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Holding Cigarette Manufacturers and Smokers Liable for Toxic Butts: Potential Litigation- Related Causes of Action for Environmental Injuries/Harm and Waste Cleanup

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Across America, our sidewalks, parks, streets, and neighborhoods are constantly littered with cigarette butts. Not only are these butts unsightly, but they sicken babies and dogs every year, and scientific tests have proven that they are toxic to aquatic life. Cigarette butts are the most common item picked up at beach and neighborhood cleanups, and municipalities and businesses spend millions of dollars each year to tackle cigarette butt litter. This Article explores potential legal theories to address cigarette butt litter by holding cigarette manufacturers responsible for butt waste under common law doctrines and state laws and regulations. The Article's primary focus is on the potential to address cigarette butt litter as a public nuisance by exploring the lessons learned from attempts to address other dangerous and damaging products in this manner. This Article explores challenges and opportunities of other statutory and common law approaches to addressing cigarette butt litter.

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I. INTRODUCTION

Cigarette butt litter is a toxic epidemic. Not only is the litter unsightly, but it is dangerous. Cigarettes contain hundreds of chemical additives,¹ and many of those chemicals are known carcinogens.² When

1. 599 *Ingredients Added to Cigarettes*, TOBACCO.ORG (1994), <http://archive.tobacco.org/Resources/599ingredients.html>.

cigarette butts are littered on our streets, sidewalks, beaches, parks, and lawns, those butts leach harmful pollutants into the soil and water. Cigarette butts are also poisonous, and the ubiquitous litter leads to poisoned dogs and children every year.³

The toxic byproduct of cigarettes—nondegradable, plastic-like cellulose butts with chemical components known to be fatal to freshwater fish⁴—should remain the responsibility of the manufacturers who control the butts’ ingredients, produce the butts, and know or have reason to know of the high incidence of improper butt disposal. Absent laws expressly declaring cigarette waste to be the responsibility of the cigarette manufacturers, plaintiffs who have been injured by cigarette waste might consider using litigation to seek relief.

The challenge with tackling cigarette butt litter is multifold. The actual littering takes place by millions of smokers who have little knowledge or understanding of the dangers of cigarette butts to human health and the environment.⁵ Those best poised to solve the problem—the cigarette manufacturers—hide behind a shield of intervening bad actors, noting that they are not the ones doing the littering.⁶ Yet, these obstacles may be surmountable, and litigation has the possibility of playing a role in ridding our communities of cigarette waste.

Perhaps the most promising approach to holding cigarette companies responsible for the damage cigarette butt litter causes is through public nuisance, a theory advanced to hold manufacturers responsible for public harms due to guns and lead paint.⁷ This Article also examines the suitability of products liability and California state hazardous waste law for holding cigarette manufacturers liable for cigarette butt litter and how to apply pressure on them to modify their product or adopt procedures to reduce or eliminate cigarette butt litter.

2. Thomas E. Novotny et al., *Tobacco and Cigarette Butt Consumption in Humans and Animals*, 20 TOBACCO CONTROL (SUPP. 1) i17, i17 (2011) (citing U.S. Surgeon Gen., U.S. Dep’t of Health & Human Servs., *The Health Consequences of Smoking: A Report of the Surgeon General*, CTRS. FOR DISEASE CONTROL & PREVENTION (2004), http://www.cdc.gov/tobacco/data_statistics/sgf/2004/pdfs/chapter2.pdf).

3. *Id.* at i17-i19.

4. Elli Slaughter et al., *Toxicity of Cigarette Butts, and Their Chemical Components, to Marine and Freshwater Fish*, 20 TOBACCO CONTROL (SUPP. 1) i25, i26-i29 (2011) (citing U.S. ENVTL. PROT. AGENCY, EPA-821-R-02-012, METHODS FOR MEASURING THE ACUTE TOXICITY OF EFFLUENTS AND RECEIVING WATERS TO FRESHWATER AND MARINE ORGANISMS § 9.16.1 (5th ed. 2002)).

5. See winterrules, Comment to *Are Cigarette Butts Biodegradable?*, YAHOO! ANSWERS, <http://answers.yahoo.com/question/index?qid=20081006170932AarNXiL> (last visited Sept. 28, 2014).

6. See *infra* Part III.A.3.B.

7. See *infra* Part III.

II. CIGARETTE BUTT LITTER—UBIQUITOUS, SLOW TO DEGRADE, EXPENSIVE, AND TOXIC

A. *Cigarette Butt Litter Is a Problem Across the Country and Around the Globe*

Cigarette butts are the most common form of litter in the United States and worldwide. Four and a half trillion cigarette butts are discarded worldwide each year.⁸ In Texas alone, more than half a billion cigarettes are littered on Texas roadways each year.⁹ In 2012, cigarette butts were the number one item picked up on International Coastal Cleanup Day, with volunteers counting more than 2.1 million butts picked up.¹⁰

B. *Cigarette Butt Litter Degrades Slowly*

Contrary to popular belief that cigarette filters are made of cotton and are biodegradable,¹¹ most cigarette filters are made of nonbiodegradable cellulose acetate.¹² While cellulose acetate is photodegradable, it is not biodegradable.¹³ That means that “ultraviolet rays from the sun will eventually break the filter into smaller pieces . . . , [but] the

8. Slaughter et al., *supra* note 4, at i25; see also *This Isn't Just a Cigarette. It's Toxic Waste*, LIVE TOBACCO FREE AUSTIN, [http://www.austintexas.gov/sites/default/files/files/Water shed/litter-posters.pdf](http://www.austintexas.gov/sites/default/files/files/Water%20shed/litter-posters.pdf) (last visited Sept. 28, 2014).

9. Envtl. Res. Planning, LLC, Sherry Matthews Advocacy Mktg., *2013 Texas Litter Survey*, DON'T MESS WITH TEXAS 1, 21 (Aug. 23, 2013), http://www.dontmesswithtexas.org/docs/DMWT_2013_Litter_Survey.pdf.

10. Int'l Coastal Cleanup, *Top 10 Items Found*, OCEAN CONSERVANCY, <http://www.oceanconservancy.org/our-work/international-coastal-cleanup/top-10-items-found-1.html> (last visited Sept. 28, 2014). As a note, cigarette butts are typically undercounted during cleanups because volunteers typically stop counting after picking up dozens of butts. For example, a comprehensive cleanup in Orange County, California, yielded twenty times more butts than the estimated International Coastal Cleanup Day total for that beach for the same year. See Shelly L. Moore et al., *Composition and Distribution of Beach Debris in Orange County, California*, 42 MARINE POLLUTION BULL. 241, 244-45 (2001).

11. The most popular answer to the question “Are cigarette butts biodegradable?” on Yahoo! Answers states, “The filters of most cigarettes are made of cotton.” winterrules, *supra* note 5.

12. Elizabeth A. Smith & Thomas E. Novotny, *Whose Butt Is It? Tobacco Industry Research About Smokers and Cigarette Butt Waste*, 20 TOBACCO CONTROL (SUPP. 1) i2, i2 (2011) (citing Nyok-Sai Hon, *Photodegradation of Cellulose Acetate Fibers*, 15 J. POLYMER SCI. (POLYMER CHEMISTRY EDITION) 725, 725 (1977)).

13. Thomas E. Novotny et al., *Cigarette Butts and the Case for an Environmental Policy on Hazardous Cigarette Waste*, 6 INT'L J. ENVTL. RES. & PUB. HEALTH 1691, 1693 (2009) (citing Hon, *supra* note 12, at 725; Clean Va. Waterways, *Are Cigarette Butts Biodegradable?*, LONGWOOD U., <http://www.longwood.edu/CLEANVA/cigbuttbiodegradable.htm> (last visited Sept. 28, 2014)).

source material never disappears; it essentially becomes diluted in water or soil.”¹⁴

In 1950, filtered cigarette sales only accounted for 1.5% of all cigarette sales.¹⁵ During the 1950s, cigarette companies responded to the public health outcry against lung cancer by creating and marketing filtered cigarettes.¹⁶ Currently, filtered cigarettes account for more than 97% of cigarettes sold in the United States.¹⁷ Not only do filters fail to provide any health benefits, they actually deceive smokers into thinking the filters protect their health.¹⁸ As Stanford University Professor of the History of Science, Robert N. Proctor, recently put it: “Filters are the deadliest fraud in the history of human civilization. They are put on cigarettes to save on the cost of tobacco and to fool people. They don’t filter at all. In the U.S., 400,000 people a year die from cigarettes—and those cigarettes almost all have filters.”¹⁹

C. *Cigarette Butts Are Toxic*

Cigarettes, and consequently their butts, contain hundreds of chemicals, at least 50 of which are known to be carcinogenic.²⁰ The five major cigarette manufacturers have admitted to routinely adding 599 different chemicals to cigarettes.²¹ Every year, children and pets are exposed to discarded cigarette butts and become ill.²² For example, between 1988 and 1991, the Albert Einstein Hospital Emergency Department in Philadelphia described 700 children under six years of age who ingested cigarettes or cigarette butts and reported to the Poison Control Center.²³ In 1997 alone, the Rhode Island Department of Health

14. *Id.*

15. Kathleen M. Register, *Cigarette Butts as Litter—Toxic as Well as Ugly?*, 25 UNDERWATER NATURALIST 23, 24 (2000).

16. Bradford Harris, *The Intractable Cigarette ‘Filter Problem,’* 20 TOBACCO CONTROL (SUPP. 1) i10, i10-i11 (2011) (citing Alfred R. Zipser, Jr., *Cigarette Industry Convalescing; Filter Prescription Seems To Help*, N.Y. TIMES, Oct. 3, 1954, at F5).

17. Register, *supra* note 15, at 24.

18. Harris, *supra* note 16, at i10.

19. Pagan Kennedy, *Who Made That? (Cigarette Filter)*, N.Y. TIMES, July 8, 2012, (Magazine), at 14, available at http://www.nytimes.com/2012/07/08/magazine/who-made-that-cigarette-filter.html?_r=0.

20. U.S. Surgeon Gen., *supra* note 2, at 44 (citing Stephen S. Hecht et al., *A Tobacco-Specific Lung Carcinogen in the Urine of Men Exposed to Cigarette Smoke*, 329 NEW ENG. J. MED. 1543, 1543-45 (1993)).

21. See 599 *Ingredients Added to Cigarettes*, *supra* note 1.

22. See Novotny et al., *supra* note 2, at i17.

23. *Id.* at i18 (citing Douglas McGee et al., *Four-Year Review of Cigarette Ingestions in Children*, 11 PEDIATRIC EMERGENCY CARE 13, 13 (1995)).

reported 146 cases of children under the age of six ingesting cigarette butts, with one-third of those kids showing nicotine toxicity.²⁴

D. *Cigarette Butt Litter Is Expensive*

The costs of tobacco-related litter are high, even when environmental threats to children and pets are not included. Public litter clean-up costs in major cities across the United States and Canada range from \$3 million to \$16 million per year.²⁵ A literature study examining litter studies found that tobacco product litter comprises 38% of all visible litter.²⁶ An analysis prepared for the city of San Francisco estimated that the cost of tobacco litter alone ranges from \$500,000 per year to upwards of \$6 million for a city the size of San Francisco.²⁷ The National Oceanic and Atmospheric Administration (NOAA) estimates that over the past 25 years, volunteers have collected more than 52.9 million cigarette butts from the world's beaches.²⁸ Despite volunteer and municipal cleanup efforts, the amount of cigarette butt litter left in the environment is staggering. With half a *billion* cigarette butts littered on roads in just Texas each year—and volunteers collecting only 52.9 million cigarette butts from the world's beaches over 25 years—the number of cigarette butts left littered in the environment across the United States is breathtaking.

Cigarette butts are also toxic to aquatic life.²⁹ One method to determine aquatic toxicity is the median lethal effect concentration or “LC₅₀” test. The test involves determining at what concentration the substance will cause the death of half of the fish exposed to the material over the course of 96 hours.³⁰ For example, California law specifies that if the LC₅₀ is less than 500 milligrams per liter in soft water with

24. *Id.* (citing William A. Bonadio & Yvonne Anderson, Letter to the Editor, *Tobacco Ingestions in Children*, 28 CLINICAL PEDIATRICS 592, 592 (1989)).

25. John E. Schneider et al., *Tobacco Litter Costs and Public Policy: A Framework and Methodology for Considering the Use of Fees To Offset Abatement Costs*, 20 TOBACCO CONTROL (SUPP. 1) i36, i38 (2011) (citing Mid. Atl. Solid Waste Consultants, Keep Am. Beautiful, Inc., *2008 National Visible Litter Survey and Litter Cost Research Study*, ENVTL. RES. PLANNING, LLC (Sept. 18, 2009), http://www.erplanning.com/uploads/KAB_2009_National_Litter_Study.pdf).

26. Mid. Atl. Solid Waste Consultants, *supra* note 25.

27. Schneider et al., *supra* note 25, at i40.

28. See *Picking Up 52.9 Million Plastic Cigarette Butts off Beaches*, NOAA OFF. RESPONSE & RESTORATION (Apr. 26, 2012), <http://response.restoration.noaa.gov/about/media/picking-52-million-plastic-cigarette-butts-beaches.html>.

29. Slaughter et al., *supra* note 4, at i27-i29.

30. *Id.* at i26.

freshwater fathead minnows, the substance exhibits acute aquatic toxicity.³¹

Researchers at San Diego State University completed the LC₅₀ test using freshwater fathead minnows and marine topsmelt and testing both cigarette butts and cigarette filters separately.³² The study concluded that the LC₅₀ for “[l]eachate from smoked cigarette butts . . . (smoked filter + tobacco) was . . . approximately 1 cigarette butt [per liter] for both [the marine topsmelt (*Atherinops affinis*) and the freshwater fathead minnow (*Pimephales promelas*)].”³³ The study also found that the leachate from smoked cigarette filters without tobacco was less toxic, with LC₅₀ values of 1.8 and 4.3 cigarette butts per liter, respectively, for both fish species. Likewise, unsmoked cigarette filters with no tobacco were also found to be toxic, with LC₅₀ values of 5.1 and 13.5 cigarette butts per liter, respectively, for both fish species.³⁴

The research recognized that the “mean weight of a single smoked cigarette butt is approximately 310 [milligrams].”³⁵ Given that the LC₅₀ was one cigarette butt per liter and one butt weighs approximately 310 milligrams, the LC₅₀ for cigarette butt leachate is less than 500 milligrams per liter. Cigarette butts that include a smoked filter and tobacco are acutely toxic to freshwater species and therefore qualify as hazardous waste under California’s hazardous waste laws.

III. USING PUBLIC NUISANCE LAW TO HOLD CIGARETTE MANUFACTURERS LIABLE FOR ABATING CIGARETTE BUTT LITTER AND REIMBURSING MUNICIPALITIES FOR CLEANUP COSTS

Millions of cigarette butts littering our neighborhoods are undisputedly an unsightly nuisance. But do they rise to the level of being considered a public nuisance? While some scholars and judges have rejected the use of public nuisance doctrines against product manufacturers, other jurisdictions have allowed such suits to go forward.³⁶ Over the past decade, frustrated cities have attempted to use

31. The rule also specifies that the test must be done using soft water, which is water that has less than 40 to 48 milligrams per liter of calcium carbonate. CAL. CODE REGS. tit. 22, § 66261.24(a)(6) (2014).

32. Slaughter et al., *supra* note 4, at i26. The study used a machine to uniformly smoke the cigarettes used in the tests. *Id.*

33. *Id.*

34. *Id.* at i27.

35. *Id.*

36. See generally Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741 (2003) (arguing that products do not usually infringe on public rights). Gifford is a widely cited torts scholar whose work is cited by courts that ruled against finding lead paint a public nuisance, including the Supreme Court of Rhode Island. *State v. Lead Indus.*

public nuisance lawsuits to hold manufacturers of handguns, lead paint, and gasoline additives accountable for the costs their products impose on the public and to make them responsible for abating those harmful impacts.³⁷

Public nuisance “extend[s] to virtually any form of annoyance or inconvenience interfering with common public rights.”³⁸ Public nuisance, then, is “a species of catch-all criminal offense, consisting of an interference with the rights of the community at large.”³⁹ When a nuisance infringes on a public right, rather than on private property, it may become a public nuisance.⁴⁰ Traditionally, public nuisance suits are brought by a state or public agency on behalf of the public to abate an activity that is imposing on a public right.⁴¹

Could a public nuisance lawsuit against cigarette manufacturers be the key to solving cigarette butt litter problems? To date, there have been no lawsuits applying public nuisance law to cigarette butt litter.⁴² While applying public nuisance common law to cigarette butt litter would be novel, case law from other public nuisance suits provides insight into the hurdles a plaintiff in a cigarette butt litter lawsuit would need to overcome in order to state a successful public nuisance claim.

A. *Elements of a Successful Public Nuisance Lawsuit*

The *Restatement (Second) of Torts* defines public nuisance as “an unreasonable interference with a right common to the general public.”⁴³

Ass’n, 951 A.2d 428, 443-44, 448-49, 454 (R.I. 2008). Gifford, in addition to being a law school dean, professor, and author, also worked as an advisor to DuPont, a paint company, from 2000 to 2008. *Curriculum Vitae of Donald G. Gifford*, UNIV. OF MARYLAND FRANCIS KING SCH. OF LAW, http://www.law.umaryland.edu/faculty/profiles/cv/Donald_Gifford.pdf (last visited Sept. 28, 2014).

37. For summaries and lists of cases regarding products causing social ills, see 1 MICHAEL DORE, *LAW OF TOXIC TORTS* § 4:6 (2014); Gifford, *supra* note 36; and Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2006).

38. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1111 (Ill. 2004) (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* § 86, at 618 (5th ed. 1984)).

39. *Id.*

40. See RESTATEMENT (SECOND) OF TORTS § 821B (1979).

41. *E.g.*, NAACP v. *AcuSport, Inc.*, 271 F. Supp. 2d 435, 482 (E.D.N.Y. 2003) (“A state actor is both in the best position and has a responsibility to protect the public that has entrusted it with their representation. Private suits on behalf of the public have come to be recognized as appropriate only under special circumstances.”); see also Eric J. Mayer & Brian Lowenberg, *Nuisance Joins the PJC*, 61 *ADVOCATE* 54, 55 (2012).

42. *Smith & Novotny*, *supra* note 12, at 17 (“There has been no tobacco litigation to date concerning tobacco litter/waste issues.”).

43. RESTATEMENT (SECOND) OF TORTS § 821B(1).

Courts generally list the elements of a public nuisance claim to include (1) the existence of a public right, (2) a substantial and unreasonable interference with the right by the defendant, (3) proximate cause, and (4) injury.⁴⁴

1. Public Right

Those seeking to abate a public nuisance will need to define what public right the nuisance violates. While no court has yet spoken as to whether a public right exists in relation to cigarette butt litter, some courts have given guidance. In California, “those responsible for polluting groundwater can be held liable for creating a public nuisance.”⁴⁵ In Massachusetts, interference with “[t]he right to be free of contamination to the municipal water supply” constitutes a public nuisance.⁴⁶ An Illinois court held that plaintiffs alleging contamination of the food supply by genetically modified corn successfully alleged a violation of a public right.⁴⁷ The United States Court of Appeals for the Second Circuit held, “We have no doubt that the release or threat of release of hazardous waste into the environment unreasonably infringes upon a public right and thus is a public nuisance as a matter of New York law.”⁴⁸

Given the toxic components of cigarette butt litter, potential public rights include the right to be free of toxic waste on public rights of way, public parks, public places of congregation, and public beaches. How many parents struggle to keep their toddlers from trying to eat cigarette butts strewn over the ground in the local park?⁴⁹ The public may also claim a right to be safe from exposure to toxic cigarette byproducts in our

44. *E.g.*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1113 (Ill. 2004) (citing *Feder v. Perry Coal Co.*, 279 Ill. App. 314, 318 (1935)).

45. *California v. Campbell*, 138 F.3d 772, 776 (9th Cir. 1998) (citing *Carter v. Chotiner*, 291 P. 577, 578 (Cal. 1930) (discussing that polluted water is a public nuisance)).

46. *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219, 1233 (D. Mass. 1986) (citing *Leary v. City of Boston*, 481 N.E.2d 1184, 1187-88 (Mass. App. Ct. 1985); *Wesson v. Washburn Iron Co.*, 95 Mass. (13 Allen 95, 101 (1866)); RESTATEMENT (SECOND) OF TORTS § 821B cmt. b).

47. *In re Starlink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 848 (N.D. Ill. 2002).

48. *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1051 (2d Cir. 1985) (citing *State v. Schenectady Chems., Inc.*, 479 N.Y.S.2d 1010, 1013 (App. Div. 3d 1984); *State v. Monarch Chems., Inc.*, 456 N.Y.S.2d 867, 868-69 (App. Div. 3d 1982); RESTATEMENT (SECOND) OF TORTS § 821B cmt. c).

49. Apparently, this is not an unusual problem. A colleague of mine raised this very concern to me. As a mother in Washington, D.C., she had to avoid the park closest to her home because her toddler kept trying to eat the cigarette butts, which were all over the park. A quick Internet search reveals that this is fairly common. *E.g.*, *Study: Thousands of Kids Get Sick Eating Cigarettes*, SEATTLE TIMES (Feb. 14, 1997), <http://community.seattletimes.nwsources.com/archive/?date=19970214&slug=2523943>.

public waterways, including surface water, runoff, and soil contamination.

A court will not, however, merely gloss over and accept any public right a plaintiff may dream up. In the city of Chicago's public nuisance lawsuit against Beretta U.S.A. Corporation, seeking to hold the gun manufacturer responsible for gun violence, Chicago claimed that the defendants violated the common right of the public "to be free from conduct that creates an unreasonable jeopardy to the public's health, welfare and safety."⁵⁰ The Supreme Court of Illinois rejected the notion that "there is a public right to be free from the threat that some individuals may use an otherwise legal product . . . in a manner that may create a risk of harm to another."⁵¹ Likewise, the Supreme Court of Rhode Island rejected a public nuisance case brought to abate lead paint hazards, finding the poisoning of children in their own homes by a consumer product failed to infringe on a public right.⁵²

At first glance, the Illinois and Rhode Island courts' resistance to extending public nuisance to conditions caused by consumers using products in a way that creates the risk of harm to others appears to be problematic for cigarette butt litter plaintiffs. Arguably, cigarettes are a legal product that some individuals illegally litter, creating a risk of harm to others. On the other hand, the condition created—litter on streets, beaches, parks, and other public property—impacts *all* members of the public, not just a few individuals. Considering both the pervasive impact of litter and the harmful nature of the butts themselves, cigarette butt litter more closely aligns with hazardous waste disposal (which has been found to interfere with a public right) than with gun violence and arguably violates the public right to comfort.

Additionally, many cities already define litter generally, including cigarette butt litter, as a public nuisance through local ordinances. For example, the city of San Diego declares litter a nuisance, stating that waste "found upon or in front of streets, sidewalks, and private property within the City of San Diego are public nuisances that adversely affect the public health, safety, and general welfare."⁵³ Where local ordinance defines cigarette butt litter as a public nuisance, a court would be hard-pressed to deny that cigarette butt litter interferes with a public right.

50. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1108-09 (Ill. 2004) (quoting Second Amended Complaint at 78, *City of Chicago*, 821 N.E.2d 1099 (No. 98 CH 015596)).

51. *Id.* at 1116.

52. *State v. Lead Indus. Ass'n*, 951 A.2d 428, 453 (R.I. 2008) (citing *City of Chicago*, 821 N.E.2d at 1114).

53. SAN DIEGO, CAL., MUN. CODE § 54.0201(f) (2006).

2. Substantial and Unreasonable Interference

Not only must a plaintiff articulate a public right, but it also must prove that such interference is unreasonable. The *Restatement (Second) of Torts* lists three independent factors a court might use to determine whether the interference is unreasonable:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.⁵⁴

It is arguable as to whether cigarette butt litter involves a “significant” interference with public health, safety, peace, comfort, or convenience. Perhaps the cigarette butt litter threatens public health, because every year, children and dogs are sickened by eating cigarette butts. But are the hundred or so sick kids across the state a “significant” interference?⁵⁵ Cigarette butt litter also potentially interferes with public comfort by leaving disgusting trash along sidewalks and streets and in other public areas. The sheer number of littered cigarette butts supports the conclusion that the interference is significant.

Plaintiffs will likely be better served by relying on the second prong of the *Restatement's* three-part test. Conduct prohibited by statute, ordinance, or regulation unreasonably interferes with a public right.⁵⁶ Many local jurisdictions prohibit littering, punishable by a fine, and some take it a step further. For example, the state of Washington has not only made littering illegal,⁵⁷ but it has actually declared litter to be a nuisance.⁵⁸ While litter laws may not specifically call out cigarette butts, where littering is proscribed by ordinance, courts should conclude that cigarette butt litter is a significant and unreasonable interference with a

54. RESTATEMENT (SECOND) OF TORTS § 821B(2)(a)-(c) (1979).

55. *E.g.*, Letter from William A. Bonadio & Yvonne Anderson to Benjamin K. Silverman, *supra* note 24; Novotny et al., *supra* note 2, at i18 (citing McGee et al., *supra* note 23, at 13).

56. RESTATEMENT (SECOND) OF TORTS § 821B(1).

57. WASH. REV. CODE § 70.93.060(1) (2014) (“[N]o person shall throw, drop, deposit, discard, or otherwise dispose of litter upon any public property in the state or upon private property in this state not owned by him or her or in the waters of this state whether from a vehicle or otherwise.”).

58. *Id.* § 70.93.060 findings (“The legislature further finds that litter is a nuisance, and, in order to alleviate such a nuisance, counties must be provided statutory authority to declare what shall be a nuisance, to abate a nuisance, and to impose and collect fines upon parties who may create, cause, or commit a nuisance.”); *see also* SAN DIEGO, CAL., MUN. CODE § 54.0201(f).

public right. Where a state or locality has determined litter to be a nuisance, both the public right and the substantial interference are proven.

Cigarette littering may also fall into the third category of significant and unreasonable interference—conduct of a continuing nature or conduct that has produced a permanent or long-lasting effect, which the actor knows to have a significant effect upon the public right. Cigarette butt litter is “of a continuing nature.”⁵⁹ It takes years to degrade,⁶⁰ and smokers litter billions of butts into the environment each year. Cigarette manufacturers are well aware of the components of cigarette filters,⁶¹ have considered ways to make butts biodegradable,⁶² and are acutely aware of the high incidence of butt littering.⁶³ Indeed, cigarette manufacturers have directed millions of dollars to antilittering campaigns such as Keep America Beautiful to address the problem they continue to create.⁶⁴ Such minimal remediation efforts fail to abate the ongoing contribution of toxic chemicals into public rights of way and the continuing poisoning of water sources, wildlife, and even humans.⁶⁵

3. Proximate Cause

To hold cigarette butt manufacturers liable for a public nuisance, a plaintiff would need to show that the manufacturers’ actions were the proximate, or legal, cause of the plaintiff’s harm.⁶⁶ Without wading too far into the thorny realm of proximate cause, this Subpart will briefly

59. See RESTATEMENT (SECOND) OF TORTS § 821B(2)(c).

60. Clean Va. Waterways, *supra* note 13.

61. J.L. Pauly et al., *Cigarettes with Defective Filters Marketed for 40 Years: What Philip Morris Never Told Smokers*, 11 TOBACCO CONTROL (SUPP. 1) i51, i54-i55 (2002) (citing Inter-Office Correspondence from Nancy R. Ryan, Philip Morris U.S.A., to J.A. Nash, Philip Morris U.S.A., LEGACY TOBACCO DOCUMENTS LIBR., U. CAL. S.F. (Oct. 15, 1982), <http://legacy.library.ucsf.edu/tid/qio05a00/pdf>).

62. Novotny et al., *supra* note 13, at 1695 (citing Inter-Office Correspondence from Ted Sanders, Philip Morris U.S.A., to C.K. Ellis, Philip Morris U.S.A., LEGACY TOBACCO DOCUMENTS LIBR., U. CAL. S.F. 4-5 (Feb. 7, 1992), <http://legacy.library.ucsf.edu/documentStore/a/h/h/ahh48e00/Sahh48e00.pdf>).

63. See Elizabeth A. Smith & Patricia A. McDaniel, *Covering Their Butts: Responses to the Cigarette Litter Problem*, 20 TOBACCO CONTROL 100, 101 (2011) (citing *Responsible Smoking: Litter Recommendations*, LEGACY TOBACCO DOCUMENTS LIBR., U. CAL. S.F. (Oct. 1997), <http://legacy.library.ucsf.edu/tid/oid40b00>).

64. Novotny et al., *supra* note 13, at 1695-96 (citing Walter Lamb, *Keep America Beautiful: Grassroots Non-Profit or Tobacco Trust Group?*, PR WATCH, Third Quarter 2001, at 1, 4). Keep America Beautiful is an antilittering organization with strong ties to the tobacco industry. See *id.*

65. See Novotny et al., *supra* note 2, at i19.

66. *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 201 n.3 (App. Div. 2003).

address two aspects of proximate cause that are related to an action against cigarette manufacturers for butt litter—foreseeability and an intervening illegal action. This Subpart also discusses which actions a plaintiff may want to focus on as the proximate cause of the harm.

a. Foreseeability

An important aspect of determining proximate cause is whether or not the harm is reasonably foreseeable. The Court of Appeals of Wisconsin upheld a jury’s finding that a lead paint producer had created a public nuisance but was not liable because the manufacturer lacked awareness at the time that producing the lead paint could create the resulting nuisance.⁶⁷

While the cigarette manufacturers themselves are not dropping cigarette butts on the ground, it is reasonably foreseeable that the smoker is likely to do so. Not only do we know this by the number of cigarette butts that litter our sidewalks and streets, but even movies model this behavior again and again.⁶⁸ Cigarette manufacturers would be hard-pressed to claim they lacked awareness of the high incidence of cigarette butt littering and the toxic components of their product. In fact, cigarette manufacturers, concerned that cigarette litter might make smoking even more socially unacceptable, have “sponsored anti-littering groups, distributed portable ashtrays (frequently branded) and installed permanent ashtrays in downtown areas of numerous cities.”⁶⁹

Courts have found that if consumers regularly use a product in a dangerous, unintended manner, the use is probably foreseeable.⁷⁰ For example, if a gun manufacturer knows consumers are keeping the gun in

67. See *City of Milwaukee v. NL Indus.*, 762 N.W.2d 757, 770 (Wis. Ct. App. 2008) (mentioning *Vogel v. Grant-Lafayette Elec. Coop.*, 548 N.W.2d 829 (Wis. 1996)).

68. For example, in the final scene of the movie *Grease*, when Sandy is trying to show that she is cool, she drops her cigarette to the ground and seductively grinds it out with her “sexy” shoes. Oky Ruiz, *You’re the One That I Want*, YOUTUBE (Sept. 28, 2011), <http://www.youtube.com/watch?v=T8gAM0C9U64> (excerpt from the film *GREASE* (Paramount Pictures 1978)). While the Center for Disease Control and Prevention gathers data on the number of “tobacco incidents” in movies each year (in 2012, there were 2,818 tobacco incidents in top-grossing movies), it does not yet track the number of times movie characters are shown littering their cigarette butts. See Office on Smoking & Health, Nat’l Ctr. for Chronic Disease Prevention, *Smoking in the Movies*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/movies/index.htm (last updated Aug. 22, 2014) (citing Jonathan R. Polansky et al., *Smoking in the Top-Grossing US Movies, 2012*, CTR. FOR TOBACCO CONTROL RESEARCH & EDUC., U. CAL. S.F. (Mar. 2013), <http://scholarship.org/UC/item/3i69r912>).

69. Smith & Novotny, *supra* note 12, at i2-i3 (citing Smith & McDaniel, *supra* note 63, at 101-02).

70. See, e.g., *Gootee v. Colt Indus.*, 712 F.2d 1057, 1066 (6th Cir. 1983).

a half-cock position as a safety measure, then this misuse is foreseeable.⁷¹ Further, the Supreme Court of Alaska noted that “a manufacturer should not be relieved of responsibility simply because it closes its eyes to the way its products are actually used by consumers.”⁷²

Cigarette manufacturers know that cigarettes have been tossed on the ground and can reasonably foresee that they will continue to be tossed on the ground.⁷³ They also know that cigarette butt filters do not degrade easily in the natural environment. In fact, cigarette manufacturers have looked into both removing the offending filter and making the filter biodegradable.⁷⁴

Yet, cigarette manufacturers, knowing that smokers will toss butts on the ground, have failed to make their product safer. They refuse to remove all filters or to make the filters biodegradable.⁷⁵ They make cigarettes with plastic filters inserted into paper wrappers, giving the appearance to smokers and nonsmokers alike that the butt is merely harmless paper and cotton that will easily degrade in the environment.⁷⁶ They also have failed to include warning messages on cigarette packs that the butts are toxic and that consumers should properly dispose of them.⁷⁷ For these reasons, the fact that cigarettes will be littered is reasonably foreseeable, as is the fact that they can remain in the environment for years. Given the fact that filtered cigarette butts contain harmful chemicals, their impact on aquatic life is foreseeable, as is the fact that children and pets will get sick each year from ingesting cigarette butts littered in public places.

b. Lack of Control and Intervening Acts

The cigarette manufacturer’s primary defense to proximate cause will be to argue that the manufacturer no longer had control of the

71. *Id.* (citing *Tulkku v. Mackworth Rees, Div. Avis Indus., Inc.*, 281 N.W.2d 291, 294 (Mich. 1979)).

72. *Lamer v. McKee Indus., Inc.*, 721 P.2d 611, 615 (Alaska 1986).

73. *See generally* Novotny et al., *supra* note 13, at 1695-96 (discussing cigarette manufacturers’ research on cigarette butt disposal) (citing Lamb, *supra* note 64, at 4).

74. *Id.* at 1696.

75. *See id.*

76. When informed that cigarette butts are not made solely of easily degradable materials, most people are astonished. Having personally shared this information with hundreds of people at beach cleanups, the vast majority were shocked to learn this information. *See* *winterrules*, *supra* note 5.

77. *See, e.g.*, S. Chapman & S.M. Carter, “Avoid Health Warnings on All Tobacco Products for Just as Long as We Can”: *A History of Australian Tobacco Industry Efforts To Avoid, Delay and Dilute Health Warnings on Cigarettes*, 12 *TOBACCO CONTROL* (SUPP. 3) iii13, iii13 (2003).

cigarette when it caused the harm; the smoker's act of throwing the butt on the ground is an intervening action that becomes the proximate cause of the injury. Indeed, Chicago's public nuisance case against gun manufacturers demonstrates that intervening criminal activity can be devastating to a public nuisance claim.⁷⁸ The Supreme Court of Illinois refused to find proximate cause, concluding that the intervening criminal activity by third parties rendered the defendants' activity not the proximate cause of the injury. The court also noted that "it is not at all clear that the condition would cease to exist even if these particular defendants entirely ceased selling firearms."⁷⁹

A string of lead paint cases from across the country paints a similarly bleak outlook for establishing causation for manufacturers of a product later used, or misused, by consumers. The Supreme Court of New Jersey found causation lacking because the paint manufacturers no longer controlled the source of the harm, and the conduct that gave rise to the public health crisis was the "poor maintenance of premises where lead paint may be found by the owners of those premises."⁸⁰ The court noted, "Although one might argue that the product, now in its deteriorated state, interferes with the public health, one cannot also argue persuasively that the conduct of defendants in distributing it, at the time when they did, bears the necessary link to the current health crisis."⁸¹ The Supreme Court of Rhode Island similarly refused to find paint manufacturers liable because the state had failed to allege that the defendant manufacturers were in control of the lead paint at the time it caused harm to the children.⁸²

Fortunately for plaintiffs attempting to sue cigarette manufacturers for cigarette butt litter, control over the harm is not dispositive in a public nuisance action. Although it failed to find proximate cause under the facts of *City of Chicago v. Beretta U.S.A. Corp.*, the Supreme Court of Illinois acknowledged that "when the nuisance results from the use or misuse of an object apart from land, . . . lack of control of the instrumentality at the time of injury is not an absolute bar to liability."⁸³

78. See *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1136 (Ill. 2004) (quoting *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 201 (App. Div. 2003)).

79. *Id.* at 1136-37; see also *Bubalo v. Navegar, Inc.*, No. 96 C 3664, 1998 WL 142359, at *4-5 (N.D. Ill. Mar. 20, 1998) (holding that a manufacturer could not be held liable for public nuisance for designing, marketing, and selling guns (legal and nondefective products) that were targeted to appeal to criminals).

80. *In re Lead Paint Litig.*, 924 A.2d 484, 486, 501 (N.J. 2007).

81. *Id.* at 501-02.

82. *State v. Lead Indus. Ass'n*, 951 A.2d 428, 455 (R.I. 2008).

83. 821 N.E.2d at 1132.

The United States Court of Appeals for the Ninth Circuit held that those injured by gun violence could sue a gun manufacturer under a public nuisance theory and that the plaintiffs had sufficiently alleged that the actions of the gun manufacturer in fostering an illegal secondary market led to the foreseeable result of a prohibited purchaser securing a firearm and injuring innocent people.⁸⁴ Additionally, in *City of New York v. Beretta U.S.A. Corp.*, the United States District Court for the Eastern District of New York refused to dismiss a case against a gun manufacturer as a matter of law when the city alleged the defendant gun manufacturers were a direct link in the causal chain resulting in the harm suffered to the public and were realistically in a position to prevent such harm.⁸⁵

Courts have also allowed public nuisance suits to go forward where the defendants no longer had control of the instrumentality causing the nuisance, even when there was no affirmative intervening action or illegal activity. The United States District Court for the Southern District of New York denied a motion to dismiss private-well-owner plaintiffs' public nuisance claim against petroleum companies because the gasoline additive methyl tertiary butyl ether (MTBE) threatened their private water supplies.⁸⁶ The defendants alleged that they had no liability because they had no control over the release of the chemicals into groundwater supplies,⁸⁷ pointing to two cases, one relieving a polychlorinated biphenyl (PCB) manufacturer of liability when a third party had disposed of the hazardous material⁸⁸ and the other holding that a manufacturer could not be held liable for public nuisance for designing, marketing, and selling guns targeted to criminals.⁸⁹ The court allowed the suit to go forward, noting that plaintiffs "alleg[ed] that defendants had

84. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1212-13 (9th Cir. 2003); *see also* *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (6th Ct. App. 2006) ("[L]iability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant *created or assisted in the creation of the nuisance*." (alteration in original) (quoting *City of Modesto Redevelopment Agency v. Superior Court*, 13 Cal. Rptr. 3d 865, 872 (4th Ct. App. 2004))).

85. 315 F. Supp. 2d 256, 284 (E.D.N.Y. 2004) (citing *Ileto*, 349 F.3d at 1212-13).

86. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 630 (S.D.N.Y. 2001).

87. *Id.* at 628.

88. *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989).

89. *Bubalo v. Navegar, Inc.*, No. 96 C 3664, 1998 WL 142359, at *4-5 (N.D. Ill. Mar. 20, 1998) (citing RESTATEMENT (SECOND) OF TORTS § 834).

knowledge of the dangers of the product, failed to warn anyone of these dangers, and actively conspired to conceal the threat caused by MTBE.”⁹⁰

Likewise, the United States District Court for the Northern District of Illinois rejected a claim by manufacturers of genetically modified corn seed that they could no longer be responsible for the effects of the modified corn seed once it left their control.⁹¹ The court found that the manufacturer of the corn seed had some continuing obligation to see that the corn seed was applied correctly.⁹² The court also found, “All parties who substantially contribute to the nuisance are liable.”⁹³

c. Which Action is the Proximate Cause?

Another key question in the proximate cause debate is, What actions are we focusing on as the proximate cause of the cigarette butt litter injury? In *County of Santa Clara v. Atlantic Richfield Co.*, plaintiffs were allowed to move forward with a public nuisance action against paint manufacturers when “the alleged basis for defendants’ liability for the public nuisance created by lead paint [was the lead paint manufacturers’] affirmative promotion of lead paint for interior use, not their mere manufacture and distribution of lead paint or their failure to warn of its hazards.”⁹⁴

Applying this lesson to cigarette manufacturers, plaintiffs are more likely to be successful in a public nuisance claim when they show not only that the cigarette manufacturers made the cigarettes that caused the cigarette butt litter, but that they knew the scope of the cigarette butt litter problem and had the ability to alleviate the issue (i.e., by removing or redesigning the filters that trap and slowly leach toxic chemicals into the

90. *In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d at 628. The City of New York, its water board, and its water authority won a jury verdict of nearly \$105 million based on four claims, including public nuisance. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 79 (2d Cir. 2013). Exxon appealed, and in 2013, the Second Circuit upheld the verdict and public nuisance cause of action. *Id.* at 78, 130.

91. *In re Starlink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 845 (N.D. Ill. 2002) (citing RESTATEMENT (SECOND) OF TORTS § 834).

92. This case was somewhat unique because the Federal Insecticide, Fungicide, and Rodenticide Act placed a duty on the corn seed manufacturers to ensure that the seeds did not drift and commingle with other seeds; the seeds at issue in the case were not fit for human consumption. *Id.* at 834, 843.

93. *Id.* at 847. *But see* Stephanie E. Cox, *Genetically Modified Organisms: Who Should Pay the Price for Pollen Drift Contamination?*, 13 DRAKE J. AGRIC. L. 401, 412 (2008) (“Because the case was settled for \$110 million, there was no decision on the merits of the case, leaving the question of legal liability for crop contamination open in the United States.” (citing Laura Khoury & Stuart Smyth, *Reasonable Foreseeability and Liability in Relation to Genetically Modified Organisms*, 27 BULL. SCI., TECH. & SOC’Y 215, 222 (2007))).

94. 40 Cal. App. 3d 313, 328 (4th Ct. App. 2006).

environment and by warning the public about the harm), but they failed to do so. By including filters that have no health benefits, but negatively impact the environment,⁹⁵ the cigarette manufacturers have control of the solutions. Through these actions and failures, cigarette manufacturers have participated to a substantial extent in the butt litter problem and may be found the proximate cause of it.⁹⁶

d. Injury

To bring an actionable public nuisance case, a plaintiff must show that it has been harmed by the public nuisance.⁹⁷ A state or public agency bringing a cigarette-butt-litter public nuisance suit must carefully articulate whether it is bringing the suit on its own behalf to recover costs expended to clean up the litter or on behalf of the public to abate the nuisance.⁹⁸ In the case of cigarette butt litter, a state agency may claim that the litter injures the public by being unsightly. The litter also injures the public agency because the agency likely expends costs in removing the cigarette butt litter.⁹⁹ The agency might also argue that the public is injured by the cigarette butt litter because the funds that the agency spends abating cigarette butt litter cannot be spent on other matters of public interest and safety, such as police officers, firefighters, and libraries. It is also possible that the agency might be able to articulate how many dogs or children in its jurisdiction had been injured by cigarette butts or that the jurisdiction's marketing efforts on behalf of the public and chamber of commerce were less effective because of the litter.

Some case law provides a basis for a state or public agency seeking both litter abatement and cost recovery from cigarette butt manufacturers. The Supreme Court of Ohio allowed a governmental agency to recover the costs of abating a nuisance created by gun manufacturers

95. See Harris, *supra* note 16, at I10-i11 (citing Zipser, *supra* note 16, at F5).

96. See Novotny et al., *supra* note 13, at 1695-96 (discussing that cigarette manufacturers have studied and subsequently quashed efforts to make filters biodegradable) (citing Inter-Office Correspondence from Ted Sanders to C.K. Ellis, *supra* note 62, at 4-5).

97. NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 449 (E.D.N.Y. 2003).

98. See *id.* at 482 ("A state actor is both in the best position and has a responsibility to protect the public that has entrusted it with their representation. Private suits on behalf of the public have come to be recognized as appropriate only under special circumstances.")

99. The city of San Francisco hired a team of economists to analyze cigarette butt litter's cost to the city. John Schneider et al., Health Econ. Consulting Grp., L.L.C., *Estimates of the Costs of Tobacco Litter in San Francisco and Calculations of Maximum Permissible Per-Pack Fees*, S.F. DEP'T OF PUB. WORKS 1, 3 (June 22, 2009), http://www.sfdpw.org/ftp/uploadedfiles/sfdpw/director/annual_reports/tobacco_litter_study_hecg_062209%5B1%5D.pdf. While the economic analysis was prepared as the basis of a cigarette tax, *id.*, a similar analysis would be useful in proving that the plaintiff has indeed been injured.

because the nuisance was “ongoing and persistent.”¹⁰⁰ Similarly, the Supreme Court of Indiana found that a “nuisance claim may be predicated on a lawful activity conducted in such a manner that it imposes costs on others.”¹⁰¹ The court noted that whether or not the manufacturer intends the harm, i.e., whether or not the cigarette maker intends their product to be thrown on the ground, when the manufacturer is aware of the impact to the public right, public nuisance actions are “best viewed as shifting the resulting cost from the general public to the party who creates it.”¹⁰² The court also noted that an Indiana statute that allowed a successful nuisance plaintiff to seek damages applied equally to a city or state entity bringing a successful nuisance claim.¹⁰³

However, government plaintiffs seeking to recover costs of abating cigarette butt litter should be aware of the “municipal cost recovery rule” or the “free public services doctrine.”¹⁰⁴ This rule or doctrine bars a government from recovering “the costs of carrying out public services from a tortfeasor whose conduct caused the need for the services.”¹⁰⁵ Recent lead paint litigation has supported this theory and calls into question whether a public entity can recover damages for injuries caused to the public entity’s property by a product.¹⁰⁶

In *Atlantic Richfield Co.*, several government entities acting for themselves, as class representatives, and on behalf of the people of California, sued lead paint manufacturers, seeking abatement and damages. The California Sixth District Court of Appeal upheld the County of Santa Clara’s action in striking down the public nuisance cause of action in which the government entities—representing themselves—were seeking to recover the costs of abatement of lead paint hazards. The court of appeal determined that “liability for damages for product-related injuries should not be extended beyond products liability law to public nuisance law.”¹⁰⁷ The court of appeal allowed the plaintiff’s request for

100. *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1149-50 (Ohio 2002) (citing *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 324 (9th Cir. 1983)).

101. *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1234 (Ind. 2003) (citing *Yeager & Sullivan, Inc. v. O’Neill*, 324 N.E.2d 846, 852 (Ind. Ct. App. 1975)).

102. *Id.* at 1234.

103. *Id.* at 1240 (citing IND. CODE § 32-30-6-8).

104. See Barbara J. Van Arsdale, *Construction and Application of “Municipal Cost Recovery Rule,” or “Free Public Services Doctrine,”* 32 A.L.R.6TH 261, 268 (2008).

105. *Id.*

106. *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 319-20, 331 (6th Ct. App. 2006).

107. *Id.* at 331 (mentioning *City of Modesto Redevelopment Agency v. Superior Court*, 13 Cal. Rptr. 3d 865 (4th Ct. App. 2004); *City of San Diego v. U.S. Gypsum*, 35 Cal. Rptr. 2d 876 (4th Ct. App. 1994)).

abatement, on behalf of the people, to move forward, noting that the “plaintiff may obtain relief *before* the hazard causes any physical injury or physical damage to property.”¹⁰⁸ The superior court ultimately found that ConAgra Grocery Products Company, NL Industries Incorporated, and Sherwin-Williams Company created a public nuisance by promoting and selling lead paint despite knowing its toxicity.¹⁰⁹ The court directed the defendants to establish a \$1.15 billion fund to clean up hazardous conditions across California.¹¹⁰

B. Framing a Public Nuisance Claim Against Cigarette Manufacturers

To bring a successful public nuisance claim against tobacco manufacturers, local or state governments suing on behalf of the public, and possibly themselves, must allege “the existence of a public right, a substantial and unreasonable interference with that right by the defendant, proximate cause, and injury.”¹¹¹ While courts broadly construe public rights and have found that rights to be free from contaminated water or food supply fall within the gambit of public nuisance, courts have rejected rights too broadly stated, such as the right “to be free from the threat that some individuals may use an otherwise legal product . . . in a manner that may create a risk of harm to another.”¹¹² Potentially public rights related to cigarette butt litter may include the right to be free of unsightly cigarette waste in public waterways, public places, and public rights of way. Also, because studies show that cigarette butt litter is toxic to fish and aquatic species, a plaintiff might claim that butt litter interferes with the right to be free from toxic materials discarded in places where the toxic butts would wash into creeks, rivers, water supplies, and the ocean. Furthermore, because animals and children are sickened every year from ingesting cigarette butts, a plaintiff might articulate a public health public right, such as the right to be free from materials that sicken dogs and children from accumulating in public places. Perhaps the best evidence that cigarette butt litter interferes with a public right is if the jurisdiction has a law or ordinance deeming litter a public nuisance.

108. *Id.* at 328.

109. *People v. Atl. Richfield Co.*, No. 1-00-CV-788657, slip op. at 2 (Cal. App. Dep’t Super. Ct. Mar. 26, 2014).

110. *Id.* slip op. at 10.

111. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1113 (Ill. 2004) (citing *Feder v. Perry Coal Co.*, 279 Ill. App. 314, 318 (App. Ct. 1935)).

112. *Id.* at 1116.

Once a plaintiff articulates a public right, it must demonstrate substantial and unreasonable interference with that right.¹¹³ The accumulation of millions of cigarette butts in the environment should suffice as substantial and unreasonable interference. However, to demonstrate this with evidence, a plaintiff may elect to submit evidence of the extent of the problem in the locality at issue. Ideally, a plaintiff would have the following: data on the number of cigarette butts littered in the community; photos showing the unsightly litter; testimony regarding the amount of time and money spent addressing the problem by the government, business owners, and volunteers; and even declarations regarding children or animals sickened by cigarette butt litter in the locality. The ideal plaintiff would be located in a state or municipality that has made littering punishable and has declared litter a nuisance.

Causation is the next hurdle that a plaintiff must overcome to bring a successful public nuisance suit.¹¹⁴ To show proximate cause, plaintiffs might state the following: but for the manufacturers using a nondegradable filter in cigarettes, the butts would not linger in the environment, but would quickly degrade. Cigarette butt manufacturers are aware of the magnitude of the cigarette butt litter problem and that cellulose acetate filters not only leach harmful chemicals into the environment but prevent butts from degrading.¹¹⁵ Cigarette manufacturers are well aware of the vast majority of smokers who toss cigarette butts on the ground, thinking that paper wrappers and “cotton” filters quickly degrade in the environment, yet they have failed to educate the public about the content and dangers of cigarette butts.¹¹⁶ By including filters in the vast majority of cigarettes, even though they serve no health purpose and in fact deceive the smoker into thinking filters are protective by allowing smokers to inhale fewer dangerous chemicals,¹¹⁷ cigarette manufacturers are the proximate cause of the cigarette butt litter as a public nuisance.

Adding in the fact that the disposal of the butt in the customary way (stomping it out and leaving it on the ground) is a foreseeable use of the product and that the smokers themselves have no control over the toxic components in the butt, the manufacturer is the cause of the harm. An important step in making the claim will be the allegation of specific

113. *Id.* at 1113.

114. *Id.* at 1132.

115. Smith & Novotny, *supra* note 12, at i2 (citing Hon, *supra* note 12, at 725).

116. *See* Harris, *supra* note 16, at i10.

117. *Id.*

injuries, whether they are to marine ecosystems, public rights of way, specific public parks, or the like. The injuries include documented toxic impacts of cigarette butts on freshwater fish, the invasion of the natural environment by toxic chemicals present in butts,¹¹⁸ and economic injuries to those responsible for clearing tobacco-related waste from public lands and public rights of way.¹¹⁹ Injury to stormwater systems could also be explored, as well as the environmental degradation of soil, waterways, and public parks.

If cities or states are bringing the action, the most likely relief will be abatement. Abatement of the butt nuisance could take many forms, including requiring filters to biodegrade, eliminating filters from cigarettes, informing the public about the hazardous contents of cigarette butts (through mandated public education programs, advertising, or label warnings),¹²⁰ instituting mandatory cigarette butt “take back” programs, or banning certain toxic components in the cigarettes.¹²¹ Monetary relief is rare in a public nuisance action brought by a public entity unless that party can claim harm different in kind to the general public.¹²² Cities may be able to sue cigarette manufacturers under public nuisance and seek damages related to the ongoing litter control efforts based on a market share responsibility requiring cigarette manufacturers to pay for the percentage of litter control directed toward the clearing of tobacco-related litter.¹²³ In conclusion, a public nuisance claim against cigarette manufacturers seeking abatement of the nuisance created by cigarette butts has the potential to spur action toward reducing or eliminating the cigarette butt litter problem.

IV. CIGARETTES AS A DEFECTIVE PRODUCT

In some unsuccessful public nuisance lawsuits dealing with the harm caused by a product, the court has directed the plaintiff that the

118. Slaughter et al., *supra* note 4, at i25-i27 (citing U.S. ENVTL. PROT. AGENCY, *supra* note 4, § 9.16.1).

119. Schneider et al., *supra* note 25, at i39-i40 (citing Mid. Atl. Solid Waste Consultants, *supra* note 25).

120. Some of these abatement actions might be preempted by the Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. § 387p(a)(2) (2012), or the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334 (2012).

121. See Novotny et al., *supra* note 13 at 1700.

122. NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 497 (E.D.N.Y. 2003) (citing William L. Prosser, *Private Action for Public Nuisance Law*, 52 VA. L. REV. 997, 1007 (1966)).

123. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 619 (citing *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980)).

proper cause of action was a product liability lawsuit.¹²⁴ But does products liability law provide an avenue for addressing cigarette butt litter? Maybe. The best options to try to hold cigarette manufacturers liable for problems with cigarette waste under products liability law would be by using theories of negligent design or failure to warn. However, these lawsuits would likely face skepticism from courts over whether there is an actionable harm and may be preempted given the extensive existing regulation of cigarettes.

A. Cigarettes that Include Cellulose Acetate Filters Are Negligently Designed

An injured plaintiff can bring a successful negligent design lawsuit when the product design is inherently dangerous, regardless of how carefully it is manufactured.¹²⁵ A product may be deemed “defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the [manufacturer adopting a reasonable alternative design] and the omission of the alternative design renders the product not reasonably safe.”¹²⁶ In examining whether the product bears a design defect, “the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the [manufacturer] rendered the product not reasonably safe.”¹²⁷ A plaintiff can show a product is inherently dangerous or not reasonably safe by demonstrating that the product fails to meet ordinary consumer expectations of safety or that the product risks outweigh its benefits. However, “Products are not generically defective merely because they are dangerous.”¹²⁸

Cigarettes are undoubtedly a dangerous product, ultimately killing a significant percentage of their users. Cigarettes have also been the subject of endless litigation related to dangers related to cigarettes themselves and the danger they pose to human health. But what if a plaintiff brought a negligent design lawsuit based on cigarette

124. *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 331 (6th Ct. App. 2006) (explaining the court’s determination that “liability for damages for product-related injuries should not be extended beyond products liability law to public nuisance law” and mentioning *City of Modesto Redevelopment Agency v. Superior Court*, 13 Cal. Rptr. 3d 865 (4th Ct. App. 2004); *City of San Diego v. U.S. Gypsum*, 35 Cal. Rptr. 2d 876 (4th Ct. App. 1994)).

125. See *Barker v. Lull Eng’g Co.*, 575 P.2d 443, 446 (Cal. 1978) (discussing *Cronin v. J.B.E. Olson Co.*, 501 P.2d 1153 (Cal. 1972)).

126. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

127. *Id.* § 2 cmt. d.

128. *Id.* § 2 cmts. a, g.

manufacturers' inclusion of a filter? By including cellulose acetate-based filters, which are not biodegradable, in cigarettes,¹²⁹ the cigarette manufacturers substantially contribute to a long term toxic litter problem. The filters not only hold toxic chemicals that have been proven to be poisonous to fish,¹³⁰ but they stall a cigarette butt's decomposition,¹³¹ lengthening the amount of time a cigarette butt will remain on a street or sidewalk, in a park, or on the beach.

Consumers expect that cigarette filters are made of cotton, which, added together with the paper and tobacco, would naturally decompose quickly and are therefore safe to discard on the ground.¹³² Cigarettes made with cellulose acetate filters that do not biodegrade in the environment and have been proven toxic to fish fail to meet this consumer expectation that cigarette butts are safe to discard on the ground and therefore fail to meet ordinary consumer expectations of safety.¹³³

Further, the risks of cellulose acetate filters outweigh their benefits. Research shows that one cigarette butt with a cellulose acetate filter left in one liter of water will kill freshwater fathead minnows placed in that liter of water.¹³⁴ Not only do filters fail to provide any health benefits, they actually deceive smokers into thinking the filters protect their health.¹³⁵ Research indicates that the tobacco industry has known cigarette filters sometimes release cellulose acetate fragments into a smoker's mouth and potentially into a smoker's lungs.¹³⁶ This research concludes with an astounding allegation: "The tobacco industry has been negligent in not performing toxicological examinations and other studies to assess the human health risks associated with regularly ingesting and inhaling non-degradable, toxin coated cellulose acetate fragments . . . that are released from conventional cigarette filters during normal smoking."¹³⁷

129. Smith & Novotny, *supra* note 25, at i2 (citing Hon, *supra* note 25, at 725).

130. Slaughter et al., *supra* note 4, at i25 (citing Register, *supra* note 15, at 23).

131. Clean Va. Waterways, *supra* note 13.

132. *winterrules*, *supra* note 5.

133. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. g.

134. Slaughter et al., *supra* note 4, at i26.

135. Harris, *supra* note 16, at i10. As Stanford University science professor Robert N. Proctor recently put it: "Filters are the deadliest fraud in the history of human civilization. They are put on cigarettes to save on the cost of tobacco and to fool people. They don't filter at all. In the U.S., 400,000 people a year die from cigarettes—and those cigarettes almost all have filters." Kennedy, *supra* note 19, at 14.

136. Pauly et al., *supra* note 61, at i54-i55 (citing Memorandum from H. Wakeham to R.H. Blackmore, LEGACY TOBACCO DOCUMENTS LIBR., U. CAL. S.F. (Oct. 26, 1961), <http://legacy.library.ucsf.edu/tid/hho05a00/pdf>).

137. *Id.* at i51.

Thus, a unique product defect cause of action based on the breakdown and subsequent inhalation of defective filters could break new ground in holding cigarette manufacturers liable for the damage caused by filters to individual people. This is especially true given the scientific community's findings: "(a) filter fibers [are] released from cigarettes; (b) there exists probable cause to suggest that cigarette filter fibers are inhaled and/or ingested; (c) the discharged fibers were coated with . . . carcinogens; (d) cigarette filter fibers implanted in mice . . . resist biodegradation; and (e) cigarette filter fibers have been identified in human lung specimens."¹³⁸

Concerns about the components of cigarette filters could be brought to the forefront of the tobacco industry if plaintiffs with demonstrated injury caused by pieces of cigarette filters within their lungs could be identified. Those plaintiffs could frame a negligence or product defect case.

Injury, in a product defect case, is usually premised on injury to a person or to property.¹³⁹ The best plaintiff in a negligence or product defect case related to cigarette filters would be a person who was directly injured by the defective filters. In evaluating whether reasonable care was taken by the manufacturers, we look to the consumer expectation test or the risk-utility test.¹⁴⁰ If a case is to be built around an injured smoker, plaintiffs would allege that the inhalation and/or ingestion of a toxin-coated plastic fiber is not what the consumer intends when smoking a cigarette.¹⁴¹ Indeed, if litigators can prove the cigarette manufacturers are aware of the defective filters and have failed to remedy the situation or inform smokers, then the manufacturers could be held liable for damage caused by those defective filters.

Without a smoker sick from inhaling cellulose acetate fibers, a defective design case for including filters would be a stretch because the harm is the unsightly litter and the price a municipality pays to pick it up is costly. Absent a fish kill in a river directly linked to cigarette litter or a rash of kids getting sick from eating the litter, a plaintiff would be hard-pressed to characterize the litter as dangerous. The fact that cigarettes are designed with a toxic filter that slowly degrades in the environment would not form the basis of a successful case without proving that the

138. John L. Pauly et al., *Fibers Released from Cigarette Filters: An Additional Health Risk to the Smoker?*, 55 *CANCER RES.* 253, 257 (1995).

139. *Seely v. White Motor Corp.*, 403 P.2d 145, 152 (Cal. 1965).

140. E. Paul Dougherty, *Consumer Expectations v. Risk/Utility in California*, WILSON ELSER (2004), http://www.wilsonelser.com/files/repository/ConsumerExpectationvRisk_Spring2004.pdf.

141. Pauly et al., *supra* note 61, at i59.

litter caused a specific injury.¹⁴² But even then, it is possible that a court would reject harm to the environment or a pet as actionable harm under products liability because “harm” is typically characterized as “harm to persons or property.”¹⁴³

Further, prior to pursuing a products liability lawsuit, interested plaintiffs should examine whether such an action would be preempted by the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act).¹⁴⁴ Section 907 of the Federal Food, Drug, and Cosmetic Act (FDCA), as amended by the Tobacco Control Act, allows the United States Food and Drug Administration “to require standards for tobacco products (for example, tar and nicotine levels) as appropriate to protect public health.”¹⁴⁵ If removal of cellulose acetate filters is necessary to protect the environment, it is possible that the Tobacco Control Act may not preempt a defective design lawsuit. Then again, it is unlikely that danger to the environment would qualify as actionable “harm” under a product liability lawsuit.

B. Failing To Warn Smokers of the Dangers of Cigarette Butts to the Environment Is a Violation of Products Liability Law

Another potential litigation approach to addressing cigarette butt litter is by bringing a “failure to warn” lawsuit. Such a cause of action alleges that a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided if the manufacturer provided reasonable instructions or warnings and when the failure to provide such warnings renders the product not reasonably safe.¹⁴⁶ Failure to warn covers not only “alerting users and consumers to the existence and nature of product risks so that they can . . . reduce the risk of harm” by the way they use the product but also “inform[ing] users and consumers of nonobvious and

142. Finding a pet owner whose pet ingested a cigarette butt or a parent whose child became ill after ingestion or exposure to a littered cigarette butt might also suffice. Novotny et al., *supra* note 2, at i19 (citing *Map of State EPR Laws*, PROD. S.S. INST. (Aug. 2014), http://www.productstewardship.us/?state_EPR_Laws_Map); Gregory Connolly et al., *Unintentional Child Poisonings Through Ingestion of Conventional and Novel Tobacco Products*, 125 PEDIATRICS 896, 897 (2010) (citing Stephen J. Goepferd, *Smokeless Tobacco: A Potential Hazard to Infants and Children*, 113 J. AM. DENTAL ASS'N 49, 49-50 (1986)).

143. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 21 (1998).

144. 21 U.S.C. § 387p(a)(2) (2012).

145. Ctr. for Tobacco Prods., *Consumer Fact Sheet: Overview of the Family Smoking Prevention and Tobacco Control Act*, U.S. FOOD & DRUG ADMIN. (FDA) 2, <http://www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM336940.pdf> (last updated Apr. 24, 2014).

146. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c).

not generally known risks that unavoidably inhere in using or consuming the product.”¹⁴⁷ Manufacturers must provide warnings for inherent risks that reasonably foreseeable product users and consumers would reasonably deem material or significant in deciding whether to use or consume the product.¹⁴⁸

Scientific studies have proven that cigarette butts are toxic to fish.¹⁴⁹ But given the massive public misunderstanding of the makeup of cigarette filters and the ongoing problem of smokers tossing their butts on the ground,¹⁵⁰ it is clear that cigarette manufacturers have failed to warn consumers of the toxicity of their cigarette butts and instruct smokers to dispose of butts properly. There is a strong argument that if smokers knew about the toxicity of cigarette butts, they would refrain from throwing their butts on the ground.

Manufacturers have been held liable for the failure to warn consumers about how best to dispose of hazardous waste byproducts. The California Fifth District Court of Appeal found that the improper disposal of hazardous waste could form the basis of a failure-to-warn claim/product liability action against the manufacturer of wood treating chemicals.¹⁵¹ The court reasoned that even if the third-party consumer was negligent, intentionally tortious, or criminal in disposing of the chemicals, the manufacturer was not relieved of the duty to warn that such disposal is dangerous. Specifically, the court said that when “improper disposal or storage of the chemicals was the likely consequence of the chemical suppliers’ failure to warn,” then the manufacturer’s liability is not relieved when the toxins are disposed of in an unsafe way.¹⁵² This is similar to a cigarette manufacturer failing to warn cigarette consumers that the byproduct of their smoking is a hazardous butt containing toxic waste. Even if the smoker violates the law by littering the butt, the failure of the manufacturer to warn of the dangers involved with such conduct may qualify as negligence.

147. *Id.* § 2 cmt. i.

148. *Id.*

149. Slaughter et al., *supra* note 4, at i25-i27.

150. The most popular answer to the question “Are cigarette butts biodegradable?” on Yahoo! Answers states, “The filters of most cigarettes are made of cotton.” *winterrules, supra* note 5. Cigarette butts are the most common form of litter in the United States and worldwide, at a whopping 4.5 trillion cigarette butts discarded worldwide each year. *See* Slaughter et al., *supra* note 4, at i25.

151. *Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc.*, 271 Cal. Rptr. 596, 610 (5th Dist. 1990), *disapproved of by Johnson v. Am. Standard, Inc.*, 179 P.3d 905, 914 (Cal. 2009) (holding sophisticated users of a chemical product need not be warned by manufacturer).

152. *Id.*

Again, a failure to warn runs into the same “harm” problem as a products liability lawsuit because “harm” is typically characterized as “harm to persons or property.”¹⁵³ As with the other products liability cause of action, any potential plaintiff should closely examine the Tobacco Control Act to ensure it does not preempt such a lawsuit.¹⁵⁴

While products liability may not be a viable approach for a municipality looking to address local cigarette butt litter issues, the fact that there are problems with a products liability lawsuit supports the viability of a public nuisance lawsuit. Courts should be more open to applying public nuisance law where other more traditional avenues for a plaintiff to be made whole, such as products liability, are not available.

V. USING STATE HAZARDOUS WASTE LAW TO ADDRESS CIGARETTE BUTT LITTER

California hazardous waste law provides another potential avenue for cracking down on cigarette butt litter.¹⁵⁵ While most states adopt federal hazardous waste rules, California adopted an expanded definition of hazardous waste. California law specifies that hazardous waste includes waste that exhibits aquatic toxicity.¹⁵⁶ To be deemed hazardous due to aquatic toxicity, California recognizes the media lethal effect concentration or “LC₅₀” test. The test involves determining the concentration at which the substance will cause half the fish exposed to the material to die over the course of 96 hours. The law specifies that if the LC₅₀ is less than 500 milligrams per liter in soft water with fathead minnows, the substance exhibits acute aquatic toxicity.¹⁵⁷

A. *Cigarette Butts Are Hazardous Waste Under California Law*

Researchers at San Diego State University completed the LC₅₀ test using a marine fish, the marine topsmelt, and a freshwater fish, the fathead minnow.¹⁵⁸ The researchers ran the tests with leachate from smoked cigarette butts (including the filter and tobacco),¹⁵⁹ leachate from

153. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 21 (1998).

154. See 21 U.S.C. § 387p(a)(2) (2012). Cigarette package labeling and warnings fall under the domain of federal agencies, and preemption issues related to affixing a label and disposing of cigarette filters (and the hazards of not doing so) would need further research.

155. See CAL. CODE REGS. tit. 22, § 66261.3 (2014).

156. *Id.* § 66261.24(a)(6).

157. *Id.* The rule also specifies that the test must be done using soft water, which is water that has less than 40 to 48 milligrams per liter of calcium carbonate. *Id.*

158. Slaughter et al., *supra* note 4, at i27.

159. “Leachate is liquid that extracts solutes from other matter as it passes through it. In an environmental sense, leachate most commonly refers to water acquiring properties from the

filters with no tobacco, and unsmoked cigarette filters.¹⁶⁰ The study showed that the LC₅₀ for leachate from smoked cigarette butts was approximately one cigarette butt per liter for both the marine topmelt (*Atherinops affinis*) and the freshwater fathead minnow (*Pimephales promelas*).

The study recognized that “the mean weight of a single smoked cigarette butt is approximately 310 [milligrams].”¹⁶¹ Given that the LC₅₀ was one cigarette butt per liter and that one butt weighs approximately 310 milligrams, the LC₅₀ for cigarette butt leachate is less than 500 milligrams per liter. Therefore, a single smoked cigarette butt with tobacco and a filter meets the acute aquatic test for toxicity in California.

This science raises significant questions. What are the consequences of a single smoked cigarette butt being a hazardous waste? Are there special requirements for hazardous waste generators? Are there any exceptions that apply? Do these rules apply automatically, or does the state have to make an affirmative finding before any of these rules and consequences apply? Is there anything that interested advocates could do to enforce these rules independent of government action? The following Subpart attempts to answer these questions.

B. California Establishes Strict Rules for Hazardous Waste Generators

California hazardous waste law sets out requirements for generators of hazardous waste to ensure that the wastes are disposed of properly.¹⁶² A material is “waste” if it is “discarded”;¹⁶³ it is discarded if it has been “disposed of.”¹⁶⁴ In California, a material is “disposed of” when it is abandoned; for example, a cigarette smoked by an individual and then tossed on the ground has, under California law, been “disposed of” and is considered “waste.”¹⁶⁵

Does that mean that every smoker of filtered cigarettes is a hazardous waste generator in California subject to hazardous waste laws? Not necessarily. California hazardous waste law provides an exemption for generators of household hazardous waste. The law exempts generators “handling only hazardous waste produced incidental to

refuse that it contacts.” *What Is Leachate?*, SCOTT ENVTL. GRP. (Aug. 16, 2012), <http://environmentalcleaningservices.ca/specialized-environmental-services/what-is-leachate/>.

160. Slaughter et al., *supra* note 4, at i25, i27 (citing Register, *supra* note 15, at 23).

161. *Id.* at i27.

162. CAL. CODE REGS. tit. 22, § 66262.2.10.

163. *Id.* § 66261.2(a).

164. *See id.* § 66261.2(b)-(c).

165. CAL. PENAL CODE § 374 (2014).

owning and maintaining their own place of residence.”¹⁶⁶ While smokers may argue that the exemption applies, there is a stronger argument that the exemption does not apply to cigarettes. Cigarettes and smoking are not “incidental to owning and maintaining” a place of residence. “Incidental” is defined as “something that happens as a minor part or result of something else.”¹⁶⁷ Cigarettes may be smoked at home or elsewhere, and smoking is not at all related to home ownership or maintenance. If anything, only cigarettes smoked and disposed of at home should be subject to the exemption. What rules, then, apply to smokers of filtered cigarettes who smoke them outside the home?

Hazardous waste generators in California must comply with California’s rules on determining whether the generator’s waste is hazardous,¹⁶⁸ obtaining an identification number, complying with rules for hazardous waste accumulation if waste is disposed of “on-site,” complying with manifest rules if the waste is disposed of “off-site,” recordkeeping, and additional reporting.¹⁶⁹

California law places the onus of determining whether a waste is hazardous on the person who generates it. The person must determine if the waste is excluded,¹⁷⁰ listed,¹⁷¹ or exhibits characteristics of hazardous waste.¹⁷² Generators of hazardous waste within the state are subject to requirements to create a manifest,¹⁷³ which designates a hazardous waste facility permitted to handle the waste listed on the manifest.¹⁷⁴

C. Enforcement Under California Hazardous Waste Law

Because science has already shown that cigarette butts from filtered cigarettes exhibit toxicity and will therefore be hazardous waste once

166. CAL. CODE REGS. tit. 22, § 66262.10(i).

167. *Incidental Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/incidental> (last visited Sept. 28, 2014).

168. CAL. CODE REGS. tit. 22, § 66262.10(a)-(b) (mentioning *id.* § 66262.11).

169. *Id.* § 66262.10(b), (g)-(h), (d) (mentioning *id.* §§ 66262.12, .34, .40(c)-(d), .43); see *id.* § 66262.20(a).

170. *Id.* §§ 66262.11(a) (“[T]he generator shall first determine if the waste is excluded from regulation under section 66261.4 or section 25143.2 of the Health and Safety Code.”).

171. *Id.* § 66262.11(b) (“[T]he generator shall then determine if the waste is listed as a hazardous waste in articles 4 or 4.1 of chapter 11 or in Appendix X of chapter 11 of this division . . .”).

172. *Id.* § 66262.11(c) (“[T]he generator shall determine whether the waste exhibits any of the characteristics set forth in article 3 of chapter 11 of this division . . .”).

173. *Id.* § 66262.20(a) (“[A] generator . . . who transports, or offers for transport a hazardous waste for off-site transfer, treatment, storage, or disposal . . . shall prepare a Uniform Hazardous Waste Manifest . . . before the waste is transported off-site.”).

174. *Id.* § 66262.20(b) (“A generator shall designate on the manifest one facility which is permitted to handle the waste described on the manifest.”).

abandoned, smokers should be subject to the remainder of California's hazardous waste laws that apply to generators. This means that smokers of filtered cigarettes should apply for and receive an identification number, find a hazardous waste facility that would accept cigarette butts, and keep records of how and when the cigarettes are shipped to the facility. While it seems a little extreme, it underscores how daunting it would be to treat filtered cigarette butts the way their impacts on the environment justifies and how irresponsible the majority of smokers are with their cigarette butts.

Further, there could be severe consequences for those who litter cigarette butts containing a filter. In California, a person who generates hazardous waste within the state and who has not complied with regulations is subject to the full range of enforcement mechanisms.¹⁷⁵ Enforcement may be through administrative penalties or criminal or civil prosecution.¹⁷⁶ California requires that hazardous waste generators that fail to comply with the laws should be treated consistently.¹⁷⁷ This means that cigarette butt litterers hypothetically should be treated the same as a generator of hazardous chemicals that spills or otherwise dumps those chemicals on the land.

Because every smoker of filtered cigarettes in California is a generator of hazardous waste as soon as they discard the butt, every cigarette smoker is subject to enforcement for failure to comply with generator requirements. Subjecting every smoker of filtered cigarettes in California to hazardous waste laws may deter smokers from smoking. This approach could further public health goals of reducing the number of smokers and environmental goals of reducing cigarette butt litter.

However, there are multiple hurdles to this approach. First, without provisions allowing citizens to enforce these rules, the approach relies solely on the California Department of Toxic Substances Control (DTSC) to crack down on cigarette smokers.¹⁷⁸ This is unlikely to happen given the complete political boondoggle it would create to apply hazardous waste generator requirements to cigarette smokers. Second, if

175. *Id.* § 66262.10(f) (“A person who generates hazardous waste as defined by chapter 11 of this division is subject to the compliance requirements and penalties described in chapter 6.5 of division 20 of the Health and Safety Code (commencing with section 25100) if the generator does not comply with the requirements of this chapter.”).

176. *See* CAL. HEALTH & SAFETY CODE § 25180(d) (2014).

177. *Id.* (“In enforcing this chapter . . . the department and the local officers and agencies . . . (a) shall exercise their enforcement authority in such a manner that generators . . . are treated equally and consistently with regard to the same types of violations.”).

178. *See DTSC: Who We Are and What We Do*, DEP'T TOXIC SUBSTANCES & CONTROL, CA.GOV, http://www.dtsc.ca.gov/InformationResources/DTSC_Overview.cfm (last visited Sept. 28, 2014).

cigarette smokers could, hypothetically, comply with hazardous waste generator rules of getting an identification number and manifesting their butt waste, the sheer volume of generators would certainly overwhelm the regulators at the DTSC. It could have the unintended consequence that regulators no longer have the capacity to monitor and enforce against generators of industrial hazardous waste that may be more toxic than cigarette butts.

D. Potential Enforcement Against Cigarette Manufacturers Under California Hazardous Waste Law

California hazardous waste law provides a unique mechanism to respond to hazardous waste deposited on public land that may have promising applications in relation to cigarette butts. Any city, county, or state agency that “knows or has probable cause” to believe that unauthorized hazardous waste disposal has occurred on public property must notify the DTSC.¹⁷⁹ The DTSC must then determine if there has been unauthorized hazardous waste disposal.¹⁸⁰

If the DTSC determines there has been unauthorized hazardous waste disposal, it must first conduct tests to determine the general composition of the waste.¹⁸¹ In the case of cigarette butts, if the DTSC found littered butts containing filters, it could either rely on existing science that demonstrates its toxicity or perform the same study on the actual cigarettes that were littered. Once the DTSC finds the waste hazardous, it must require the city, county, or state agency to prepare a hazardous waste management plan specifying removal or remediation actions. The plans must protect “human health and the environment and minimize or eliminate the escape of hazardous waste constituents, leachate, contaminated rainfall, and waste decomposition products into ground and surface waters and into the atmosphere.”¹⁸² The locality must

179. CAL. HEALTH & SAFETY CODE § 25242(a) (“Any city, county, or state agency which, as owner, lessor, or lessee, knows or has probable cause to believe that a disposal of hazardous waste which is not authorized pursuant to this chapter has occurred on, under, or into the land which the city, county, or state agency owns or leases shall notify the department.”).

180. *Id.* (“Upon receiving that notice, the department shall determine if there has been a disposal of hazardous waste which is not authorized pursuant to this chapter.”).

181. *Id.* § 25242(b)(1) (“[T]he department shall . . . [c]onduct, or arrange for the conducting of, test to determine the general chemical and mineral composition of the hazardous waste.”).

182. *Id.* § 25242(b)(2) (“The department shall . . . require the city, county or state agency which submitted the notice . . . to prepare a hazardous waste management plan specifying those removal or remedial actions . . . which are needed to be taken concerning the hazardous waste.”).

also hold public hearings on the proposed plans.¹⁸³ The DTSC must send notice of its findings to the county, city, and residents living within 2,000 feet of the property line of the land at issue and post signs visible to the public bearing the information.¹⁸⁴

One of the most powerful requirements of the law is its mandate that the DTSC “pursue all feasible civil and criminal actions against the . . . party responsible for the disposal of the hazardous waste.”¹⁸⁵ Hypothetically, this could mean that the DTSC should identify all smokers who littered cigarette butts and initiate actions against them, a practically impossible task.

The county, city, or state agency must submit the proposed hazardous waste management plan to the DTSC or the local Regional Water Quality Control Board and should incorporate appropriate changes requested by the public.¹⁸⁶ The county, city, or state agency is therefore on the hook for cleaning up the disposed waste and making sure it is disposed of properly. It seems like this would be an ineffective tool to combat cigarette butt littering, since no county or city would voluntarily subject itself to cleanup costs. Then again, localities often clean up the cigarette butts anyway.¹⁸⁷ The only difference would be if those butts had to be specially disposed of and manifested.

The law does, however, provide an incentive for a county or city to identify cigarette butt litter on its land as hazardous waste. The city or county may recover costs incurred preparing and implementing the cleanup plan “from any person who produced the waste or from any other person who was responsible for the disposal or the hazardous waste.”¹⁸⁸

Recovering costs of cleanup from those individual cigarette smokers who littered butts on the county’s or city’s property would be nearly impossible given the difficulty of identifying exactly who littered there. However, the law allows recovery from any “other party

183. *Id.* § 25242(b)(4) (“[T]he department shall . . . [c]onduct public hearings on the proposed hazardous waste management plan during those times and at those places which are convenient to the affected public.”).

184. *Id.* § 25242(b)(3) (“[T]he department shall . . . [s]end notice of the department’s findings . . . to the county in which the land is located, the city, if any, in which the land is located, the owner of the property, and residents living within 2,000 feet of the property line of the land on which the hazardous wastes were disposed. The department shall also post signs in the vicinity of the land which contain this information and are visible to the public.”).

185. *Id.* § 25242.2.

186. *Id.* § 25242(c).

187. Mid. Atl. Solid Waste Consultants, *supra* note 25.

188. CAL. HEALTH & SAFETY CODE § 25242.2.

responsible for the disposal of the hazardous waste.”¹⁸⁹ This opens the door to recovery from a party other than the littering cigarette smoker. The term “responsible” is not defined in the California hazardous waste law or regulations. But, borrowing the “proximate cause” analysis from a public nuisance claim,¹⁹⁰ cigarette companies that choose to include filters in cigarettes significantly contribute to the toxicity of cigarette butt litter. Further, cigarette companies are fully aware that their products are the most littered item in the world and that the resulting butts are toxic. Cigarette companies fail to share this information with smokers, leading smokers to believe that it is safe to throw their filtered cigarette butts on the ground. The cigarette companies are therefore “responsible” for the toxic cigarette butt litter, and the localities should be able to bring a successful action to recover the cost of the cleanup from them. Further, the DTSC should be able to bring a separate action against the companies for contributing to the litter.

This method effectively gives California municipalities two separate approaches—public nuisance and hazardous waste—to hold cigarette manufacturers responsible for local cigarette butt litter. While the hazardous waste approach requires a more formalistic response, it also opens the door for the municipality to recover the costs spent cleaning up the butts, instead of potentially limiting recovery solely to abatement as could be the case with public nuisance.¹⁹¹

Further, the fact that filtered cigarette butts meet the definition of toxic waste in California should be enough to convince the DTSC to develop an alternative approach to regulating cigarette butt waste. For other toxic waste products, such as batteries, the DTSC prohibits residents from disposing those products in household trash and established requirements that those products be specially discarded.¹⁹² In fact, California already bans residents from disposing of a long list of items, including fluorescent lamps and tubes, computer and television monitors, electronic devices, mercury-containing devices, paints, pesticides, solvents (including nail polish remover), antifreeze, and needles and sharps.¹⁹³ Why has the DTSC hesitated to create special rules for filtered cigarettes that we know are toxic? Perhaps with enough

189. *Id.*

190. *See supra* Part I.A.

191. *See* Van Arsdale, *supra* note 104, at 268; *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 331 (6th Ct. App. 2006).

192. *Batteries*, CALRECYCLE, <http://www.calrecycle.ca.gov/reducewaste/Batteries/> (last updated May 29, 2014).

193. *Hazardous Waste & Universal Waste (U-Waste): Wastes Banned from the Trash*, CALRECYCLE, <http://www.calrecycle.ca.gov/HomeHazWaste/Info/> (last updated Aug. 28, 2014).

pressure from the public, environmental advocates, and public health advocates, California will adopt stringent standards for cigarette disposal and will work with the cigarette manufacturers on an extended producer responsibility scheme.¹⁹⁴

VI. TAKING ACTION: NEXT STEPS TO ADDRESS CIGARETTE BUTT LITTER

This Article lays out several litigation-related approaches to addressing cigarette butt litter. While there is no litigation “silver bullet” to address cigarette butt litter, there are multiple potential litigation-related approaches to use in order to reduce cigarette butt litter. With public nuisance as the most promising of the litigation-related approaches, interested municipalities may want to further explore whether they have a promising factual basis on which to bring a suit.

The ideal jurisdiction to test this theory would be a city that has data on the cigarette butt litter problem. The data would likely come from a nonprofit group (or possibly the government) that conducts regular cleanup events during which data about the number of cigarette-related litter is collected. Second, the jurisdiction should have a law or ordinance declaring litter generally, or cigarette butts specifically, a public nuisance. Third, the jurisdiction should ideally have information on the number of children and pets that have gotten sick from exposure to cigarette butts over the past several years. Fourth, the jurisdiction should have an economic analysis of the cost of cleaning up cigarette butt litter, such as the cost analysis performed for the city of San Francisco.¹⁹⁵ And finally, the jurisdiction should have an idea of what type of relief it is seeking. Courts are most likely to order those responsible for public nuisance to abate the nuisance.¹⁹⁶ Does abatement mean reimbursement for the costs the municipality paid to have the litter removed? Would banning the sale of filtered cigarettes abate the problem? Or does abatement mean that the cigarette manufacturers should work with the municipality to develop an extended producer responsibility regime through which the manufacturer is ultimately responsible for cigarette butt litter? Municipalities would need to wrestle with these issues prior to bringing a public nuisance lawsuit.

194. See Novotny et al., *supra* note 13, at 1702.

195. An analysis prepared for the city of San Francisco estimated that the cost of tobacco litter alone ranges from \$500,000 per year to upwards of \$6 million for a city the size of San Francisco. Schneider et al., *supra* note 25, at i40.

196. See *supra* Part III.A.2.

While a product liability action is a further stretch, the most likely plaintiff for such action would be an individual injured by inhaling pieces of a cellulose acetate cigarette filter.¹⁹⁷ Finding such a plaintiff could be a challenge but would not be impossible.

To proceed in California, a municipality concerned about its cigarette butt litter may report “unauthorized disposal of hazardous waste” to the DTSC. The DTSC would then need to follow the legally required steps to determine that the cigarette butt waste is hazardous and require the municipality to clean it up.¹⁹⁸ From there, the state and municipality could work together to recover the cost of cleanup from the cigarette manufacturers. This approach is the most difficult of the litigation-related approaches outlined. However, it could spur California to adopt an extended producer responsibility regime for cigarette butts like it has done for motor oil, batteries, and prescription drugs.

197. Pauly et al., *supra* note 138, at 257. The study found:

(a) filter fibers were released from cigarettes; (b) there exists probable cause to suggest that cigarette fibers are inhaled and/or ingested; (c) the discharged fibers were coated with . . . carcinogens . . . and toxins; (d) cigarette filter fibers implanted in mice . . . resist[ed] biodegradation; and (e) cigarette filter fibers have been identified in human lung specimens.

198. *Cortese List: Section 65962.5(a)*, CALEPA, CA.GOV, <http://www.calepa.ca.gov/site/cleanup/corteselist/SectionA.htm> (last updated Oct. 6, 2011).