points*, WEBPAGEFX (Nov. 20, 2014), <http://www.webpagefx.com/blog/marketing/customer-pain-points/>; TheRealBigBlack’s Channel, *Dodge Challenger—George Washington “Freedom” American Revolutionary War Ad*, YOUTUBE (Nov. 17, 2010), <https://www.youtube.com/watch?v=BqpJvey-7-s>.

4. See Hal Weinstein, *How an Agency Builds a Brand—The Virginia Slims Story*, in PAPERS FROM THE 1969 A.A.A.A. REGION CONVENTIONS 1, 16 (1970), available at <http://legacy.library.ucsf.edu/tid/efc64e00/pdf>; Amanda Amos & Margaretha Haglund, *From Social Taboo to “Torch of Freedom”: The Marketing of Cigarettes to Women*, 9 TOBACCO CONTROL 3, 3–4 (2000).

5. See Dwight Jensen, *Camel News Caravan*, in ENCYCLOPEDIA OF TELEVISION NEWS 32, 32 (Michael D. Murray ed., 1999).

6. This revelation came most prominently from the Surgeon General’s report in 1964. U.S. DEP’T OF HEALTH, EDUC. & WELFARE, SMOKING AND HEALTH:

advertisements' correlation with the use of tobacco products. These findings were met by congressional action in 1969 in the form of the Public Health Cigarette Smoking Act,⁷ which required strong health warnings on cigarette packages and banned the advertisement of "cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."⁸

Restrictions on the advertisements of cigarettes continued, as did efforts by Congress to educate the public on the adverse effects of smoking.⁹ At the same time, individuals who had developed lung cancer began suing tobacco companies on grounds of tort liability.¹⁰ These suits dissolved quickly—either because they were easily swatted down by the tobacco companies for lack of proximate cause and assumption of risk or because plaintiffs were too easily drowned in the cost of competing in litigation.¹¹ This trend continued until a shift occurred in litigation strategy in the 1990s, with plaintiffs forming class-action suits supported by state attorneys general

REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 31 (1964), available at <http://profiles.nlm.nih.gov/ps/access/NNBBMQ.pdf>.

7. Pub. L. No. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331–1341 (2012)).

8. 15 U.S.C. § 1335 (2012). This legislation was upheld as constitutional in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd mem. sub nom.* Nat'l Ass'n of Broadcasters v. Kleindienst, 405 U.S. 1000 (1972). In a striking passage, even the dissent, while criticizing the "heavy hand of government," conceded that "the real 'Marlboro Country' is the graveyard." *Id.* at 587 (Wright, J., dissenting).

9. *See, e.g.*, Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 2, 79 Stat. 282, 282 (codified at 15 U.S.C. § 1331 (2012)) (creating a "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health"); Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4(a)(1), 98 Stat. 2200, 2201–02 (codified as amended at 15 U.S.C. § 1333 (2012)) (strengthening the required warnings on labels for cigarettes); Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, §§ 4, 6, 84 Stat. 87, 88–89 (codified as amended at 15 U.S.C. §§ 1333, 1335 (2012)) (banning cigarette advertisements "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission" and strengthening the warning required to appear on cigarette packages); Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, §§ 2–3, 100 Stat. 30, 30–31 (codified at 15 U.S.C. §§ 4401–4402 (2012)) (extending the regulatory provisions of the Federal Cigarette Labeling and Advertising Act to smokeless tobacco products); ADAMHA Reorganization Act, Pub. L. No. 102-321, § 1926, 106 Stat. 323, 394 (codified at 42 U.S.C. § 300x-26 (2012)) (creating incentives for States to regulate the retail sale of tobacco products by making States' receipt of certain block grants contingent on their prohibiting the sale of tobacco products to minors); Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98-24, § 505(b), 97 Stat. 175, 178 (repealed 2000) (requiring the Secretary of Health and Human Services to report to Congress every three years on the "addictive property of tobacco" and to include recommendations for action that the Secretary may deem appropriate).

10. For an in-depth look at these suits, see generally Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 110 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

¹¹ *Id.* at 113–14.

seeking reimbursement costs for Medicaid and other state-provided healthcare.¹² This resulted in state settlement agreements, culminating in the 1998 Tobacco Master Settlement Agreement (“MSA”) between forty-six settling states, five U.S. territories, the District of Columbia, and the four main cigarette manufacturers: Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Phillip Morris Incorporated, and R.J. Reynolds Tobacco Company.¹³

The major focus of the MSA, aside from settlement payments, was the advancement of public health and, more specifically, the reduction of youth smoking.¹⁴ Some opponents of the MSA argued that the use of mass tort settlements as a form of regulation circumvented the legislature’s role and threatened the normal separation of powers, creating a “fourth branch of government.”¹⁵ Advocates saw the MSA as a positive step for *parens patriae* litigation to fill in the gaps of regulation and help alleviate some of the financial burdens caused by corporations’ health and environmental disasters.¹⁶ Mainly it was a victory for anti-smoking advocates across the United States. In any event, the MSA laid out clear prohibitions on advertising to youth, prohibitions on advertisements in the media, a prohibition on outdoor advertisements in general, limitations on lobbying efforts, and a general prohibition on material misrepresentations of the health consequences of tobacco products.¹⁷ While the MSA is, as one professor put it, “just one brick in the regulatory edifice that houses the smoking policy of the United States,”¹⁸ it is an important one in its protection of youth and its creation of a type of cause of action against cigarette manufacturers that even indirectly target youth in their advertising.¹⁹

12. See *infra* text accompanying notes 35–46.

13. *Master Settlement Agreement*, PUB. HEALTH L. CENTER § II(hh), (qq), (rr), <http://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf> (last visited Feb. 25, 2015). Mississippi, Florida, Texas, and Minnesota had already settled in alternate agreements prior to the MSA and were not included. See *id.* § II(qq).

14. *Id.* § I. The MSA will be discussed in Part I.

15. See Douglas McCollam, *Long Shot*, AM. LAW., June 1999, at 86, 86. For a discussion on the seeming overreach of state attorneys general, see generally Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913 (2008) (exploring the distortion of “governmental priorities and fiscal policy” by the coordination between state attorneys general and plaintiffs’ law firms); Victor E. Schwartz et al., *Can Governments Impose a New Tort Duty to Prevent External Risks? The “No-Fault” Theories Behind Today’s High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923 (2009) (criticizing the foundational basis for the lawsuits leading to the MSA, as well as their implication on future government recoupment suits).

16. See, e.g., Michael L. Rustad & Thomas H. Koenig, *Reforming Public Interest Tort Law to Redress Public Health Epidemics*, 14 J. HEALTH CARE L. & POLY 331, 366–67, 373 (2011).

17. *Master Settlement Agreement*, *supra* note 13, § III.

18. Eric A. Posner, *Tobacco Regulation or Litigation?*, 70 U. CHI. L. REV. 1141, 1141 (2003) (reviewing W. KIP VISCUSI, *SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL* (2002)).

19. *Master Settlement Agreement*, *supra* note 13, §§ III(a), VII.

However, electronic cigarettes did not exist at the time the MSA was created. There is not a section in the MSA that defines “electronic cigarettes.” Because of this, we now have a recurrence of a form of advertisement that we have not seen for decades: a person engaging in smoking behavior. The phrase “smoking behavior” is used because, technically, the actors are not “smoking” in the traditional sense. The electronic cigarette (or “e-cigarette”) industry has taken great pains to separate the idea of e-cigarettes from traditional tobacco cigarettes.²⁰ In an attempt to rebrand the habit, e-cigarette manufacturers have devised a new verb: “vape.”²¹ In fact, over the past few years the word has become part of the cultural lexicon, being selected as the Oxford English Dictionary’s word of the year for 2014.²² With the rise of e-cigarettes, as with any new technology, states are struggling to decide the best course of action, be it by bringing e-cigarettes under the existing definition of “tobacco products” or by creating an entirely new framework for them.²³ Currently forty-one states ban the sale of e-cigarettes to minors,²⁴ defining them as “alternative nicotine products,” “products made or derived from tobacco,” or “vapor products,” and eighteen states partially ban their public use alongside traditional cigarettes.²⁵ Additionally, 354 cities and counties have enacted total smoke-free bans, and 186 others have enacted partial local bans.²⁶ However, there is currently no regulation regarding advertisements, as Congress has yet to act on the subject. The Food and Drug Administration (“FDA”) had a comment period for proposed deeming regulation that ended in August 2014 after being extended from July 9, 2014.²⁷ However, even with these deeming regulations, the FDA is

20. *Blu eCigs Electronic Cigarettes: A Bright Choice!*, BLU ECIGS, <http://www.blucigs.com/blu-ecigs-bright-choice/> (last visited Feb. 23, 2015) (promoting e-cigarettes as an “alternative to cigarettes”); *FAQ | Warning*, NJOY, <https://www.njoy.com/faq> (follow “What is an NJOY e-cigarette?” hyperlink) (last visited Feb. 23, 2015) (distinguishing e-cigarettes from tobacco cigarettes).

21. Matt Schiavenza, *The Word of the Year Is a Total Drag*, ATLANTIC (Nov. 18, 2014, 5:37 PM), <http://www.theatlantic.com/technology/archive/2014/11/oxford-dictionary-names-vape-as-2014-word-of-the-year/382919/>.

22. Oxford Dictionaries, *The Oxford Dictionaries Word of the Year Is . . . Vape*, OXFORDWORDS BLOG (Nov. 17, 2014), <http://blog.oxforddictionaries.com/2014/11/oxford-dictionaries-word-year-vape/>.

23. For current state-law treatment of e-cigarettes, see *Alternative Nicotine Products: Electronic Cigarettes*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/health/alternative-nicotine-products-e-cigarettes.aspx> (last updated Feb. 26, 2015).

24. *Id.* The remaining states are Maine, Massachusetts, Montana, New Mexico, North Dakota, Oregon, Pennsylvania, and Texas. *Id.* Michigan has a law prohibiting sales to minors that is pending the governor’s signature. *Id.*

25. *Id.*; U.S. State and Local Laws Regulating Use of Electronic Cigarettes as of April 2, 2015, AM. NONSMOKERS’ RTS. FOUND. 1–3 [hereinafter *State and Local Laws*], <http://www.no-smoke.org/pdf/ecigslaws.pdf> (last visited Apr. 7, 2015). The partial bans vary widely from state to state, and, for reasons of clarity, I have included any and all bans in these numbers.

26. *State and Local Laws*, *supra* note 25, at 3–11.

27. Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 79 Fed. Reg. 23,142 (proposed Apr. 25, 2014) (to be codified at 21 C.F.R. pts. 1100, 1140, 1143). A deeming regulation is a rule or regulation that

mainly focused on labeling, free samples, minimum-age requirements, health warnings, and vending machine sales.²⁸ This still leaves open a regulatory gap in advertisement and youth targeting by e-cigarette companies.

This Comment focuses on using the already existing framework of the MSA and how, under its provisions, the regulatory gap can quite possibly be filled. While the FDA's deeming regulations would be a positive step forward and further action by the states to reduce youth access to electronic cigarettes is needed, the MSA has the ability to quickly reach across forty-six state jurisdictions, as well as five U.S. territories, and bring e-cigarettes under the MSA's umbrella. Part I focuses on the events that led to the MSA itself and its implications. Part II examines the MSA's specific provisions and regulatory framework. Part III explains the industry post-MSA and the rise of e-cigarettes within the industry. Part IV discusses past enforcement of the MSA, examines how the courts have responded to possible contractual interpretations of the MSA's provisions, and contains the arguments for the inclusion of e-cigarettes within the framework based on the MSA's definitions and purpose of eliminating youth smoking. In the Conclusion, this Comment will examine what the future may hold for the e-cigarette industry as well as the tobacco industry as a whole.

I. THE MASTER SETTLEMENT AGREEMENT

In the annals of litigation history, there has never been another battle quite like the aptly named Tobacco Wars. Congress's struggle with what to do about the problem of addiction and smoking, coupled with political stances on both sides and pressure from powerful tobacco lobbying groups, created a deadlock in the 1990s.²⁹ A pinnacle of the struggle came on April 14, 1994, when the CEOs of the seven largest tobacco companies in the United States were called to

extends the FDA's jurisdiction to new tobacco products. *The FDA & Deeming Regulations of E-cigarettes*, CASAA (Mar. 3, 2013), http://casaa.org/deeming_regulations.html.

28. Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 79 Fed. Reg. at 23,143–44. Though advertising to youth by electronic cigarettes could be brought under the Tobacco Control Act ("TCA"), the FDA is not currently dealing with the issue as such. See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 3(2), 123 Stat. 1776, 1781 (2009) ("The purposes of this division are . . . to ensure that the Food and Drug Administration has the authority to address . . . the use of tobacco by young people . . ."). Though some factual assertions in the comment may be called into question, a good insight into the FDA's action under the TCA in regards to e-cigarettes may be found in Nick Dantonio, Comment, *Vape Away: Why a Minimalist Regulatory Structure Is the Best Option for FDA E-Cigarette Regulation*, 48 U. RICH. L. REV. 1319, 1353–58 (2014); see also *Compliance and Enforcement Report*, FOOD & DRUG ADMIN. CENTER FOR TOBACCO PRODUCTS, <http://www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM396614.pdf> (last visited Feb. 23, 2015).

29. For an excellent account of the different waves of litigation, as well as interviews with individuals directly involved, see PETER PRINGLE, *CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE* (1998).

testify before the congressional Health and Environment Subcommittee.³⁰ Following testimony on the record from the CEOs about the “growing and disturbing trend” of labeling cigarettes as addictive, equating cigarettes with hard drugs, they were questioned by Congressman John Bryant on the addictive properties of nicotine.³¹ Questioning the usual legal defense of the tobacco companies in litigation, Congressman Bryant pointed out that the companies’ normal defense was to show that smokers used cigarettes out of their own free will—a defense that would be circumvented should their products prove to be addictive—and that the CEOs had a vested interest in maintaining that defense in front of Congress.³² This line of questioning culminated in an insinuation that the CEOs had discussed the need to state in the same words that “nicotine is not addictive,” to which Edward Horrigan of the Liggett Group replied, “That’s absolutely outrageous.”³³ Congressman Bryant responded by saying that he found it difficult to hear the CEOs “characterizing anything as outrageous after seven apparently intelligent people have stood here and told the American people, 250 million of whom know better, that cigarettes are not addictive.”³⁴

Another key event in 1994 was the leaking of what became known as the “Merrell Williams papers.” Merrell Williams, a paralegal working for a firm in Louisville, Kentucky, that represented Brown & Williamson (the third-largest cigarette manufacturer at the time), leaked internal documents to a personal injury lawyer.³⁵ The documents “ies of the tobacco industry—that cigarettes don’t cause cancer, nicotine is not addictive[,] and we don’t market to kids.”³⁶ After the leak, the documents were used in lawsuits by a multitude of state attorneys general, who were further aided in litigation by industry secrets revealed by a former Brown & Williamson executive, Jeffrey Wigand, on CBS’s *60 Minutes*.³⁷ After decades of downplaying the risks associated with smoking and the revelation of knowingly using outdated arguments, the tobacco companies were beset on all sides by litigation, in the form of plaintiffs’ lawyers teaming up with state attorneys general, and faced an American public that was ready for blood.

An agreement was reached in 1997 between the states and the major tobacco companies in the form of a “global settlement.”³⁸ The settlement, which was brought to Congress to end the Tobacco Wars, obligated the industry to pay \$368.5 billion over the course of twenty-

30. *Id.* at 77.

31. *Id.* at 79–81.

32. *Id.* at 79–80.

33. *Id.* at 81.

34. *Id.*

35. Douglas Martin, *Merrell Williams Jr., 72; Bared Big Tobacco*, N.Y. TIMES, Nov. 27, 2013, at B17.

36. *Id.* (internal quotation marks omitted).

37. See *60 Minutes: Jeffrey Wigand, Ph.D.* (CBS television broadcast Feb. 4, 1996), available at <http://www.cbsnews.com/videos/jeffrey-wigand-phd-2-parts/>.

38. Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 338 (2001).

five years.³⁹ The settlement would have also precluded any other types of class action and any punitive damages sought in individual suits for industry conduct that occurred before the enactment of the legislation.⁴⁰ As Congress debated the legislation, at one point amending the bill to increase the industry's financial obligation to \$516 billion and eliminate its immunity from litigation,⁴¹ the tobacco companies involved decided their next move would be to proceed with settlement agreements with the states closest to trial: Mississippi on July 3, 1997, followed by Florida on August 25, 1997, Texas on January 16, 1998, and Minnesota on May 8, 1998.⁴² These settlements amounted to approximately \$40 billion in payments over twenty-five years.⁴³ Little over a month after the tobacco companies settled with Minnesota, negotiations on congressional legislation fell through.⁴⁴

By November of the same year, the industry had negotiated a settlement, the MSA, with the remaining forty-six states.⁴⁵ The total bill for Big Tobacco was less than the 1997 proposal, with annual payments totaling \$204.5 billion through 2025; however, it only settled the state and local medical-cost-reimbursement lawsuits, falling far short of the industry-wide immunity contained in the 1997 proposal.⁴⁶ The door was left open for future class-action and individual lawsuits, so long as they did not contain the signing state governments as parties. By the same token, the states did not get all of the prohibitions they would have been afforded in the 1997 proposal, namely limiting tobacco sales to face-to-face transactions, banning use of all human imagery, banning advertisements on the Internet, and banning all free samples and vending machine sales.⁴⁷ However, in spite of the lack of these provisions in the MSA, the settlement did make great strides with specific prohibitions that were seen as directly affecting youth consumption.

II. THE MSA'S REGULATORY FRAMEWORK

A. *A Prohibition on Youth Tar*

39. *Id.*

40. *Id.* at 338–39.

41. This amendment actually led to the death of the then-called McCain tobacco bill, S. 1415, 105th Cong. (1998). The bill, along with mandating \$516 billion in annual payments for the first twenty-five years, mandated that a portion of the payments be used to offset costs to tobacco growers. *Id.* For a comprehensive comparison of the MSA, the 1997 proposed legislation, and the McCain tobacco bill, see C. STEPHEN REDHEAD, CONG. RESEARCH SERV., RL30058, TOBACCO MASTER SETTLEMENT AGREEMENT (1998): OVERVIEW, IMPLEMENTATION BY STATES, AND CONGRESSIONAL ISSUES 12–14 tbl.1 (1999), available at <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL30058.pdf>.

42. REDHEAD, *supra* note 41, at 1; Rabin, *supra* note 38, at 340.

43 Rabin, *supra* note 38, at 340.

44. REDHEAD, *supra* note 41, at 1.

45 *Id.*

46. *See id.* at 12–14 tbl.1.

47. *See id.*

The first portion of regulations in the “Permanent Relief” section of the MSA addresses advertising that reaches minors, beginning with a direct prohibition of youth targeting.⁴⁸ The language states that none of the tobacco industry signatories “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 the incidence of Youth smoking within any Settling State.”⁴⁹ The section is broad, encompassing any type of action that may target youth, either in earnest or in effect.

Following this is a series of specific bans on types of advertisements that had come to be associated with an increase in youth exposure to cigarettes, which correlated with an increase in youth smoking. The bans include the use of cartoons in advertisements and labeling;⁵⁰ brand-name sponsorship of concerts, athletic events, or any other youth events;⁵¹ free samples and gifts;⁵² and a pack size of fewer than twenty cigarettes.⁵³ Giving away free samples at concerts and having what were known as “kiddie packs,” containing only a few cigarettes as a cheap alternative, were only a few of the tactics used to appeal to youth at the time the MSA was signed.⁵⁴

B. *Removing Public Advertisements*

The second major portion of regulations to come out of the MSA was a more general prohibition on advertisements. The MSA’s first sweeping change was the removal and ban of “Outdoor Advertising” and “Transit Advertisements.”⁵⁵ As per the definitional section of the MSA, “Outdoor Advertising” is defined as all billboards, signs in arenas, stadiums, shopping malls, and arcades (another youth venue), and any advertisement that could be seen outside other than a sign smaller than fourteen square feet located directly outside of a “retail establishment that sells Tobacco Products.”⁵⁶ “Transit Advertisements” include any advertising that was placed on or inside

48. *Master Settlement Agreement*, *supra* note 13, § III(a).

49. *Id.*

50. *Id.* § III(b).

51. *Id.* § III(c)(1).

52. *Id.* § III(g)–(h).

53. *Id.* § III(k).

54. See Brad Sherman, *For Sake of Children, Congress Must Ban “Kiddie Packs,”* L.A. TIMES (Mar. 1, 1998), <http://articles.latimes.com/1998/mar/01/local/me-24293> (describing packages containing only one or two cigarettes as “a starter kit for the not-yet-addicted”). The TCA was signed in 2009, giving the FDA the authority to regulate the manufacture, distribution, and marketing of tobacco products. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 3(1), 123 Stat. 1776, 1781 (2009) (“The purposes of this division are . . . to provide authority to the Food and Drug Administration to regulate . . . the manufacture, marketing, and distribution of tobacco products . . .”). The FDA also has specific regulations aimed at “kiddie packs” of less than twenty cigarettes. 21 C.F.R. § 1140.16(b) (2014).

55. *Master Settlement Agreement*, *supra* note 13, § III(d).

56. *Id.* § II(ii).

of private or public vehicles that were used to transport individuals, as well as the areas “within any bus stop, taxi stand, transportation waiting area, train station, airport[,] or any similar location.”⁵⁷

In addition to this outdoor prohibition, there was an even larger prohibition of any payments the tobacco industry might make to have its products appear in the media.⁵⁸ It extended to all media that reached the public, including “any motion picture, television show, theatrical production or other live performance, live or recorded performance of music, commercial film or video, or video game . . .”⁵⁹ It was routine performance for the tobacco industry to pay stars to appear in advertisements for their products, but it was also routine, as was revealed by the Merrell Williams papers and the Jeffrey Wigand *60 Minutes* interview, for companies to make payments to the media industry in exchange for stars smoking on the big and small screens.⁶⁰ Lastly, there was a prohibition on “Brand Name Merchandise,” banning apparel or other merchandise bearing brand names and keeping individuals from becoming walking advertisements for the tobacco industry.⁶¹

C. *Advancing the Public Health*

The third major portion of regulations consisted of a series of commitments and prohibitions intended to affect the overall advancement of public health. The first of these commitments was that each tobacco manufacturer that was a signatory to the MSA would promulgate corporate principles expressing commitment both to the MSA and to a reduction in the use of tobacco products by youth.⁶² This commitment required the participating tobacco manufacturers to “designate an executive level manager . . . to identify methods to reduce Youth access to, and the incidence of Youth consumption of, Tobacco Products,” and it urged employees to do the same.⁶³ In addition, the MSA placed specific limitations on the industry’s use of lobbying efforts to oppose state and local legislation or administrative rules that were intended to reduce the use and access of tobacco products by youth.⁶⁴ This provision includes a requirement that tobacco lobbyists seek authorization from their respective manufacturer before taking any action, extending liability under the MSA to the industry’s lobbyists as designated agents under the agreement.⁶⁵

57. *Id.* § II(xx).

58. *Id.* § III(e).

59. *Id.*

60. See NAT’L CANCER INST., U.S. DEP’T OF HEALTH & HUMAN SERVS., THE ROLE OF THE MEDIA IN PROMOTING AND REDUCING TOBACCO USE 360–65 (Ronald M. Davis et al. eds., 2008), available at http://cancercontrol.cancer.gov/brp/tcrb/monographs/19/m19_complete.pdf.

61. *Master Settlement Agreement*, *supra* note 13, § III(f), (i), (j).

62. *Id.* § III(l).

63. *Id.*

64. *Id.* § III(m).

65. *Id.* § III(m)(A).

Further, the MSA dissolved the Tobacco Institute, the Council for Tobacco Research-U.S.A., and the Center for Indoor Air Research, all of which were tobacco-industry trade groups that had heavily focused their lobbying efforts on preventing any tobacco-related legislation and disseminating false information about the adverse health effects of tobacco smoking.⁶⁶ In addition to this dissolution, the MSA imposed additional restrictions on the formation of new trade associations. These restrictions required new trade associations to comply with the provisions of the MSA and provided additional oversight of any new trade association by the settling states under applicable antitrust laws.⁶⁷ The final section on the advancement of public health prohibited any actions taken by the manufacturers that resulted in the suppression of medical and scientific research regarding smoking and health.⁶⁸

The MSA also prohibited any type of material misrepresentation regarding the health consequences of using any of the participating manufacturers' products or ingredients.⁶⁹ These provisions could effectively reopen the door to litigation if it were discovered that the manufacturers had resumed using the same tactics that they had prior to the MSA.⁷⁰

III. POST-SETTLEMENT AND THE RISE OF ELECTRONIC CIGARETTES

One would think that with all of the prohibitions and restrictions on advertising and the \$204.5 billion price tag of the MSA, coupled with the four other state settlements and expanding regulations by the federal government, that the manufacturers of tobacco products would have been dealt a crippling blow from which it would be difficult to recover. In reality, however, it appears as though the industry suffered no major harm and quite possibly benefited from avoiding mass liability and damages that might have been awarded by juries in each state.⁷¹ In the two years following the MSA, the top five U.S.-based tobacco manufacturers saw an increase in profits from domestic sales, as well as an increase in the value of each company.⁷² Ironically, in some sense the MSA entrenched the tobacco industry by improving the financial health of tobacco companies and creating an

66. *Id.* § III(o); see Lisa A. Bero, *Tobacco Industry Manipulation of Research*, 120 PUB. HEALTH REP. 200, 201-05 (2005) (discussing how the tobacco industry funded research through the Tobacco Institute, the Council for Tobacco Research-U.S.A., and the Center for Indoor Air Research).

67. *Master Settlement Agreement*, *supra* note 13, § III(p).

68. *Id.* § III(q).

69. *Id.* § III(r).

70. The MSA's formal enforcement procedure is laid out in section VII. See *id.* § VII.

71. See F. A. Sloan et al., *Impacts of the Master Settlement Agreement on the Tobacco Industry*, 13 TOBACCO CONTROL 356, 358-59 (2004), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1747950/pdf/v013p00356.pdf> (discussing the performance of the tobacco industry following the Master Settlement Agreement).

72. *Id.*

atmosphere for the settling states to become financially dependent on the companies' continued payments to the MSA's escrow accounts.⁷³

Despite these financial observations, the amount of cigarettes that adults smoke has steadily declined over the past two decades, and the extent to which cigarettes are used by youth has declined as well.⁷⁴ Whether the MSA has been a major contributing factor in America's overall smoking habit is up for debate; however, there is clear evidence that the amount of exposure a young individual has to smoking behavior in advertisements and media is directly correlated to an increase in the likelihood that that individual will smoke.⁷⁵ And with this exposure to smoking behavior comes the question of what to do with a product that seems to be taking the tobacco industry by storm: the e-cigarette.

A. *What Is an E-cigarette?*

Today's e-cigarette advertisements may be new, but the first smokeless, non-tobacco cigarette was actually patented by Herbert A. Gilbert in 1965.⁷⁶ His device was closer to some type of plug-in vaporizer than today's e-cigarettes and had an additional specification for physicians' use as a medical device.⁷⁷ The device contained no nicotine but did provide for a flavor cartridge.⁷⁸ The purpose of the device was similar to that of wooden cigarettes as it was solely used for the "feeling" or psychological effect of using a cigarette.⁷⁹ However, in remarkable similarity to today's e-cigarettes, the patent claims the device can be used "to maintain the satisfaction of smoking without any of its disadvantages."⁸⁰ But this is where the similarities

73 See Andrew J. Haile, *Sin Taxes: When the State Becomes the Sinner*, 82 TEMP. L. REV. 1041, 1053–57 (2009) (examining the conflict of interest between protecting the public health and states' dependence on tobacco revenues).

74. Israel T. Agaku et al., *Current Cigarette Smoking Among Adults—United States, 2005–2012*, 63 MORBIDITY & MORTALITY WKLY. REP. 29, 31–32 (2014) (finding that cigarette smoking by adults decreased from 20.9% in 2005 to 18.1% in 2012); Laura Kann et al., *Youth Risk Behavior Surveillance—United States, 2013*, 63 MORBIDITY & MORTALITY WKLY. REP.: SURVEILLANCE SUMMARIES, June 13, 2014, at 1, 14 (finding that cigarette smoking by individuals under eighteen years of age decreased from 18.1% in 2011 to 15.7% in 2013).

75. See Gilbert J. Botvin et al., *Smoking Behavior of Adolescents Exposed to Cigarette Advertising*, 108 PUB. HEALTH REP. 217, 222 (1993) (finding a correlation between adolescent smoking behavior and exposure to cigarette advertising); Todd F. Heatherton & James D. Sargent, *Does Watching Smoking in Movies Promote Teenage Smoking?*, 18 CURRENT DIRECTIONS PSYCHOL. SCI. 63, 63–67 (2009) (finding that around 70% of current movies contain cigarette smoking and that youth who watched smoking behavior in these movies were three times as likely to smoke as compared to those who had little to no exposure to these movies).

76. Smokeless Non-Tobacco Cigarette, U.S. Patent No. 3,200,819 (filed Apr. 17, 1963) (issued Aug. 17, 1965).

77. See *id.* at col. 1 ll. 11–13.

78 *Id.* at col. 1 ll. 9–22, col. 4 ll. 1, 52.

79 See *id.* at col. 1 ll. 23–29, col. 3 ll. 52–55, 60–65.

80. *Id.* at col. 3 ll. 52–55.

end as the machine lacked the practical size that e-cigarettes have today.

The technology needed for the modern e-cigarette would not come about until an inventor in China named Hon Lik filed a patent in 2003, and even so, today's typical e-cigarettes were not introduced to the U.S. market until later, in 2004.⁸¹ The basic components of a typical e-cigarette are a cylindrical casing with air-holes that houses an atomizer, a nicotine and flavor cartridge, a sensor of some kind, a battery, and an LED light.⁸² When a user takes a draw from the e-cigarette, the sensor activates the LED along with the atomizer, which vaporizes the liquid nicotine and allows for the nicotine in vapor form to flow into the user's mouth and lungs.⁸³ Hence the origin of the word "vaping."⁸⁴ That being said, e-cigarette companies, perhaps on advice from their lawyers, have refrained from holding out their products as smoking cessation devices. Should they have done so, they would have had to obtain approval of the FDA to market their products and to verify any health claims.⁸⁵ Instead, like placebos used to imitate the feel of smoking, e-cigarettes go as far as possible to imitate a real cigarette in order to attract users. Unlike placebos, however, e-cigarettes have actual nicotine derived from actual tobacco.⁸⁶

B. Who Sells Them?

Current participants in the e-cigarette market include, out of over 466 emerging brands,⁸⁷ Reynolds American Incorporated, Lorillard Incorporated, Altria Group Incorporated, and quite possibly the Imperial Tobacco Group PLC.⁸⁸ Imperial Tobacco, while not one of

81. Kerry Cork, *To Vape or Not to Vape: Controversy Swirls Around E-cigarettes*, 16 NALBOH NEWSBRIEF, no. 4, 2009, at 7, 7, available at <http://www.publichealthlawcenter.org/sites/default/files/resources/article-cork-ecigarettes-12-09.pdf> (describing the "vaping" controversy as it was in 2009); Barbara Demick, *A High-Tech Approach to Getting a Nicotine Fix*, L.A. TIMES (Apr. 25, 2009), <http://articles.latimes.com/2009/apr/25/world/fg-china-cigarettes25> (explaining the idea behind Hon Lik's invention).

82. Christopher J. Brown & James M. Cheng, *Electronic Cigarettes: Product Characterisation and Design Considerations*, 23 TOBACCO CONTROL ii4, ii4–ii5 (2014), available at http://tobaccocontrol.bmj.com/content/23/suppl_2/ii4.full.pdf+html.

83. *Id.* at ii5.

84. See Schiavenza, *supra* note 21 (discussing the history of the word "vape").

85. See *Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891, 898 (D.C. Cir. 2010) (holding that the FDA can only regulate tobacco products, including e-cigarettes, under the Food, Drug, and Cosmetic Act if they are "marketed for therapeutic purposes").

86. See *Frequently Asked Product Related Questions*, VUSE DIGITAL VAPOR CIGARETTES, <https://vusevapor.com/FooterLinks/ProductFAQs> (last visited Jan. 19, 2015) ("VUSE products . . . heat liquid containing nicotine derived from tobacco.").

87. Brady Dennis, *E-cigarette Market Is Booming*, WASH. POST, June 17, 2014, at A3.

88. There is a current market-shuffle situation with Reynolds American buying out Lorillard in a \$27.4 billion deal while, at the same time, selling Lorillard's top-selling e-cigarette brand, Blu, to Imperial Tobacco. Richard

the original participating manufacturers under the MSA, announced on November 21, 2007, that its application to become a participating manufacturer was approved.⁸⁹ There are also several non-Big Tobacco e-cigarette companies, including NJOY, Lead by Sales, and VMR Products, all of which sell their products online.⁹⁰ As stated, one of the main components, and arguably the cause of the heated debates surrounding e-cigarettes, is the liquid nicotine cartridge.⁹¹ The reason for concern over the cartridge itself is mainly due to a lack in production and safety standards, an alarming issue considering that nicotine can be directly absorbed through mere contact with the skin.⁹² Additionally, the concentration of nicotine varies widely between different e-cigarette products, and there have even been discrepancies found between labeled and measured nicotine content.⁹³

Online sales of e-cigarettes include a variety of different flavorings for these cartridges, though there has always been widespread criticism of the use of flavorings as being attractive mainly to children.⁹⁴ Specifically, Reynolds American's brand, Blu, comes in menthol, cherry, vanilla, piña colada, and peach schnapps—flavors that the company sees as appealing to adults.⁹⁵ These

Craver, *Big 3 Want FDA to Ban Vapor E-cigs*, WINSTON-SALEM J., Sept. 7, 2014, at A4; see also Mike Esterl, *Big Tobacco's Reality Check for E-cigarettes*, WALL ST. J., Aug. 27, 2014, at B1 (noting the entrance of Reynolds American, Altria Group, and Lorillard into the e-cigarette market).

89. Press Release, Imperial Tobacco, Imperial Tobacco Group PLC's Master Settlement Agreement Application Approved (Nov. 21, 2007), available at <http://www.imperial-tobacco.com/index.asp?page=78&newscategory=18&year=2007&newsid=520>.

90. Staffs of Richard J. Durbin et al., *Gateway to Addiction?: A Survey of Popular Electronic Cigarette Manufacturers and Targeted Marketing to Youth*, COMMITTEE ON ENERGY & COM.: DEMOCRATS 8, 14 (Apr. 14, 2014), <http://democrats.energycommerce.house.gov/sites/default/files/documents/Report-E-Cigarettes-Youth-Marketing-Gateway-To-Addiction-2014-4-14.pdf>.

91. Though, oddly, the word "nicotine" does not appear in Blu e-cigarettes' "How blu Works: What is blu?" section on its website, aside from the required warning at the bottom of the page. *What Is Blu?*, BLU ECIGS, <http://www.blucigs.com/how-blu-works/what-is-blu/> (last visited Feb. 25, 2015).

92. See John Bonifield, *E-cigs' Liquid Nicotine Causing Poisonings*, CNN (Apr. 3, 2014, 1:32 PM), <http://www.cnn.com/2014/04/03/health/ecigs-nicotine-poisoning/>.

93. For further information on this subject, see generally Megan J. Schroeder & Allison C. Hoffman, *Electronic Cigarettes and Nicotine Clinical Pharmacology*, 23 TOBACCO CONTROL ii30 (2014), available at http://tobaccocontrol.bmj.com/content/23/suppl_2/ii30.full.pdf+html.

94. See *Designed for Addiction: How the Tobacco Industry Has Made Cigarettes More Addictive, More Attractive to Kids and Even More Deadly*, CAMPAIGN FOR TOBACCO-FREE KIDS 24–25 (June 23, 2014), http://www.tobaccofreekids.org/content/what_we_do/industry_watch/product_manipulation/2014_06_19_DesignedforAddiction_web.pdf (criticizing the flavoring of tobacco products generally for making them "more appealing, particularly to young people").

95. *Store*, BLU ECIGS, <http://store.blucigs.com/tanks> (last visited Apr. 18, 2015). NJOY currently markets the following flavors for its e-cigarettes: Classic Tobacco, Menthol, Pomegranate, Blood Orange, Black and Blue Berry, Peach Tea, Vanilla Bean, Butter Crunch, Double Espresso, and Single Malt Scotch. *Vaping E-liquids*, NJOY, <https://www.njoy.com/vaping/e-liquids> (last visited Feb. 25,

cartridges, which Blu refers to as “e-liquid,” are also available with different amounts of nicotine, ranging from 0% to 2.4%.⁹⁶ The e-liquid, though varying from brand to brand, normally contains propylene glycol, vegetable or other glycerin, distilled water, flavoring, and, of course, nicotine.⁹⁷

C. *Show Me the Mon*

As the media, industry experts, and medical professionals argue over whether it is acceptable to say that e-cigarettes are less harmful to health than traditional, combustible tobacco cigarettes, there is still no solid evidence as to the long-term health effects of e-cigarette use. E-cigarettes simply have not been on the market long enough, and extensive testing has not yet been done. Nicotine, however, has been around long enough to be known as toxic and has been linked to tumor growth,⁹⁸ increase in blood pressure and cardiovascular disease,⁹⁹ and a deleterious effect on brain development.¹⁰⁰ Arguments on health effects aside, the use of e-cigarettes is most certainly on the rise. According to the *Wall Street Journal*, e-cigarette sales went from about \$20 million in 2010 to over \$482 million in the first eight months of 2014.¹⁰¹

This market expansion came even before Reynolds American and Altria launched their e-cigarette brands in the summer of 2014, named Vuse and MarkTen, respectively.¹⁰² A recent report by several members of Congress drew attention to the fact that Blu e-cigarettes had, from August 2012 to November 2013, sponsored or held 242 sampling events.¹⁰³ During that same period, Vuse had held ninety such events.¹⁰⁴ Additionally, both Vuse and Blu had reported using television or radio ads to promote their products.¹⁰⁵ The report found

2015). NJOY also uses phrases like “Smoky Sophistication” to imply that the e-cigarettes are for adults. See *Single Malt Scotch*, NJOY, <https://www.njoy.com/vaping/e-liquids/single-malt-scotch/10ml-15mg> (last visited Feb. 25, 2015).

96. *Ask Blu*, BLU ECIGS, <http://www.blucigs.com/ask-us/> (last visited Feb. 25, 2015) (follow “View Answer” hyperlink under “What nicotine levels and flavors are available for blu Tank™ Systems?”).

97. *E.g.*, *id.* (follow “View Answer” hyperlink under “What are the ingredients in the blu Tank™ liquid?”); *FAQ | Warning*, *supra* note 20; see also *A Safe Way to Kick the Habit?*, WASH. POST, Mar. 11, 2014, at E3.

98. *E.g.*, Helen Pui Shan Wong et al., *Nicotine Promotes Colon Tumor Growth and Angiogenesis Through β -Adrenergic Activation*, 97 TOXICOLOGICAL SCI. 279, 279 (2007).

99. OFFICE OF THE SURGEON GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL 369–70, 386–87 (2004), available at http://www.cdc.gov/tobacco/data_statistics/sgr/2004/pdfs/chapter3.pdf.

100. OFFICE OF THE SURGEON GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 8 (2014), available at <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.

101. Esterl, *supra* note 88.

102. *Id.*

103. Staffs of Richard J. Durbin et al., *supra* note 90, at 24–29.

104. *Id.* at 29–31.

105. *Id.* at 33.

that out of the nine commonly sold e-cigarette brands that were studied, eight of them “promote[d] their products through sponsored or sampling events” and seven of them had aired television or radio ads “during events and programs, including those with youth viewership.”¹⁰⁶ Such events included the Super Bowl.¹⁰⁷ In terms of spending power, e-cigarette advertising increased from \$5.6 million in 2010 to \$82.1 million in 2013.¹⁰⁸

D. Advertising Directed at Youth?

It is not surprising that, at the same time, a Centers for Disease Control and Prevention study released in August 2014 showed that e-cigarette use tripled among middle- and high-school students from 2011 to 2013, rising from an estimated 79,000 to over 263,000.¹⁰⁹ The study notes that teens that smoked e-cigarettes were twice as likely to have intentions of using traditional tobacco cigarettes, and about three out of every four teen smokers became adult smokers.¹¹⁰ In terms of ads, the report indicated that the more sources of exposure that students had to cigarette advertisements, the more likely they were to consider smoking.¹¹¹ Another report from the American Academy of Pediatrics surveyed almost two thousand ninth- and tenth-grade students in Hawaii with an average age of fourteen-and-a-half years old.¹¹² The report found that 29% of them had smoked e-cigarettes.¹¹³ Particularly, 17% had reported only using e-cigarettes, 12% had reported using both e-cigarettes and traditional cigarettes, and only 3% reported using only traditional cigarettes.¹¹⁴ The report concluded by suggesting that “e-cigarettes are recruiting medium-risk adolescents, who otherwise would be less susceptible to tobacco product use,” and that e-cigarette users saw e-cigarettes as healthier than traditional cigarettes.¹¹⁵

The evidence suggests that e-cigarettes pose a danger of increased risk of youth smoking, and that an increase in exposure to

106. *Id.* at 1.

107. *Id.*

108. *Vaporized: E-cigarettes, Advertising, and Youth*, LEGACY 8 (May 2014), http://legacyforhealth.org/content/download/4542/63436/version/1/file/LEG-Vaporized-E-cig_Report-May2014.pdf.

109. Rebecca E. Bunnell et al., *Intentions to Smoke Cigarettes Among Never-Smoking US Middle and High School Electronic Cigarette Users: National Youth Tobacco Survey, 2011–2013*, 17 NICOTINE & TOBACCO RES. 228, 230 (2015).

110. *Id.* at 230–31; Press Release, Ctrs. for Disease Control & Prevention, More than a Quarter-Million Youth Who Had Never Smoked a Cigarette Used E-cigarettes in 2013 (Aug. 25, 2014), *available at* <http://www.cdc.gov/media/releases/2014/p0825-e-cigarettes.html>.

111. Bunnell et al., *supra* note 109, at 231–32. Out of the students that had no exposure to smoking ads, 13% reported having “[i]ntention to smoke.” *Id.* at 232. This was compared to students that were exposed to one or two sources of ads, who had a rate of 20.4%, and students that were exposed to three to four sources of ads, who had a rate of 25.6%. *Id.*

¹¹² Thomas A. Wills et al., *Risk Factors for Exclusive E-cigarette Use and Dual E-cigarette Use and Tobacco Use in Adolescents*, 135 PEDIATRICS e43, e43 (2015).

113. *Id.*

114. *Id.*

115. *Id.* at e43, e45–e46.

advertisements only heightens that risk. While the FDA continues to decide on deeming regulations intended for labeling and vending machine sales, the problem of access and attention by youths to e-cigarettes is allowing for a new generation of nicotine addiction. The American Heart Association criticized the regulation's lack of attention to flavoring, advertising, and marketing currently directed at children.¹¹⁶ But this is where the MSA could play a role in stemming the tide, as it has in the past.

IV. CONTRACTUAL INTERPRETATION AND THE MASTER SETTLEMENT AGREEMENT

Big Tobacco is not the only industry to face massive liability that ended in settlements. Lead paint, asbestos, and Agent Orange are all well-known examples of mass tort liability, to name only a few.¹¹⁷ And, as one would expect, there are specific provisions within the MSA dealing with enforcement procedures.¹¹⁸ Section VII(f) explicitly encourages the settling states to coordinate their enforcement efforts "as to matters that are not exclusively local in nature."¹¹⁹ These provisions led the National Association of Attorneys General ("NAAG") to form the Tobacco Enforcement Committee in 1999.¹²⁰ The committee is charged with reviewing and confronting tobacco companies for violations of the provisions under section III.¹²¹ Since the MSA was signed, the committee has implicated each major tobacco manufacturer in at least one enforcement matter.¹²² These enforcement matters have ranged from suspected improper health claims to the use of cartoons in advertisements.¹²³ The committee, due to limited resources, depends on outsiders to bring claims of suspected violations to its attention, be it from an individual citizen, a public health organization, or, at times, a competing tobacco company.¹²⁴ The committee then investigates the situation and coordinates with the appropriate state to determine the proper course of action.

116. Letter from Nancy Brown, Chief Exec. Officer, Am. Heart Ass'n, to Margaret A. Hamburg, Comm'r, Food & Drug Admin. 9–14 (Aug. 8, 2014), available at http://www.heart.org/idc/groups/ahaecc-public/@wcm/@adv/documents/downloadable/ucm_466798.pdf.

117. See Edmund J. Ferdinand, III, *Asbestos-Revisited: Lead-Based Paint Toxic Tort Litigation in the 1990s*, 5 TUL. ENVTL. L.J. 581, 581–82 (1992); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 950 (1995).

118. See *Master Settlement Agreement*, *supra* note 13, § VII.

¹¹⁹ *Id.* § VII(f).

120. DENNIS ECKHART, TOBACCO CONTROL LEGAL CONSORTIUM, THE TOBACCO MASTER SETTLEMENT AGREEMENT: ENFORCEMENT OF MARKETING RESTRICTIONS 3 (2004), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-marketing-2004.pdf>.

121. *Id.*; see *supra* Part II.

122. See ECKHART, *supra* note 120.

123. *Id.*

¹²⁴ *Id.*

The MSA provides that the governing law of the agreement is that of the settling state that brings the enforcement action.¹²⁵ Additionally, the manufacturers that are signatories to the MSA also agree to exclusive state-court jurisdiction in enforcement matters.¹²⁶ Along with restrictions on the manufacturers, there are ongoing responsibilities of the settling states, including a responsibility that the NAAG convene “at least two meetings per year and one major national conference every three years for the Attorneys General of the Settling States, the directors of the Foundation[,] and three persons designated by each Participating Manufacturer” for the purpose of evaluating the success of the MSA and to continue to combat youth smoking.¹²⁷

The actual process of enforcement laid out in the MSA provides for a thirty-day period between giving notice and filing an enforcement action.¹²⁸ Notice must be provided to the attorney general of each settling state, to the NAAG, and to each of the participating manufacturers in the MSA.¹²⁹ This notice period provides time for a manufacturer to stop the action that is in violation or to find an alternative way to comply. The MSA also states that the parties should attempt, whenever possible, to resolve any disputes by discussion and that the attorney general should “give good-faith consideration to whether the participating manufacturer that is claimed to have violated this Agreement has taken appropriate and reasonable steps to cause the claimed violation to be cured.”¹³⁰ If a dispute is not resolved by discussion, the Enforcement Committee decides whether or not to recommend a formal enforcement action, and, regardless of the committee’s decision, each settling state has the right to formally proceed on its own after giving notice.¹³¹ Litigation of the dispute leaves it up to the courts to decide whether or not a manufacturer has actually breached the MSA. If the court finds a breach, the party that initiated the proceeding may request an “Enforcement Order,” or an order restraining the manufacturer from continuing the practice that is found to be in violation.¹³² If a manufacturer continues the practice after an order has been issued, the attorney general can seek an order for monetary damages, civil contempt, or even criminal sanctions.¹³³

A. *How Have Courts Responded?*

Less than a year after the MSA went into effect, Rhode Island became the first state to initiate an enforcement action for a violation. A newspaper had quoted the U.S. Smokeless Tobacco Company, through one of its spokespeople, claiming that smokeless tobacco “had

125. *Master Settlement Agreement*, *supra* note 13, § XVIII(n).

126. *Id.* § VII(a).

127. *Id.* § VIII(a)(2).

¹²⁸ *Id.* § VII(c)(2).

129. *Id.*

130. *Id.* § VII(e)(6).

¹³¹ ECKHART, *supra* note 120, at 4; *Master Settlement Agreement*, *supra* note 13, § VII(c).

132. *Master Settlement Agreement*, *supra* note 13, § VII(c)(3).

133. *Id.* § VII(c)(4).

not been proven to cause oral cancer and other diseases”—in direct contradiction with findings by the surgeon general.¹³⁴ Rhode Island then initiated proceedings as the statement was in violation of the “Material Misrepresentations” section of the MSA.¹³⁵ This led to a formal withdrawal of the statement, as well as a payment of \$15,000 to the State for the “prevention of youth tobacco use.”¹³⁶ Not long after, the NAAG became concerned with advertisements that tobacco companies were placing in magazines that appeared to target youth through the use of cartoonlike images.¹³⁷ Subsequent investigations and airing of grievances by the NAAG of possible violations of the “Youth Targeting” portion of the MSA led to voluntary discontinuations or modifications of a number of different magazine ad campaigns.¹³⁸ These actions were “voluntary” since no specific section of the MSA sets percentage-of-youth-readership limits on what magazines tobacco companies can advertise in. Each manufacturer adopted its own standards, and, almost predictably, not every manufacturer decided on the same standards.¹³⁹ This led to an enforcement proceeding by California against R.J. Reynolds, which had announced that its policy would only restrict advertising in magazines that had over 50% youth readership.¹⁴⁰

California was joined by twenty-one other states, as well as Guam, and meetings between attorneys general and the CEO of R.J. Reynolds failed to resolve the dispute, ending in formal litigation in California.¹⁴¹ Though R.J. Reynolds subsequently lowered the bar as low as 25% youth readership, the trial court found that the advertisements constituted a violation of the MSA’s prohibition on youth targeting and awarded an injunction as well as sanctions of \$20 million.¹⁴² The case was appealed, and the court of appeals reversed the \$20 million award, holding that, while sanctions were appropriate, the record did not support the amount awarded.¹⁴³ However, the court affirmed the injunction, finding that R.J. Reynolds violated MSA section III(a) as it “knew to a substantial certainty its advertising was exposed to youth to virtually the same extent it was exposed to young adults.”¹⁴⁴ Furthermore, the court reiterated that the only way manufacturers could avoid targeting youth, as per the

134. ECKHART, *supra* note 120, at 4.

135. *Id.*; see *Master Settlement Agreement*, *supra* note 13, § III(r).

136. ECKHART, *supra* note 120, at 4.

137. *Id.* at 5.

138. *Id.*; see *Master Settlement Agreement*, *supra* note 13, § III(a).

¹³⁹ See ECKHART, *supra* note 120, at 5.

140. *Id.* R.J. Reynolds revised this policy to 33% youth readership—which eliminated only one magazine in which the company was advertising at that time—before the proceedings were initiated. *Id.*

141. *Id.*

142. *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, No. GIC 764118, 2002 WL 1292994, at *10–11 (Cal. Super. Ct. June 6, 2002), *aff’d in part, rev’d in part*, 11 Cal. Rptr. 3d 317 (Ct. App. 2004).

143. *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 11 Cal. Rptr. 3d 317, 348 (Ct. App. 2004).

144. *Id.* at 328.

MSA, was to “minimize exposure of the advertising” to children.¹⁴⁵ R.J. Reynolds was in violation of this provision as the record supported the conclusion that “Reynolds could implement alternative advertising schedules using different magazines to avoid targeting youth while maintaining effective targeting of young adult smokers,” which was the audience Reynolds claimed to target.¹⁴⁶

In another circumstance in 2001, the Attorney General of Ohio filed suit against R.J. Reynolds for distributing over one billion matchbooks displaying small advertisements for its cigarettes.¹⁴⁷ R.J. Reynolds claimed that the matchbooks were not “merchandise” under the terms of the MSA, arguing that the word was ambiguous and should be read narrowly to “encompass only items typically bought and sold at retail.”¹⁴⁸ The Supreme Court of Ohio, however, disagreed.¹⁴⁹ It first found that the casual definition of merchandise would include matchbooks, whether or not they were actually sold.¹⁵⁰ Furthermore, in the context of the MSA, it was clear that the parties intended a broad reading of the definition.¹⁵¹ The court reaffirmed that “[t]he purpose of contract construction is to effectuate the intent of the parties, and that in tent is presumed to reside in the language they chose to employ in the agreement.”¹⁵²

B. *Contractual Interpretation in Light of E-Cigarettes*

The aforementioned cases are illustrative of what courts would potentially do with a claim that e-cigarettes should fall within the terms of the MSA. The MSA, as a settlement agreement, is virtually indistinguishable from a contract between any two parties.¹⁵³ It is bound by the same contractual principles, such as relying on the plain meaning of the words and taking into account intent only as expressed in the four corners of the agreement.¹⁵⁴ Words in a contract are to be given their ordinary meaning unless there is evidence that both parties intended those words to mean something else.¹⁵⁵ Additionally, in the case of the MSA, there is no “drafter,” so the maxim of construing an instrument against its drafter does not apply here.¹⁵⁶ With the expanded view of what it means to target youth,

145. *Id.* at 329.

146. *Id.*

147. *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 820 N.E.2d 910, 912–13 (Ohio 2004).

148. *Id.* at 915.

149. *Id.* at 915–18.

150. *Id.* at 916.

¹⁵¹ *Id.* at 915, 917–18.

152. *Id.* at 915 (quoting *Kelly v. Med. Life Ins. Co.*, 509 N.E.2d 411, 413 (Ohio 1987)) (internal quotation marks omitted).

153. *See, e.g., Cont'l W. Condo. Unit Owners Ass'n v. Howard E. Ferguson, Inc.*, 660 N.E.2d 431, 432 (Ohio 1996) (“It is axiomatic that a settlement agreement is a contract . . . [that is] valid and enforceable by either party.”).

¹⁵⁴ 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §§ 32:3, 32:5 (4th ed. 2012).

155. *E.g., People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 11 Cal. Rptr. 3d 317, 326 (Ct. App. 2004).

156. *Master Settlement Agreement*, *supra* note 13, § XVI(a).

along with the interpretation of what it means to be a cigarette or a tobacco product, the states seem to have two avenues of contractual interpretation regarding e-cigarettes within the MSA.

C. *“Cigarette” and “Tobacco Products”*

The MSA defines “cigarette” as:

any product that contains nicotine, is intended to be burned or heated[,] . . . and consists of or contains . . . tobacco, in any form, that is functional in the product, which, because of its appearance . . . or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette . . .¹⁵⁷

Several portions of this definition are important. First, the definition incorporates products that contain nicotine and are intended to be burned or heated during the normal course of use. E-cigarettes fall well within this portion of the definition as they almost necessarily contain nicotine (with some alternative products as exceptions) and also deliver the nicotine by a system that heats the liquid during the normal course of use.¹⁵⁸ Second, the definition deals with products that “because of [their] appearance” are “offered to . . . consumers as a cigarette.” E-cigarettes also fall well within this portion as every company selling them holds them out as being the functional equivalent of a cigarette, with many attempting the most realistic cigarette look and feel they can achieve.¹⁵⁹ The name itself even implies a type of cigarette. The issue comes with the phrase “tobacco, in any form, that is functional in the product.” There is ambiguity as to what “any form” may mean. Taken literally, some type of synthetic tobacco or tobacco extraction would fall within the definition. The only problem with construing nicotine derived from tobacco as within the meaning of the phrase “any form” is that it is possibly duplicative due to the inclusion of nicotine in the first portion of the definition. However, there is nothing barring duplicative terms within a contractual agreement, and the argument for e-cigarettes’ inclusion within “cigarette” as defined in the MSA has weight.

Furthermore, the MSA defines “Tobacco Products” as “[c]igarettes and smokeless tobacco products.”¹⁶⁰ Curiously, or perhaps naturally, the MSA does not contain a definition of “smokeless tobacco product.” Taken on its own, smokeless tobacco, by definition, means “pulverized or shredded tobacco chewed or placed between cheek and gum.”¹⁶¹ However, taken as a whole, the “Tobacco Products” definition includes all of the major tobacco-related products that the participating manufacturers made at the time of drafting the MSA.¹⁶² This total

157. *Id.* § II(m).

158. *See supra* notes 82–86 and accompanying text.

159. *See, e.g., FAQ | Warning, supra* note 20 (“Our NJOY Kings are a disposable e-cigarette which looks and feels like a traditional tobacco cigarette.”).

160. *Master Settlement Agreement, supra* note 13, § II(vv).

161. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1178 (11th ed. 2004).

162. *See, e.g., Brands, LORILLARD*, <http://www.lorillard.com/brands/> (last visited Apr. 7, 2015) (listing Lorillard’s current product line); *Our Brands, PHILIP*

inclusion supports an interpretation where future tobacco products were thought to be included within the definition. An argument might be made that, per this definition, any kind of nicotine product, such as nicotine gum, patches, or smoking-cessation devices, would fall under the MSA. This, however, would be precluded by the requirement that the product be sold or marketed as a cigarette, which none of those products are. In light of these definitional arguments, e-cigarettes could possibly be brought under the MSA.

D. Youth Targeting and a Contextual Analysis of the MSA

An even stronger argument for e-cigarettes' inclusion under the MSA is the specific textual "Prohibition on Youth Targeting." The text specifies that the tobacco manufacturers cannot "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 the incidence of Youth smoking within any Settling State."¹⁶³ Taken in light of the California Court of Appeal's rationale in *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*,¹⁶⁴ advertisements that reach youth to the same extent they reach adults violate the MSA's prohibition on youth targeting.¹⁶⁵ However, this would only be applicable to e-cigarette marketing if e-cigarettes were held to fall within the definition of tobacco products. At the same time, however, any actions taken whose primary purpose is to "maintain or increase the incidence of Youth smoking" would encompass advertisements of e-cigarettes that were aimed at youth. This provision is not limited to advertisements or actions related to tobacco products. Should it be found that the primary purpose of advertising e-cigarettes to an audience even partially composed of minors was to increase smoking in general, this would be a direct violation of the MSA. The research done on the Hawaii schoolchildren referenced earlier¹⁶⁶ is evidence of, if not purposeful targeting, at least awareness in the community that e-cigarette advertisements reach youth and increase smoking.

Looking at the context of the MSA as a whole, there are phrases throughout that support the proposition that tobacco manufacturers, by recklessly promoting e-cigarettes, are violating the purpose of the MSA. Even at the start of the MSA, within the "Recitals" laying out its purpose and scope, out of the seven "whereas" sections, the reduction of youth smoking is referenced no less than four separate times.¹⁶⁷ The "Corporate Culture Commitments" portion of the

MORRIS INT'L, http://www.pmi.com/eng/our_products/pages/our_brands.aspx (last visited Apr. 7, 2014) (listing Philip Morris International's current product line); *What We Make*, R.J. REYNOLDS, <https://www.rjrt.com/whatwemake.aspx> (last visited Feb. 26, 2015) (listing R.J. Reynolds' current product line).

163. *Master Settlement Agreement*, *supra* note 13, § III(a).

164. 11 Cal. Rptr. 3d 317 (Ct. App. 2004).

¹⁶⁵ *See id.* at 328 (holding that R.J. Reynolds violated subsection III(a) of the MSA "by targeting youth because Reynolds knew to a substantial certainty that its advertising was exposed to youth to the same extent it was exposed to young adults").

166. *See supra* text accompanying notes 112–15.

167. *See Master Settlement Agreement*, *supra* note 13, § I.

“Permanent Relief” section explicitly requires that the manufacturers have principles that express a commitment to “the reduction of Youth use of Tobacco Products.”¹⁶⁸ Advancing and promoting a product that has the same effect of increasing youth tobacco use as it does the use of the actual product seems diametrically opposed to these types of principles. Lastly, the MSA’s provision for a national foundation, the purpose of which is to support the study and promotion of programs designed to reduce youth smoking,¹⁶⁹ would be undermined if the MSA allowed for products whose promotion threatens the progress made in the reduction of youth smoking.

CONCLUSION

Every day that passes while debating what to do about e-cigarettes exposes more and more minors to advertising, which, as the study from Hawaii shows, means an increasing number of young e-cigarette smokers and an opening of the gateway back to cigarettes. It has now been over fifty years since the original report of the surgeon general on the cancerous effects of smoking was published. Today, smoking is still the nation’s leading cause of preventable cancer, accounting for almost half a million premature deaths of adults last year in the United States alone.¹⁷⁰

In an interesting, if not predictable, turn of events, Reynolds American has recommended to the FDA that open system–vapor e-cigarettes should be banned.¹⁷¹ By limiting the recommendation to banning open-system e-cigarettes or those that are compatible with interchangeable parts, atomizers, and nicotine cartridges or tanks, Reynolds American did not affect any of its own market share.¹⁷² The arguments advanced by its spokesman, David Howard, are the same that health officials have used against e-cigarettes generally, including those sold by R.J. Reynolds, such as a lack of regulation, a lack of manufacturing oversight, and the use of non-child-resistant packaging, as well as flavorings that appeal to children.¹⁷³ Advocates of open-system vaping, such as Gregory Conley of the American Vaping Association, are critical of the move by Reynolds American, saying that it should be “seen for what it really is—an admission that [Reynolds American] simply cannot compete in the current e-cigarette market”¹⁷⁴ Whether the move is really to quash other participators in the e-cigarette market, or if Reynolds American views e-cigarettes as a whole as a threat to its business, is open to question.

168. *Id.* § III(D).

169. *Id.* § VI(a).

170. See Kathleen Sebelius, *Message from Kathleen Sebelius*, in OFFICE OF THE SURGEON GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 100.

171. Craver, *supra* note 88.

172. See *id.* For a definitional comparison of open and closed e-cigarette systems, see Matt Brown, *Open vs Closed Vaping Systems*, JAC VAPOUR (Dec. 23, 2014), <http://www.jacvapour.com/open-or-closed-vaping-systems/#>.

173. Craver, *supra* note 88.

174. *Id.*

What is certain is that e-cigarettes already have a foothold in the market and are unlikely to disappear anytime soon. Health officials are right in asserting that something should be done as soon as possible. In light of the MSA's purpose, scope, and definitions, it is arguable that electronic cigarettes should be brought within its regulatory reach. While litigation would be protracted and further evidence would need to be gathered, and although the industry is expanding beyond the participating manufacturers, enforcement of the MSA in this area is needed to fill in the current regulatory gap. Should that gap be filled by the MSA, it would seem as though only the participating manufacturers would be affected. More likely, however, the industry itself would be changed, giving an incentive for current e-cigarette manufacturers to join in the MSA, or at least comply with industry standards, as a way to avoid liability. The respective market share of e-cigarette-only manufacturers would be comparatively negligible, keeping the amount of escrow payments to a minimum and not out of the realm of financial viability. Others may elect to be exposed, but this would likely be a minority. Even pulling Blu e-cigarettes under the umbrella would capture the majority of the current market, let alone Vuse and MarkTen.¹⁷⁵ Furthermore, whether good or bad, there would be an incentive for the tobacco manufacturers to purchase e-cigarette companies or to advocate for federal legislation in order to level the playing field, as has already been the case. As it stands, the tobacco manufacturers are violating the purpose and intent of the MSA by advocating the use of their own brands of e-cigarettes and by directing advertisements that are reaching children. Whether this violation is willful or merely incidental is up for debate. However, if history is any teacher, one should never take tobacco advertisements at their word.

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175. See Esterl, *supra* note 88 (noting that, within the United States, Blu is sold in more than 150,000 stores and that Altria and R.J. Reynolds plan to increase the distribution of their products (MarketTen and Vuse, respectively) to more than 300,000 stores).

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