

CORPORATE COUNSEL

An ALM Publication

The Business Magazine for In-House

corp.counsel.com | July 2016

Feeling The Burn

THE INDUSTRY FACES A REGULATORY ONSLAUGHT OVER
THE BENEFITS—IF ANY—OF INDOOR TANNING

Chris Sternberg

PLUS: KIRKLAND, GCS MENTOR DIVERSITY ■ HOW TO SPOT IN-HOUSE MONEY LAUNDERING



Feeling the Heat

Storm clouds are threatening the indoor tanning industry as its trade association tries to fight back. **By Stephanie Forshee**

CHRIS STERNBERG, GENERAL
COUNSEL OF SUN TAN CITY

PHOTOGRAPH BY CLAY COOK

THERE MUST BE TIMES WHEN CHRIS Sternberg misses the 18 years he spent working at Papa John's International Inc., the pizza company, where he worked his way from assistant counsel to communications chief to general counsel. These days he's a general counsel in an industry that seems to be fighting for its life against a veritable regulatory onslaught.

He works in the indoor tanning industry, where there are few in-house lawyers. He's the general counsel of Sun Tan City, the second-largest chain in the country, with 280 salons as well as 25 Planet Fitness franchises. And he's also the legal adviser to the industry's trade group, the American Suntanning Association (ASA), which represents 1,000 of the 9,500 facilities that operate in the U.S. (with another 10,000 businesses such as day spas, hair salons and fitness clubs that offer tanning as an ancillary service). They're all part of an industry with annual revenues of \$2.9 billion, according to IBIS World.

From where Sternberg sits, indoor tanning is being attacked by just about every regulatory agency there is. The U.S. Food and Drug Administration has a proposal under way that could ban minors from indoor tanning in all 50 states, because of the growing health concerns surrounding the industry. The surgeon general issued a call to action about the harm of indoor tanning, and now requires warning labels on the devices about their risks. The Federal Trade Commission has sued an equipment manufacturer, and the International Agency for Research on Cancer moved tanning devices into its highest cancer risk category. Meanwhile, attorneys general in New York and Texas sued multiple tanning salons that made health claims in their advertisements that downplay the risks of skin cancer.

That's just a glimpse of what Sternberg and the industry are up against. But the industry does not seem to be backing down on its stance that there are health benefits to UV exposure. In fact, it's even sued one cancer society for defamation. "We feel like the indoor tanning industry is unfairly singled out," Sternberg says. "There are a lot of positive effects of UV exposure."

Despite the negative press, the industry still has a substantial customer base. Around 30 million people tan

indoors in the U.S. each year, according to the FDA. There are good reasons, Sternberg insists. "It's like exercise," he says. "Your body produces a hormone like an endorphin. You wonder, 'Why would your body be telling you to do more of this?' Why? Because sunshine is essential to life." Furthermore, the industry argues, indoor tanning offers a controlled way to combat Vitamin D deficiency, which has reached epidemic proportions in the United States, and is also an effective treatment against psoriasis.

But the attacks do seem to be taking a toll. The number of salons has been in decline for years. Sternberg puts much of the blame on a 10 percent federal excise tax that was implemented in 2010. Back then, the number of salons was 19,000—about twice what it is today. And the regulatory actions only seem to multiply. Experts in crisis management suggest that the industry needs to do more to identify potential allies and marshal support. To date, Sternberg seems to be fighting a lonely battle.

THE INDOOR TANNING INDUSTRY'S CAMPAIGN TO TURN ITS image around comes at a time when various other industries have been hit by federal regulators requiring "sound science" to back up their health claims. The FTC has gone after companies selling diet supplements and cognitive memory games in recent months. In May, LearningRx Franchise Corp. was ordered to pay \$200,000 for false advertis-

"TANNING FACT: A TANNING UNIT CAN PRODUCE AS MUCH **VITAMIN D**
AS DRINKING **100 GLASSES** OF MILK. WOW!"

SOURCE: THE WEBSITE OF A SALON THAT WAS SUED BY THE NEW YORK ATTORNEY GENERAL.

ing in its "brain training" programs that claimed the product was proven to prevent serious health conditions such as autism, dementia, strokes and concussions. Four months earlier, Lumosity was ordered to pay \$2 million for nearly identical claims.

In April the FTC sued indoor tanning equipment manufacturer Mercola over health claims that consumers could "slash [their] risk of skin cancer" by using its beds. The company, which sells other health and fitness products, agreed to pay up to \$5.3 million in refunds and to stop selling tanning equipment as part of its business. "This order should send a signal to the entire industry," says Janet Evans, FTC senior attorney with its advertising bureau.

This wasn't the first time the commission has gone after



NEW YORK ATTORNEY GENERAL ERIC SCHNEIDERMAN, WHO HAS SUED TANNING SALONS, AND HIS HEALTH CARE BUREAU CHIEF, LISA LANDAU



the indoor tanning industry. In the late '80s and early '90s, it sued four tanning device manufacturers and one company that sold skin care products for use while tanning indoors. The FTC hasn't taken action against any individual tanning salons yet, but in 2010 the commission settled a suit against the Indoor Tanning Association, a trade group representing salons and manufacturers. The association had claimed that indoor tanning is approved by the government, is safer than tanning outdoors and has health benefits.

On the state level, attorneys general in New York and Texas have accused salons of false advertising practices—with claims such as: "Tanning fact: a tanning unit can produce as much Vitamin D as drinking 100 glasses of milk. Wow!" There's also a testimonial from a "cancer survivor Kurt Hollis" telling how he treated his kidney cancer with indoor tanning.

Greg Abbott of Texas was the first to settle with salons in 2013, when he was the state's attorney general, prior to becoming governor. Darque Tan paid more than \$160,000 in penalties. Another Texas chain, Euro Tan, was also sued for deceptive advertising. Now, New York Attorney General Eric Schneiderman is the latest to take action against tanning salons. His office reached a settlement with Hollywood Tans in 2014 that barred the chain from making health claims, targeting high school students and offering

unlimited tanning packages. Planet Fitness paid \$50,000 in fines last year, and, most recently, Beach Bum Tanning's owner was penalized \$20,000 in April.

Suits filed last year against Portofino Spas and Total Tan are pending, although at press time Portofino's lawyer said that the suit against his client could be resolved soon. Robert Swetnick, an attorney with Eaton & Van Winkle in New York and the salon chain's outside counsel of several years, said that two New York judges have suggested that Portofino was entitled to free speech when it made health claims. In an interview, Swetnick asserted that Portofino stopped making health claims when the AG's office notified the company that these were an advertising violation. "Our biggest concern is that the AG did this purely for publicity," Swetnick says. "I think it's for his political future." Schneiderman, through a spokesman, responded that his decision to pursue the case was based "solely on its merits and the facts of the law."

Total Tan's attorney did not respond to repeated phone messages, but the company released a statement last year following news of the lawsuit. It denied that its advertising was misleading and accused the AG of "trying to impose his own view of the world on our industry." The statement continued, "It is well documented that there is a growing concern within the medical community regarding the medical problems caused by Vitamin D deficiency, which is directly related to the lack of sun exposure."

Schneiderman's office has been investigating the health claims of indoor tanning salons since early 2013, according to Lisa Landau, Schneiderman's health care bureau chief. She finds it unsettling that "the very business linked with cancer is advertising that it is preventing cancer." She adds, "If you talk about it as a cosmetic kind of thing, fine, but the minute you start talking about health benefits, it's problematic." Schneiderman released a brochure last year to dispel myths and misconceptions about indoor tanning. It states that New York salons should not claim that "indoor tanning is less dangerous" than tanning outdoors, that "indoor tanning is a safe way to acquire vitamin D," or that "a pre-vacation—or 'base'—tan protects you from getting a sunburn."

No other states have taken action on this issue, but Corporate Counsel has identified more than 200 salons and retailers across all 50 states that make similar health claims. For instance, Earthtone Tanning Spa in Indianapolis asks on its website: "Think there's no such thing as a safe tan? Did you know it might be more dangerous not to tan?" Bellissima Tans in Manalapan, New Jersey, claims that "tanning stimulates the thyroid gland to increase your metabolism" and "people who suffer from psoriasis and have tried tanning have seen improvements in their condition."

The health claims vary from salon to salon, but the Vitamin D link appears to be the most prevalent. It's featured in a poster that had been in the window of Desert Sun Tanning in Seattle for at least 18 months and reads: "Why Tanning Is Smart." Scott Swerland, CEO of the Desert Sun/Seattle Sun Tan franchise, says he was shocked that his franchisee had



DESERT SUN TANNING AND THE POSTER "WHY TANNING IS SMART" DISPLAYED IN ITS FRONT WINDOW



such an advertisement and, after an inquiry from Corporate Counsel, said the sign would be promptly removed.

"If the FDA or AG says I can't advertise Vitamin D, I'm not going to do that. We don't advertise that, period," Swerland says. "If you work for me, you're not a doctor. ... We're in the vanity business." However, on Desert Sun Tanning's corporate site, visitors will still find under the heading of "Sunbed Tanning" multiple benefits of regular exposure to sunlight, including regulated blood pressure, reduced stress and healthier hair, skin and nails. Swerland later clarified that he stands behind his website, and does not view the Web page as an advertisement but as a source of information.

The "Why Tanning Is Smart" poster is sold on the website of the trade group International Smart Tan Network for \$14.95. It is not known how many salons display it, aside from Desert Sun, but online dozens of tanning salons have shared the image on their websites, including Ultimate Sun in Milwaukee, Versa Tan in Montana and Rock Star Tanning in California. Some salons have been more cautious with their language online. They avoid making claims on

their own. Instead, they provide links on their websites for consumers to find additional information through TanningTruth.com or the Smart Tan Network, which has 6,000 salon members and emphasizes moderation, warning customers against overexposure. Both websites are packed with research and blog posts in favor of indoor tanning.

Sun Tan City is not a Smart Tan member, but Sternberg says his salons share a similar philosophy. "Unfortunately,

JACQUI MILLER

“THIS ORDER SHOULD SEND A SIGNAL TO THE ENTIRE INDUSTRY.”

—JANET EVANS, FTC SENIOR ATTORNEY, THE ADVERTISING BUREAU



we’re not able to share a lot of that information with customers as a result of the FTC and the New York attorney general prohibiting that,” he says. The American Suntanning Association might not be allowed to make outright health claims in its advertisements, but it has been able to make its science known in its public comments made to the FDA’s proposed ban on indoor tanning for minors. The association’s scientific adviser, Joseph Levy, has personally traveled to at least 35 states to lobby the legislatures there, according to *Smart Tan* magazine. Many of those conversations centered on allowing minors to use tanning salons. The latest count shows that the use of tanning facilities by minors is regulated to some degree in at least 42 states, according to the National Conference of State Legislatures. Ages for restrictions vary, and some allow minors to tan with parental consent.

During the public comment period for the FDA’s proposal, one salon owner said this would result in a 3-5 percent loss in business. Heidi Shultz of Palm Beach Tan wrote that as salons went out of business, “much of that equip-

ment ended up in the home market.” Therefore, the FDA should consider that consumers, including minors, now have increased access to unregulated devices.

Between the public comments and meetings with federal agencies, Sternberg is pleased that his industry is being heard. He notes that the association has met with the Centers for Disease Control and Prevention (CDC) and claims that the American Suntanning Association’s “science was so compelling,” the organization removed a statistic on its website that linked a significant amount of melanoma cases to indoor tanning. “We’ve got to get [the government] to stop the negativity and stop the regulation and stop attempting to put our salons out of business,” he says. “We have to stop the bleeding.”

ONE WAY THE ASA HAS SOUGHT TO STOP THE BLEEDING IS by fighting back. Its most aggressive effort has been to sue the Nebraska Cancer Coalition (NCC), which in 2013 launched a campaign called “The Bed Is Dead.” The NCC invited consumers to pledge to stop using tanning beds and



LUCKYBUSINESS/ISTOCKPHOTO



THE WEBSITES OF MANY SALONS FEATURE STUDIES AND STATISTICS ASSERTING THE BENEFITS OF TANNING.

shared stories of melanoma survivors on its website, where it made statements like: “Tanning=Skin Damage.” Seven Nebraska tanning salons sued the NCC last summer for defamation and deceptive trade practices. The suit called into question some of the scientific claims made in The Bed Is Dead campaign, such as “tanning is linked to more skin cancers than cigarettes to lung cancers.” The salons also disputed the NCC’s statement that “tanning before age 35 increases your risk of melanoma by nearly 60 percent.”

The NCC as well as the CDC believe that the American Suntanning Association has mischaracterized their comments. The NCC’s executive director, Kirby Simmering, declined to comment for this article, but the group responded in court records that said: “The statements made on NC2’s website are about the relationship between UV radiation/tanning and cancer, not about the plaintiffs or their businesses.” The CDC’s associate director for science, Greta Massetti, said that her organization stands behind the research that Sternberg suggested had been changed as a result of the scientific evidence provided by the indoor tanning industry. The CDC changed the wording, she said, only because it was being misrepresented in articles and studies. She also stressed that her group’s meeting with the ASA focused only on sun exposure, and “indoor tanning was not mentioned or discussed.”

Beyond the disputes with its critics, the tanning industry faces plenty of challenges, says public relations and crisis expert Richard Levick, chairman and CEO of Levick in Washington, D.C. Levick’s firm has handled many high-profile campaigns, such as the sexual abuse scandal within the Catholic Church and the BP oil spill. He says that there must be a positive for an industry or group to survive a crisis. With the tanning industry, there isn’t a clear benefit for the public, he says. Plus, Levick conducted a social analysis on the industry during a 24-hour period in early May. Granted, it was a short time frame, but he found only 132 tweets about tanning, many of

which he says were negative. “They don’t have any allies,” Levick says. “They don’t have enough support from the salons, they don’t have customers as allies. They certainly don’t have support from the government,” he says.

James Haggerty, a public relations expert with CrisisResponsePro (and a former CorpCounsel.com columnist), says that the indoor tanning industry has a long road ahead to convince the public that indoor tanning has health benefits—especially with the Skin Cancer Foundation reporting that there are more than 419,000 cases of skin cancer in the U.S. each year linked to tanning beds.

Considering all of the back-and-forth with the research coming from the indoor tanning industry, Haggerty says, “If the science is true, they’ve done a horrible job at letting the public know. If it is not the truth, or half the story or a quarter of the story and they’re trying to spin it, ultimately, something like that usually fails.”

Yet, the industry still has its supporters. Dawn Diaz worked as the general counsel of Planet Beach Franchising Corp. from 2003 to 2009. She has since moved on to lead the legal department of a finance company, but she is still a believer in tanning. When she worked for Planet Beach, the brand was expanding rapidly, but later in her tenure, the salons began to diversify and shift their focus to fitness and other services. Diaz says she is half Hispanic and doesn’t have a problem getting color outdoors, but when she worked for the chain, headquartered in Louisiana, she used tanning beds or booths once a month solely for the Vitamin D exposure. “Laying out in the sun is much more dangerous,” she asserts. “The exposure is controlled, versus the sun, you don’t know how much you’re getting. You don’t really see as many burns in tanning beds.”

Sternberg says that all the tanning industry can do is to continue to “operate within the laws as they stand today” and “try to educate the government and change their stance. Our hope,” he adds, “is that the science will be heard.” ■