

# SHOCKED, HORRIFIED, SICKENED: HOW CIGARETTES (AND THE LESSONS FROM THE TOBACCO LITIGATION) CAN TAKE YEARS OFF ANIMAL-BASED FOOD INDUSTRIES

By  
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*Animal-based food industries—meat, egg, and dairy—have a history of opposing even relatively minor attempts to reduce human consumption of animal-based foods. In the face of growing evidence that eating meat, eggs, and dairy is detrimental to human health, these industries and their supporters maintain the opposite: that these foods are essential for a healthy diet and have no negative impact as normally consumed. Recognizing parallels between animal-based food industries and another industry heavily invested in maintaining the notion that its product was benign as normally consumed, this Article argues the tobacco litigation saga holds instructive lessons for combatting the current animal-based food industries. This Article, using the Hallmark slaughterhouse suit as a case study, illustrates how plaintiffs can deploy key strategies that prevailed against the tobacco industry—whistleblowing, fraud claims, government involvement in litigation, and identification of negatively impacted children. Finally, this Article outlines the potential developments that would deepen the parallels between the animal-based food and tobacco industries, suggesting conditions under which the litigation strategies used against the tobacco industry would become increasingly applicable and valuable.*

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## I. INTRODUCTION

Over the summer of 2012, an internal newsletter at the U.S. Department of Agriculture (USDA) suggested that employees participate in a Meatless Monday initiative at the agency's headquarters, refraining from eating meat one day per week.<sup>1</sup> The newsletter explained the utility of Meatless Monday by noting that "the production of meat, especially beef (and dairy as well), has a large environmental impact."<sup>2</sup> The animal-based food industries reacted swiftly.<sup>3</sup> The president of the National Cattlemen's Beef Association (NCBA) condemned the USDA, and various members of Congress stormed social media, publicly declaring their plans to consume more meat on Mondays to compensate for the agency's "stupid" and "here[atical]" recommendation.<sup>4</sup>

The industries prevailed—the USDA removed its suggestion and assured the public that it did not endorse the Meatless Monday initia-

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<sup>1</sup> See The Monday Campaigns, *Meatless Monday: History*, <http://www.meatless-monday.com/about-us/history> [<http://perma.cc/02mVzNJgwHs>] (accessed Nov. 17, 2013) (outlining the history of Meatless Monday from its origins as a U.S. resource scarcity measure during World War I through the early twenty-first century international health campaign).

<sup>2</sup> USDA, *Greening Headquarters Update 2* (July 23, 2012) (available at <http://www.zimmcomm.biz/usda/HQGreeningUpdatesJuly2012.pdf> [<http://perma.cc/0vBBVdTYbSB>] (accessed Nov. 17, 2013)).

<sup>3</sup> Throughout this article, "animal-based food industries" refers to the meat, dairy, and egg industries.

<sup>4</sup> Sen. Chuck Grassley (@ChuckGrassley, R-IA) tweeted, "I will eat more meat on Monday to compensate for stupid USDA recommendation ab[ou]t a meatless Monday." Twitter, <http://twitter.com/ChuckGrassley/statuses/228265186367262721> [<http://perma.cc/0vYbgipaPa2>] (July 25, 2012, 4:07 p.m.) (accessed Nov. 17, 2013). Rep. Steve King (@SteveKingIA, R-IA) tweeted, "USDA HQ meatless Mondays!!! At the Dept. Of Agriculture? Heresy! I'm not grazing there. I will have double rib-eye Mondays instead." Twitter, <http://twitter.com/SteveKingIA/statuses/228217242649780225> [<http://perma.cc/0Eo1qJbrNjT>] (July 25, 2012, 12:56 p.m.) (accessed Nov. 17, 2013). The NCBA issued a press release, refusing to "remain silent as USDA turn[ed] its back on cattlemen and consumers," alleging that USDA's "[embrace of] an animal rights extremist campaign to ultimately end meat consumption . . . should be condemned by anyone who believes agriculture is fundamental to sustaining life on this planet." Press Release, NCBA, *USDA Supports Meatless Monday Campaign* (July 25, 2012) (available at <http://www.beefusa.org/newsreleases1.aspx?NewsID=2560> [<http://perma.cc/0Bvyj7aQavc>] (accessed Nov. 17, 2013)) [hereinafter NCBA Press Release].

tive.<sup>5</sup> This relatively mild incident serves as a warning of what to expect when challenging such autocratic and influential industries. These industries do not simply ignore opposition: they have a history of taking the offensive when confronted by criticism.<sup>6</sup>

This Article begins by briefly summarizing the significant medical research establishing causal links between the consumption of animal products and disease, thereby laying the foundation for the argument that the animal-based food industries are aware that their products are contributing to the national health crisis. Part III provides an overview of the recently settled lawsuit brought by the Humane Society of the U.S. (HSUS), as relator, and the United States (U.S.), as intervenor, under the False Claims Act against Hallmark/Westland Meat Company, Inc.—a slaughter plant that allegedly breached its federal contracts by falsely representing that it had humanely handled cattle. This Article asserts that the *Hallmark* litigation strategy can serve as a model for future suits against these animal-based food industries. Part IV outlines the devastating health effects caused by tobacco, and then summarizes the infamous tobacco litigation. The summary focuses on the trajectory from decades of victory for the corrupt and seemingly invincible tobacco industry over hundreds of diseased and dying plaintiffs, to the tobacco industry's payout of hundreds of billions of dollars and the recent legislation authorizing the Food & Drug Administration (FDA) to regulate tobacco products.<sup>7</sup> Part V examines the

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<sup>5</sup> USDA Press Team (@USDAPress), Twitter, <http://twitter.com/USDAPress/status/228219832733143040> [<http://perma.cc/0K9yGRvMzTa>] (July 25, 2012, 1:07 p.m.) (accessed Nov. 17, 2013); see also Press Release, NCBA, *NCBA Statement Regarding USDA's Correction Concerning the Meatless Monday Movement* (July 25, 2012) (available at <http://www.beefusa.org/newsreleases1.aspx?NewsID=2572> [<http://perma.cc/05vU47VKo6Q>] (accessed Nov. 17, 2013)) (applauding the USDA for “denouncing support of the Meatless Monday campaign”).

<sup>6</sup> See e.g. American Meat Institute, *MEAT MythCrushers*, <http://www.meatmythcrushers.com/videos.html> [<http://perma.cc/0mhBiFhSDhR>] (accessed Nov. 17, 2013) (examples of Myth Crusher videos include the following: *Myth: Processed Meat is Unhealthy and Should Be Avoided*; *Myth: Hormone Use in Beef Is a Health Concern*; *Myth: Americans Eat Too Much Meat and It Contains Saturated Fat that Leads to Heart Disease*); Burt Rutherford, *Cancer Report Draws Industry Criticism*, BEEF (Nov. 2, 2007) (available at <http://beefmagazine.com/cowcalfweekly/cancer-report-draws-criticism> [<http://perma.cc/0bXLYtfn2qx>] (accessed Nov. 17, 2013)) (detailing the beef industry's response to a World Cancer Research Fund and American Institute for Cancer Research recommendation that consumers “limit intake of red meat and avoid processed meats”).

<sup>7</sup> See James A. Kushner, *Tobacco Regulation, Litigation, and the Proposed Mega-Settlement: America's Policy of Ethnic Cleansing*, 27 Sw. U. L. Rev. 673, 675–77 (1998) (arguing that the proposed tobacco settlement would have little effect on the tobacco industry because of the settlement's limits on future suits against the industry); see also Henry Weinstein, *Tobacco Firms Ordered to Give Up Secret Files*, L.A. Times (Mar. 8, 1998) (available at <http://articles.latimes.com/1998/mar/08/news/mn-26782> [<http://perma.cc/0mqkJPe9ARK>] (accessed Nov. 17, 2013)) (stating that the confidential documents ordered disclosed in the Minnesota tobacco litigation included a 1957 scientific memo that cigarettes were both addictive and lethal; research on “starting [smoking] behavior of children as young as five-years-old”; an agreement among tobacco manufacturers not to “conduct in-house research about the health hazards of smoking”; and doc-

lessons from the tobacco litigation and asks how these lessons can inform the legal strategy against animal-based food industries, particularly as these lessons have been elucidated by the *Hallmark* case.

The tobacco litigation—particularly the state Medicaid reimbursement suits—and the *Hallmark* case both illustrate the necessity of four individual, but overlapping, factors: (1) whistleblowers in otherwise impenetrable industries; (2) allegations of fraud; (3) the power the government wields in its position as plaintiff; and (4) the compelling government interest in protecting children. The importance of these factors should not be underestimated when crafting a strategy to hold the animal-based food industries liable for their roles in the deterioration of the American people's health. Inspired by these lessons, one proposed solution lies in the False Claims Act, whereby a whistleblower would file a suit alleging that an animal-based food company deliberately concealed the risks of the product it sold to the federal government. Precedent indicates that this case would be particularly compelling, and would be more likely to encourage government intervention if it involved harm to children. Therefore, similar to *Hallmark*, a logical first case would involve allegations of fraud, related to a program that provides food to school children, such as the National School Lunch Program.

## II. HEALTH RISKS OF CONSUMING ANIMAL-BASED FOODS

America is sick.<sup>8</sup> The nation's growing obesity epidemic and its dependence on prescription heart disease medications are, at least in significant part, due to the consumption of animal-based foods. In *The China Study*, "the most comprehensive study of diet, lifestyle and disease ever done with humans in the history of biomedical research," one of the "remarkable associations" that Dr. T. Colin Campbell discovered was that people who eat the most animal-based food develop the most chronic disease and even "relatively small intakes of animal-based foods were associated with adverse effects."<sup>9</sup> Other recent studies have more narrowly focused their analyses on certain health effects of eating meat. One study, using over twenty years of data from the Health

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uments directed at misleading the public on the health dangers of tobacco (internal quotations omitted)).

<sup>8</sup> T. Colin Campbell & Thomas M. Campbell II, *The China Study: The Most Comprehensive Study of Nutrition Ever Conducted and the Startling Implications for Diet, Weight Loss, and Long-Term Health* 3 (BenBella Bks. 2006) ("By any number of measures, America's health is failing. We spend far more, per capita, on health care than any other society in the world, and yet two thirds of Americans are overweight, and over 15 million Americans have diabetes, a number that has been rising rapidly. We fall prey to heart disease as often as we did thirty years ago, and the War on Cancer, launched in the 1970s, has been a miserable failure. Half of Americans have a health problem that requires taking a prescription drug every week, and over 100 million Americans have high cholesterol . . . . These issues all come down to three things: breakfast, lunch and dinner.").

<sup>9</sup> *Id.* at 7.

Professionals Follow-up Study and the Nurse's Health Study, examined the habits of over 110,000 people. The results of the study show that eating red meat significantly increases the risk of premature death; that is, as red meat consumption increases, so does mortality risk.<sup>10</sup> The study's lead author suggests that a diet free of red meat is ideal.<sup>11</sup> The study concludes that the consumption of red meat is associated with increased risk of cardiovascular disease and cancer mortality.<sup>12</sup> Similarly, a 2011 meta-study evaluating individual studies conducted in the United Kingdom, Germany, the U.S., the Netherlands, and Japan indicates that vegetarians "have a significantly lower ischemic heart disease mortality . . . and overall cancer incidence than nonvegetarians."<sup>13</sup> Thus, these recent medical studies give new meaning to the vegetarian adage: Meat is murder.

However, as evidenced by *The China Study*, meat does not have a monopoly on death and disease; dairy products also contribute to these issues. The consumption of dairy products has been associated with a litany of serious health conditions, including childhood diabetes, asthma, arthritis, cancer, and obesity.<sup>14</sup> Dr. Alan Goldhamer, a leading medical researcher, concluded, "It appears likely that no other component in the modern diet causes more pain and suffering, including premature death and disability, than dairy products."<sup>15</sup> Another study indicates that consuming too much meat and dairy promotes early puberty, which is significant because "early puberty is associated with high risk of hormone-related cancers like prostate cancer and

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<sup>10</sup> Eryn Brown, *All Red Meat Is Risky, a Study Finds*, L.A. Times (Mar. 13, 2012) (available at <http://articles.latimes.com/2012/mar/13/health/la-he-red-meat-20120313> [<http://perma.cc/08swzjKxsiq>] (accessed Nov. 17, 2013)); see also An Pan et al., *Red Meat Consumption and Mortality*, 172 *Archives Internal Med.* 555, 555–63 (Apr. 9, 2012) (available at [http://archinte.jamanetwork.com/data/Journals/INTEMED/23009/loi110027\\_555\\_563.pdf](http://archinte.jamanetwork.com/data/Journals/INTEMED/23009/loi110027_555_563.pdf) [<http://perma.cc/0qiMaHxfXiy>] (accessed Nov. 17, 2013)) (discussing a study concluding that red meat consumption is associated with an increased risk of cardiovascular disease and cancer mortality).

<sup>11</sup> Brown, *supra* n. 10.

<sup>12</sup> Pan, *supra* n. 10, at 555 ("Conclusions: Red meat consumption is associated with an increased risk of total, CVD [cardiovascular disease], and cancer mortality.").

<sup>13</sup> Tao Huang et al., *Cardiovascular Disease Mortality and Cancer Incidence in Vegetarians: A Meta-Analysis and Systematic Review*, 60 *Annals of Nutrition & Metabolism* 233, 233–40 (2012) (available at <http://www.karger.com/Article/Pdf/337301> [<http://perma.cc/0CbdmHjvrAk>] (accessed Nov. 17, 2013)).

<sup>14</sup> Alan Goldhamer, T. Colin Campbell Foundation, *No Body Needs Milk*, <http://www.tcolincampbell.org/courses-resources/article/no-body-needs-milk/browse/> [<http://perma.cc/0aLc8GK4jjq>] (2008) (accessed Nov. 17, 2013) ("There is compelling scientific evidence that our consumption of dairy products is strongly associated with the following conditions: 1. Childhood onset (type one) diabetes 2. Constipation 3. Otitis Media (ear infections) 4. Sinus congestion and Rhinitis 5. Skin problems including rashes, dermatitis, eczema, hives and acne 6. Asthma 7. Digestive disturbance (including irritable bowel syndrome and Crohn's disease) 8. Arthritis and joint pain 9. Cancer (lymphoma, leukemia) 10. Obesity" (internal footnotes omitted)).

<sup>15</sup> *Id.*

breast cancer.”<sup>16</sup> Thus, there is medical evidence that milk is particularly harmful to those who have not yet gone through puberty. This should be of grave concern to the government, which considers children “our nation’s most vulnerable citizens.”<sup>17</sup>

Dr. Campbell’s findings show that a plant-based diet can prevent, or even reverse, diseases, including heart disease, diabetes, obesity, cancers, autoimmune diseases, and vision and brain disorders.<sup>18</sup> A plant-based diet, of course, undermines the very existence of animal-based agriculture and is a threat to the industries as evidenced by the beef industry’s reaction to the U.S. Department of Agriculture’s proposal for Meatless Mondays.<sup>19</sup>

### III. THE HALLMARK SCANDAL

#### A. *Supplier of the Year*

Hallmark/Westland Meat Company, Inc. (Hallmark), the second-largest supplier to the National School Lunch Program,<sup>20</sup> was honored as the U.S. Department of Agriculture’s (USDA) Supplier of the Year for 2004–2005.<sup>21</sup> However, its practices warrant examination.

In the fall of 2007, the HSUS conducted an undercover investigation at the federally inspected Hallmark plant in Chino, California, and obtained video footage of the egregious cruelty behind the plant’s closed doors.<sup>22</sup> Employees of the “Supplier of the Year” were filmed “kicking cows, ramming them with the blades of a forklift, jabbing them in the eyes, applying painful electrical shocks and even torturing

<sup>16</sup> Jimmy Downs, Food Consumer, *Eating Meat / Dairy Products Linked to Early Puberty*, [http://www.foodconsumer.org/newsite/Nutrition/Food/meat\\_dairy\\_products\\_early\\_puberty\\_1020121044.html](http://www.foodconsumer.org/newsite/Nutrition/Food/meat_dairy_products_early_puberty_1020121044.html) [<http://perma.cc/0qQZrF3WPvF>] (Oct. 20, 2012) (accessed Nov. 17, 2013); see also Anke L. B. Günther et al., *Dietary Protein Intake throughout Childhood Is Associated with the Timing of Puberty*, 140 *J. Nutrition* 565, 565 (Mar. 2010) (available at <http://jn.nutrition.org/content/140/3/565.full.pdf> [<http://perma.cc/0pbJ1w8XfbH>] (accessed Nov. 17, 2013)) (“These results suggest that animal and vegetable protein intake in mid-childhood might be differentially related to pubertal timing.”).

<sup>17</sup> Press Release, U.S. Dept. of Just., *U.S. Intervenes in Suit Against Former Beef Suppliers to National School Lunch Program* (May 1, 2009) (available at <http://www.justice.gov/opa/pr/2009/May/09-civ-426.html> [<http://perma.cc/063L3KdFsHB>] (accessed Nov. 17, 2013)) [hereinafter DOJ Press Release] (“The alleged misrepresentations by Hallmark and Westland could have impacted the health of many of our nation’s most vulnerable citizens—our schoolchildren.” (internal quotations omitted)).

<sup>18</sup> Campbell & Campbell, *supra* n. 8, at 6–7.

<sup>19</sup> NCBA Press Release, *supra* n. 4.

<sup>20</sup> Joe Roybal, *California Nightmare*, BEEF (Mar. 1, 2008) (available at <http://beefmagazine.com/beef-quality/cattle-handling/california-nightmare> [<http://perma.cc/0dtf6FHCrP9>] (accessed Nov. 17, 2013)).

<sup>21</sup> Nancy Perry & Peter Brandt, *A Case Study on Cruelty to Farm Animals: Lessons Learned from the Hallmark Meat Packing Case*, 106 *Mich. L. Rev. First Impressions* 117, 119 (2008) (available at <http://www.michiganlawreview.org/assets/fi/106/perrybrandt.pdf> [<http://perma.cc/0h8CjXNCgPf>] (accessed Nov. 17, 2013)).

<sup>22</sup> Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 *Animal L.* 149, 156 (2009).

them with a hose and water in attempts to force sick or injured animals to walk to slaughter.”<sup>23</sup>

On January 30, 2008, after providing the evidence to the District Attorney’s office, the HSUS released the video to the public.<sup>24</sup> In an audit report, the USDA described the video as documenting “the egregious abuse of cattle awaiting slaughter . . . in an apparent attempt to force non-ambulatory cattle to rise for slaughter.”<sup>25</sup> The next day, pending the USDA and Food Safety and Inspection Service (FSIS) investigations, Hallmark ceased operations.<sup>26</sup> FSIS concluded that Hallmark violated the prohibition on slaughtering non-ambulatory diseased cows, also referred to as “downer” cattle.<sup>27</sup> On February 4, 2008, FSIS issued a Notice of Suspension to Hallmark for “failure to maintain and implement controls to prevent the inhumane handling and slaughter of animals.”<sup>28</sup>

The Secretary of Agriculture, Ed Schafer, released the following statement: “Because the cattle did not receive complete and proper inspection FSIS has determined them to be unfit for human food and the company is conducting a recall.”<sup>29</sup> The Secretary emphasized the safety of the U.S. food supply and explained the safeguards and precautions slaughter plants have in place to protect against foodborne disease, one of which is a ban on downer cattle entering the food supply.<sup>30</sup> He stated,

I am dismayed at the in-humane handling of cattle that has resulted in the violation of food safety regulations at the Hallmark/Westland Meat Packing Company. It is extremely unlikely that these animals were at risk for BSE [bovine spongiform encephalopathy, popularly known as mad cow disease] because of the multiple safeguards; however, this action is necessary because plant procedures violated USDA regulations.<sup>31</sup>

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<sup>23</sup> HSUS, *Rampant Animal Cruelty at California Slaughter Plant*, [http://www.humanesociety.org/news/news/2008/01/undercover\\_investigation\\_013008.html](http://www.humanesociety.org/news/news/2008/01/undercover_investigation_013008.html) [<http://perma.cc/0YMjhQkUWqb>] (Jan. 30, 2008) (accessed Nov. 17, 2013).

<sup>24</sup> Lovvorn & Perry, *supra* n. 22, at 157.

<sup>25</sup> USDA, *Audit Report: Evaluation of FSIS Management Controls over Pre-Slaughter Activities*, Rpt. No. 24601-7-KC, i (Nov. 2008) (available at <http://www.usda.gov/oig/webdocs/24601-07-KC.pdf> [<http://perma.cc/0QR4z3JnorC>] (accessed Nov. 17, 2013)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Press Release, USDA, *Statement by Secretary of Agriculture Ed Schafer Regarding Hallmark/Westland Meat Packing Company Two Year Product Recall* (Feb. 17, 2008) (available at <http://www.usda.gov/2008/02/0046.xml> [<http://perma.cc/0UgYsP-jrydV>] (accessed Nov. 17, 2013)) [hereinafter *Secretary of Agriculture Statement*].

<sup>30</sup> *Id.* (“These safeguards include in-plant procedures to reduce dangerous foodborne pathogens such as *E. coli* O157:H7 and *Salmonella*. It also includes the removal of specified risk materials—those tissues demonstrated to contain the bovine spongiform encephalopathy agent in infected cattle—from the human food chain, along with the U.S. Food and Drug Administration’s 1997 ruminant to ruminant feed ban. The prohibition of non-ambulatory cattle from the food supply is an additional safeguard against bovine spongiform encephalopathy.”).

<sup>31</sup> *Secretary of Agriculture Statement, supra* n. 29.

Still, Hallmark recalled approximately 143 million pounds of beef products, the largest recall to date.<sup>32</sup> Steve Mendell, president of Hallmark, purported to share Secretary Schafer's dismay in his testimony before the Oversight and Investigations Subcommittee of the House Energy and Commerce Committee. After watching the videos showing the abuse, he retracted his statement that downer cows had not been slaughtered for food, and testified, "I was shocked. I was horrified. I was sickened."<sup>33</sup>

Federal programs, including the National School Lunch Program, had purchased more than one-third of the beef—over 50 million pounds of meat.<sup>34</sup> Subsequently, Hallmark stopped supplying beef to the program.<sup>35</sup>

Despite the lack of protections provided to farmed animals under anti-cruelty laws, the abuse captured on film was so egregious that the District Attorney charged, and the court convicted, two workers under the California anti-cruelty statute.<sup>36</sup> And in 2008, the USDA formally rescinded Hallmark/Westland's Supplier of the Year award.<sup>37</sup>

### B. Civil Action

The HSUS filed a groundbreaking suit against Hallmark, as a supplier of the National School Lunch Program, for defrauding the Agricultural Marketing Service (AMS), a division of the USDA.<sup>38</sup> The HSUS filed suit under the *qui tam* (whistleblower) section of the False Claims Act, which imposes liability for making false claims for payments to the U.S. government.<sup>39</sup> According to the Department of Justice, the HSUS alleged that the "defendants knowingly and falsely represented to AMS that all cattle at their slaughtering facility [were] humanely handled in accordance with federal regulations and that no meat from disabled, non-ambulatory cattle was included in AMS' purchases."<sup>40</sup> Thus, the complaint alleged that Hallmark defrauded the government by breaching its contractual obligations to humanely

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<sup>32</sup> *USDA Audit Report*, *supra* n. 25, at i.

<sup>33</sup> Mathew L. Wald, *Meat Packer Admits Slaughter of Sick Cows*, N.Y. Times (March 13, 2008) (available at <http://www.nytimes.com/2008/03/13/business/13meat.html> [<http://perma.cc/0eJku42xMbp>] (accessed Nov. 17, 2013)).

<sup>34</sup> Andrew Martin, *Some Suspect Meat Used in School Lunches, U.S. Says*, N.Y. Times (Feb. 22, 2008) (available at <http://www.nytimes.com/2008/02/22/business/22beef.html> [<http://perma.cc/0947X7wAz8v>] (updated Feb. 27, 2008) (accessed Nov. 17, 2013)); *Secretary of Agriculture Statement*, *supra* n. 29.

<sup>35</sup> DOJ Press Release, *supra* n. 17.

<sup>36</sup> Lovvorn & Perry, *supra* n. 22, at 150, 157–58.

<sup>37</sup> Rita Jane Gabbet, *USDA to Hallmark: We Want Our Plaque Back*, Meatingplace (Mar. 6, 2008) (available at <http://www.meatingplace.com/Industry/News/Details/8621?allowguest=true> [<http://perma.cc/0um8G6QG3u>] (accessed Nov. 17, 2013)).

<sup>38</sup> *Compl., U.S. ex rel. Humane Socy. of the U.S. v. Hallmark Meat Packing Co.* at ¶¶ 1–5 (C.D. Cal. seal lifted Apr. 28, 2009) (Civ. No. 08-0221); DOJ Press Release, *supra* n. 17; Lovvorn & Perry, *supra* n. 22, at 158.

<sup>39</sup> 31 U.S.C. § 3729(a) (2006).

<sup>40</sup> DOJ Press Release, *supra* n. 17.



handle the cattle, an express term of the lunch program agreement.<sup>41</sup> The U.S., which intervenes in less than 25% of *qui tam* actions, subsequently intervened in this suit as plaintiff.<sup>42</sup>

The U.S. alleged that the AMS bought beef products for the National School Lunch Program from Hallmark pursuant to a series of contracts and that Hallmark fraudulently procured the contracts.<sup>43</sup> The U.S. alleged that Hallmark procured the contracts by “falsely representing in its bids that it humanely handled all cattle when, in truth, it knew it regularly did not humanely handle cattle,” and “by falsely representing that it processed only ambulatory cattle when, in truth, it knew it regularly processed meat both from ‘non-ambulatory disabled cattle’ . . . and from ‘downer’ cattle.”<sup>44</sup> The complaint further alleged that Hallmark falsely certified compliance with its contractual obligations when it knew it was violating the contracts by inhumanely handling the cattle and processing downer, nonambulatory, and diseased cattle.<sup>45</sup> The U.S. included claims of abuse that went beyond the abuses documented by the HSUS investigator, alleging that on “a daily basis, both before and after bidding on and entering into the AMS Contracts, while driving cattle between the unloading ramps, holding pens, and stunning areas,” Hallmark engaged in egregious abuse to conscious, nonambulatory cows, by electrically prodding them in the face or anus, kicking or punching them, running a forklift over them, and dragging them with chains.<sup>46</sup> Hallmark was allegedly processing non-ambulatory disabled cattle “at least three times every 30 days” on several occasions in 2004—years before the HSUS’s investigation began.<sup>47</sup>

Additionally, the U.S. asserted that Hallmark, in its applications for inspection, had falsely represented to the USDA that it did not employ felons.<sup>48</sup> According to the complaint, despite these representations, a partner in the operation was a convicted felon, whose convictions related to work in the meat packing industry.<sup>49</sup> Accordingly, Hallmark had been ineligible to bid on AMS contracts, and the

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<sup>41</sup> Lovvorn & Perry, *supra* n. 22, at 158.

<sup>42</sup> *Id.* at 159. A *qui tam* action is “a whistleblower claim brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to go to the state or some other institution.” *Qui Tam Action in Words & Phrases* vol. 35B, 496–97 (West 2006) (internal citations omitted).

<sup>43</sup> Pl.’s 2d Amend. Compl., *U.S. ex rel. Humane Socy. of the U.S. v. Hallmark Meat Packing Co.* at ¶ 1 (C.D. Cal. Dec. 15, 2010) (Civ. No. 08-0221) [hereinafter Pl.’s 2d Amend. Compl.].

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at ¶ 33.

<sup>47</sup> *Id.* at ¶ 85.

<sup>48</sup> *Id.* at ¶ 2.

<sup>49</sup> Pl.’s 2d Amend. Compl. at ¶ 2.

contracts it had entered into while Hallmark was employing a felon were fraudulently obtained.<sup>50</sup>

The U.S. sued Hallmark and related entities, including the individual owners, under the False Claims Act and sought relief under common law claims of fraudulent concealment, negligent misrepresentation, payment by mistake, restitution, money had and received, and breach of contract.<sup>51</sup> The crux of the suit was not that Hallmark mistreated the animals, but that it falsely represented that it humanely handled cattle when it regularly did not—and knew that it regularly did not. In other words, Hallmark’s animal abuse constituted fraud.

By intervening in the suit, the U.S. sought to recoup the \$150 million in taxpayers’ money spent on recalled beef.<sup>52</sup> The complaint demanded treble damages under the False Claims Act, in addition to civil penalties.<sup>53</sup> On November 16, 2012, the case settled for \$497 million, a record figure for a case involving animal abuse.<sup>54</sup> While he did not expect that the bankrupt Hallmark would pay the settlement, the attorney for the HSUS explained that this symbolic settlement “informs other federal government contractors that when your contract says you provide humane handling, if you don’t do that you’re likely to end up bankrupt as well.”<sup>55</sup>

### C. *The Paradigm Shifts*

The *Hallmark* case is particularly noteworthy for the enormous settlement—a result of the treble damages claim<sup>56</sup>—and for the public’s response to typically unseen abuse of farmed animals.<sup>57</sup> Not only did millions of people watch video footage of the abuse on television, but as of October 2012, the YouTube video had also reached one million views.<sup>58</sup> The public has made it clear that it is “no longer averting its gaze when it comes to farm animal cruelty.”<sup>59</sup>

Even before the case settled, Jonathan Lovvorn, vice president and chief counsel for Animal Protection Litigation and Research at the HSUS, observed that “the precedent set by this case—i.e., the risk of personal liability for treble damages, coupled with the promise of

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at ¶¶ 105–138.

<sup>52</sup> Lovvorn & Perry, *supra* n. 22, at 159.

<sup>53</sup> Pl.’s 2d Amend. Compl. at ¶ 1.

<sup>54</sup> Tracie Cone, *\$500 Million Animal Abuse Settlement Reached*, Associated Press (Nov. 16, 2012) (available at <http://bigstory.ap.org/article/apnewbreak-huge-slaughterhouse-settlement-reached> [<http://perma.cc/0C9GKYaBkNT>] (accessed Nov. 17, 2013)).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; Pl.’s 2d Amend. Compl. at ¶ 1.

<sup>57</sup> Perry & Brandt, *supra* n. 21, at 117.

<sup>58</sup> Wayne Paccelle, A Humane Nation Blog, *Another Hallmark/Westland Investigation Milestone*, <http://hsus.typepad.com/wayne/2012/10/hallmark-investigation-video.html> [<http://perma.cc/0b6DokvNpyZ>] (Oct. 9, 2012) (accessed Nov. 17, 2013); HSUS, YouTube, *Slaughterhouse Investigation: Cruel and Unhealthy Practices* (posted Jan. 30, 2008) (available at <http://youtu.be/zhlhSQ5z4V4> (accessed Nov. 17, 2013)).

<sup>59</sup> Perry & Brandt, *supra* n. 21, at 118.

multi-million dollar bounties for workers who blow the whistle on animal abuse—could serve as a powerful deterrent for slaughterhouse owners operating in an area with woefully insufficient humane law enforcement.”<sup>60</sup> However, the power of the *Hallmark* precedent is not limited to preventing slaughterhouses from committing the most egregious abuses. *Hallmark* may well be the model for future suits against animal-based food industries. In *Hallmark*, the whistleblower uncovered cruelty that was in direct violation of an express contract with the USDA. Imagine if the investigator had uncovered documents showing that Hallmark knew that the beef it was supplying, beef that would be served to needy school children, was unfit for human consumption because it caused cancer or heart disease. Further imagine that the executives had known for years but, like the tobacco industry, had concealed the information at the expense of the nation’s health. As discussed, these studies already exist; the animal-based food industries simply refute them with their own data. One can only imagine what information the animal-based food industries may be suppressing. But as the *Hallmark* case suggests, industries’ attempts to conceal harmful facts may identify them as the next tobacco.

Before pursuing legal action against animal-based food industries, potential plaintiffs—whether government or whistleblowers—should recall the past legal fight against tobacco, a previously invincible multi-billion dollar industry.

#### IV. TOBACCO LITIGATION AND LEGISLATION

##### A. *Health Risks of Tobacco Products*

Smoking cigarettes, like eating animal-based foods, can cause devastating harm to one’s health;<sup>61</sup> however, while the government generally encourages the consumption of animal products, it now warns about the dangers of smoking.<sup>62</sup> Every year, approximately 443,000 people die prematurely from smoking and from exposure to second-hand smoke.<sup>63</sup> There are currently 8.6 million people living with a “serious illness” caused by smoking.<sup>64</sup> Not only is tobacco a carcinogen, but cigarette smoke also contains hundreds of toxic chemical compounds, at least sixty-nine of which cause cancer.<sup>65</sup> Smoking can dam-

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<sup>60</sup> Lovvorn & Perry, *supra* n. 22, at 159.

<sup>61</sup> See e.g. Ctrs. for Disease Control and Prevention, *Tobacco Use: Targeting the Nation’s Leading Killer at a Glance 2011*, <http://www.cdc.gov/chronicdisease/resources/publications/aag/osh.htm> [<http://perma.cc/0CfGcVPeHdo>] (updated Nov. 16, 2012) (accessed Nov. 17, 2013) [hereinafter CDC, *Tobacco Use*] (“Tobacco use is the single most preventable cause of disease, disability, and death in the United States.”).

<sup>62</sup> See *id.* (outlining the CDC-supported “programs to prevent and control tobacco use in all 50 states, the District of Columbia, 8 U.S. territories/jurisdictions, and 8 tribal support centers”).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> U.S. Dept. of Health and Human Servs., *A Report of the Surgeon General: How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attribu-*

age DNA, harm fetal development, weaken the immune system, and lead to heart attack, stroke, and sudden death.<sup>66</sup> Yet over 46.6 million adults in the U.S. smoke,<sup>67</sup> and more than 80% of adult smokers began before they turned 18 years old.<sup>68</sup> Each day, over 3,800 youths smoke their first cigarette.<sup>69</sup>

The Surgeon General, concluding that there is no such thing as a safe cigarette, issued a report advising that the “only proven strategy for reducing the risk of tobacco-related disease and death is to never smoke, and if you do smoke to quit.”<sup>70</sup> Today, the government acknowledges and shares with the public what the tobacco industry has known and fraudulently concealed for decades: smoking is deadly.<sup>71</sup>

### B. Decades of Litigation

In 1950, nearly 50% of Americans smoked regularly—the allure of the cigarette mesmerized American culture as professional athletes endorsed tobacco and the big screen sold smoking as sexy.<sup>72</sup> However, in 1952, news of the causal link between America’s beloved pastime and lung cancer began to spread when *Reader’s Digest*, the most widely read magazine of the time, published an article titled, *Cancer by the Carton*, predicting an epidemic of deaths from tobacco use.<sup>73</sup> With additional articles and television shows exposing the dangers of smoking, cigarette consumption fell in 1953 and 1954, and the great cancer scare of the 1950s began.<sup>74</sup> The lawsuits soon followed.<sup>75</sup>

From 1954 to 1994, private litigants filed over 800 tort suits against tobacco companies; however, tobacco companies were never held liable for wrongdoing.<sup>76</sup> In typical lawsuits, smokers alleged that

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*table Disease Factsheet* (2010) (available at <http://www.surgeongeneral.gov/library/reports/tobaccosmoke/factsheet.html> [<http://perma.cc/0XmyuhTq3bC>] (accessed Nov. 17, 2013)) [hereinafter *Surgeon General Factsheet*].

<sup>66</sup> *Id.*

<sup>67</sup> CDC, *Tobacco Use*, *supra* n. 61.

<sup>68</sup> U.S. Food & Drug Administration, *Overview of the Center for Tobacco Products: Consumer Fact Sheet*, <http://www.fda.gov/TobaccoProducts/NewsEvents/ucm265521.htm> [<http://perma.cc/03YGXDsbPi1>] (updated Jan. 15, 2013) (accessed Nov. 17, 2013) [hereinafter FDA, *Tobacco Fact Sheet*].

<sup>69</sup> *Id.*

<sup>70</sup> *Surgeon General Factsheet*, *supra* n. 65.

<sup>71</sup> *Infra* pt. IV(C) (explaining the circumstances that led to the Master Settlement Agreement, which required tobacco companies to pay \$206 billion in civil damages to forty-six states).

<sup>72</sup> Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 *Stan. L. Rev.* 853, 855 (1992).

<sup>73</sup> Roy Norr, *Cancer by the Carton*, *Reader’s Digest* 737, 738 (Dec. 1952); Rabin, *supra* n. 72, at 856.

<sup>74</sup> Rabin, *supra* n. 72, at 856.

<sup>75</sup> *Id.* at 857 (The first lawsuit filed was *Lowe v. R.J. Reynolds Tobacco Co.*, No. 9673(C) (E.D. Mo. filed Mar. 10, 1954); it was later dropped.).

<sup>76</sup> See Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 *Am. J. L. & Med.* 187, 190–91 (2000) (noting that while the courts twice found for the plaintiffs, those decisions were substantively reversed); see also Rabin, *supra* n. 72, at

they had begun smoking during youth, unaware of the dangers, and became addicted to nicotine, unable to quit.<sup>77</sup> However, regardless of which causes of action or theories of liability they advanced, the plaintiffs could not meet the burdens of proof on causation, injury, and damages.<sup>78</sup> Attempting to prove that cigarettes, or the marketing practices of the tobacco industry, were the proximate cause of injury often led to a “battle of the experts.”<sup>79</sup> Because the industry vigorously disputed causation, a plaintiff’s case-in-chief required significant expert testimony, including surgeons, pathologists, and marketing and advertising experts—a tremendous financial burden.<sup>80</sup> Solo practitioners were often going head to head with the most prestigious law firms in the country and were unable to match their coordinated financial resources; the industry defense attorneys often buried opposing counsel in paperwork, pre-trial motions, and unending depositions.<sup>81</sup> In this arena, the plaintiffs lacked the resources to combat the “awareness” defense, that is, that the plaintiffs knew (or should have known) of the health risks associated with smoking.<sup>82</sup>

The tobacco companies’ strategy was simple: defend every case, from commencement of suit through appeal, if necessary; for over thirty-five years, the tobacco companies did not make—nor did they entertain—a single settlement offer.<sup>83</sup> The handful of cases that made it to trial in the early years were based in claims of negligence and breach of implied warranty.<sup>84</sup> Tobacco companies contended that they could not have foreseen the harmful effects of smoking. The courts, emphasizing the necessity of foreseeability, ruled in favor of the tobacco companies under both the negligence and breach of implied warranty theories.<sup>85</sup> A scholar of mass product torts observed, “[W]hat is most striking about these cases against tobacco manufacturers . . . is the extent to which, at least implicitly, the courts placed the obligation to assure that the use of a product would be safe as much on the consumer as it did on the manufacturer.”<sup>86</sup> In other words, courts were conflating general public knowledge that cigarette smoke was vaguely harmful with specific knowledge that smoking caused lung cancer.<sup>87</sup>

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874 (noting that “after thirty-five years of litigation, the tobacco industry could still maintain the notable claim that it had not paid out a cent in tort awards.”).

<sup>77</sup> Basil C. Bitas & Pedro P. Barros, *Tobacco Control and the Role of Litigation: A Survey of Issues in Law, Policy, and Economics*, 16 U. Miami Intl. & Comp. L. Rev. 1, 5 (2008).

<sup>78</sup> *Id.* at 6.

<sup>79</sup> *Id.*

<sup>80</sup> Rabin, *supra* n. 72, at 858.

<sup>81</sup> *Id.* at 858–59.

<sup>82</sup> Bitas & Barros, *supra* n. 77, at 6.

<sup>83</sup> Rabin, *supra* n. 72, at 857–58.

<sup>84</sup> *Id.* at 860–61.

<sup>85</sup> Donald G. Gifford, *Suing the Tobacco and Lead Pigment Industries: Government Litigation as Public Health Prescription* 36–37 (U. of Mich. Press 2010).

<sup>86</sup> *Id.* at 37.

<sup>87</sup> *Id.* at 37–38.

In 1964, the Surgeon General's Office published its first report concerning the risks of smoking, and Congress subsequently enacted legislation requiring warning labels on cigarettes.<sup>88</sup> But in 1965, the new Restatement of Torts was decidedly less favorable for tobacco victims, declaring, "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful."<sup>89</sup>

In the next surge of cases, the defendants' strategy was the same: "To paraphrase Gen. [George] Patton, the way we won these cases was not by spending all of Reynolds' money, but by making [the enemy] spend all his."<sup>90</sup> The tobacco industry kept winning, but not only because of its financial advantage. The courts were persuaded that individuals' decisions to continue smoking in light of the evidence that cigarettes were dangerous made them responsible for their own harm, regardless of whether the defense asserted was assumption of risk or contributory negligence.<sup>91</sup> It was simply assumed that everyone—the smokers, the industry, the court—had the same amount of information about the nature of tobacco. Those who chose to continue smoking did so knowing there was some risk associated with the behavior, a risk for which they—not the tobacco companies—were responsible. At this point, smoking was presented as a personal choice; the public was not yet aware that the tobacco companies knew and intentionally concealed the dangers and addictive nature of cigarettes.<sup>92</sup>

Despite the prevailing view that smoking was a personal choice, the financial drain on the country was a collective problem. In 1993 alone, the U.S. spent \$50 billion on medical expenditures related to smoking.<sup>93</sup>

### C. *State Medicaid Reimbursement Suits*

The extent of the tobacco industry's illegal conduct was soon unveiled. In 1994, a paralegal at a law firm representing a tobacco company anonymously disclosed smoking gun documents revealing a deliberate scheme of fraud and deception to Dr. Stanton Glantz, an anti-tobacco activist.<sup>94</sup> The 10,000 documents from Brown & Williamson Tobacco established that, despite spending decades claiming cigarettes were safe, executives had known for thirty years that they were addictive and caused illness.<sup>95</sup>

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<sup>88</sup> Rabin, *supra* n. 72, at 864.

<sup>89</sup> *Restatement (Second) of Torts* § 402A cmt. i (1965).

<sup>90</sup> Rabin, *supra* n. 72, at 868.

<sup>91</sup> Gifford, *supra* n. 85, at 39–40.

<sup>92</sup> *Id.* at 40–41.

<sup>93</sup> Lawrence G. Cetrulo, *Toxic Torts Litigation Guide* vol. 3, § 18:14 (West 2012).

<sup>94</sup> LaFrance, *supra* n. 76, at 192. [Editor's Note: In LaFrance's article, Dr. Stanton Glantz is incorrectly referred to as Sheldon Glantz. See Glantz et al., *infra* n. 126, providing the correct name.]

<sup>95</sup> Jada J. Fehn, *The Assault on Bad Food: Tobacco-Style Litigation as an Element of the Comprehensive Scheme to Fight Obesity*, 67 *Food & Drug L.J.* 65, 73 (2012).

That year, the Mississippi Attorney General filed a complaint against thirteen tobacco companies to recover the medical costs of treating people suffering from tobacco-related illnesses.<sup>96</sup> Mississippi Attorney General Michael Moore commented, “[P]revious lawsuits have said the tobacco companies should pay because their products are dangerous. This suit says they should pay because the conduct is . . . illegal.”<sup>97</sup> Because the state, rather than the smoker, was the plaintiff, the defendants could not assert the smokers’ conduct as a defense to bar the claims.<sup>98</sup> That is, the tobacco industry could not argue that the state had assumed the risk or engaged in contributory negligence. Within three years, forty states had filed similar suits, including claims such as misrepresentation, deceptive advertising, indemnity, and fraud,<sup>99</sup> with all fifty states ultimately bringing suit against the tobacco industry.<sup>100</sup> These complaints sought reimbursement for the money taxpayers had paid to state-funded systems, such as Medicaid, for smoking-related conditions.<sup>101</sup> Discovery during the state Medicaid litigation further revealed the industry had been deliberately concealing and misrepresenting their practices for decades.<sup>102</sup> This time, the industry could not use its “personal responsibility” shield.

The information was out, Americans were angry, and the Food & Drug Administration (FDA) was threatening to regulate—or possibly prohibit—tobacco.<sup>103</sup> The risk proved too much. In 1998, the tobacco industry agreed to pay \$206 billion to the forty-six states that entered into the Master Settlement Agreement (MSA).<sup>104</sup> The MSA, although sharply criticized,<sup>105</sup> is remarkable for its existence. It was not only the first time the tobacco industry was held liable for the public health epidemic created by tobacco-related illnesses, it was also the largest civil settlement ever.<sup>106</sup> The MSA also marked the death of Joe Camel: the agreement restricts the industry’s marketing and promotional activities, particularly those that target youth.<sup>107</sup> Tobacco companies could no longer use cartoon characters as spokespersons, advertise at

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<sup>96</sup> Gifford, *supra* n. 85, at 121–22.

<sup>97</sup> Fehn, *supra* n. 95, at 73–74.

<sup>98</sup> *Id.* at 122.

<sup>99</sup> *Id.*; LaFrance, *supra* n. 76, at 195.

<sup>100</sup> Bitas & Barros, *supra* n. 77, at 15.

<sup>101</sup> Robert A. Levy, *Cato Institute Policy Analysis No. 275: Tobacco Medicaid Litigation: Snuffing Out the Rule of Law* (June 20, 1997) (available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa275.pdf> [<http://perma.cc/0zFrDN1XiLL>] (accessed Nov. 17, 2013)).

<sup>102</sup> LaFrance, *supra* n. 76, at 193.

<sup>103</sup> Gifford, *supra* n. 85, at 131.

<sup>104</sup> *Id.* at 175 (noting that the four remaining states—Mississippi, Florida, Texas, and Minnesota—each settled separately as their trial dates approached); Bitas & Barros, *supra* n. 77, at 16.

<sup>105</sup> See e.g. LaFrance, *supra* n. 76, at 197 (“To paraphrase Sir Winston Churchill, never was so much belonging to so many given up by so few for so little.”).

<sup>106</sup> Gifford, *supra* n. 85, at 132.

<sup>107</sup> *Id.* at 176.

youth events, outdoors, or on transit, or distribute free samples to youth.<sup>108</sup> The MSA specifically protected the youth audience.

#### D. *The Racketeers*

In 1999, the U.S. sued cigarette manufacturers and affiliated organizations to obtain healthcare reimbursement under the Medical Care Expense Recovery Act (MCRA), the Medicare Secondary Payer provisions, and civil provisions under the Racketeer Influenced and Corrupt Organization (RICO) Act.<sup>109</sup> The court dismissed both healthcare recoupment claims, concluding, in relevant part, that Congress “did not intend that MCRA be used as a mechanism to recover Medicare” costs.<sup>110</sup> In a 2006 decision, the court found the defendants liable for racketeering; however, it held that the RICO Act did not support a claim for money damages.<sup>111</sup> Although this decision has been considered a pyrrhic victory, public health advocates stress its importance: it brands the tobacco companies as racketeers and further undermines their credibility.<sup>112</sup>

#### E. *Family Smoking Prevention and Tobacco Control Act*

In 2000, the U.S. Supreme Court determined that the FDA did not have the authority to regulate tobacco.<sup>113</sup> This changed on June 22, 2009, when the Family Smoking Prevention and Tobacco Control Act was signed into law.<sup>114</sup> In addition to empowering the FDA to regulate tobacco products, the Act expressly prohibits cigarettes with characterizing flavors, such as chocolate or cinnamon,<sup>115</sup> and imposes restrictions on advertising and promoting the product, “consistent with and to full extent permitted by the [F]irst [A]mendment to the Constitution.”<sup>116</sup> The Act also requires tobacco manufacturers and agents to

<sup>108</sup> *Id.*

<sup>109</sup> *U.S. v. Phillip Morris, Inc.*, 116 F. Supp. 2d 131 (D.D.C. 2000).

<sup>110</sup> *Id.* at 135.

<sup>111</sup> *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 920–21 (D.D.C. 2006), *aff'd in part and vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009) (per curiam); Bitas & Barros, *supra* n. 77, at 17.

<sup>112</sup> Bitas & Barros, *supra* n. 77, at 17–18.

<sup>113</sup> *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000) (“It is therefore clear, based on the [Food, Drug and Cosmetic Act]’s overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.”).

<sup>114</sup> 21 U.S.C. § 387 (2012) (available at <http://www.gpo.gov/fdsys/pkg/USCODE-2012-title21/pdf/USCODE-2012-title21-chap9-subchapIX.pdf> [http://perma.cc/0PmJ55SGT EZ] (accessed Nov. 17, 2013)).

<sup>115</sup> *Id.* at § 387g(a)(1)(A) (“[A] cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke.”).

<sup>116</sup> *Id.* at § 387f(d)(1).



make disclosures of health information to the Secretary, including all documents related to “health, toxicological, behavioral, or physiologic effects of current or future tobacco products, their constituents (including smoke constituents), ingredients, components, and additives.”<sup>117</sup> The Act provides for the establishment of the Center for Tobacco Products,<sup>118</sup> which is responsible for regulating the “manufacture, marketing, and distribution of tobacco products to protect public health and to reduce tobacco use by youth.”<sup>119</sup>

It was just twelve years earlier that the tobacco industry agreed to settle the state Medicaid suits for over \$200 billion because, in part, the FDA was trying to regulate tobacco products.

## V. LESSONS FROM THE TOBACCO LITIGATION

### A. *The False Claims Act*

After decades of maintaining a no-pay position, the tobacco industry settled with the state plaintiffs for billions of dollars and agreed to restrict its practices.<sup>120</sup> Subsequently, these restrictions were strengthened through legislation and regulations. The tobacco victims’ monetary success after so many years was due in large part to four factors: (1) the role of whistleblowers; (2) allegations of fraud; (3) the introduction of the government as plaintiff; and (4) the claim of harm to children. These lessons of the tobacco suits—discussed more fully below—are instructive for litigators seeking to hold the animal-based food industries liable for the harms they cause by supplying foods detrimental to the public health. An analysis of the tobacco litigation and the *Hallmark* case suggests the False Claims Act provides a cause of action against the industries. Such a complaint would allege that the defendant had a contract with the federal government arising out of the supply of an animal-based food and that the defendant deliberately concealed the deadly health consequences of consuming its product. Consider, for example, a dairy that—with the knowledge of milk’s detrimental health effects—sells milk to the U.S. Department of Agriculture (USDA) pursuant to federal contracts for supply in federally-funded school lunch programs. If a whistleblower learns of the dairy’s knowledge, that individual would have standing to sue under the False Claims Act, alleging that the dairy defrauded the government, and the whistleblower would receive a percentage of any recovery.<sup>121</sup>

“To establish a *prima facie* case under the False Claims Act, the United States must prove: (1) the defendant presented or caused to be presented to an agent of the United States a claim for payment, (2) the claim was false or fraudulent, and (3) the defendant knew that the

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<sup>117</sup> *Id.* at § 387d(a)(4).

<sup>118</sup> *Id.* at § 387a(e).

<sup>119</sup> FDA, *Tobacco Fact Sheet*, *supra* n. 68.

<sup>120</sup> Discussed *supra* pt. IV(C).

<sup>121</sup> 31 U.S.C. § 3730 (2006).

claim was false or fraudulent.”<sup>122</sup> The False Claims Act defines “knowingly” to include “actual knowledge,” “deliberate ignorance,” and “reckless disregard” of the truth or falsity of the information.<sup>123</sup> Thus, “[i]nnocent mistakes, mere negligence, or ordinary gross negligence” do not satisfy this element of the statute.<sup>124</sup> The False Claims Act is a mechanism whereby a private citizen can sue on behalf of the government for fraud and retain a portion of the recovery; the U.S. Department of Justice can intervene in these suits, although it generally does not.<sup>125</sup>

Suits under the False Claims Act are not mutually exclusive of any other litigation strategy, and there is no suggestion that any alternative legal theories be abandoned. Rather, the proposal is that an action brought on behalf of the government that alleges fraud concerning the health of children could be successful and could foster a paradigm shift for animal-based foods as the next tobacco. The lessons from the tobacco litigation and the *Hallmark* case suggest how best to proceed.

### B. Lesson 1: Blow the Whistle

Whistleblowing was key to both the tobacco litigation and the *Hallmark* case. Individuals—an anonymous paralegal and an undercover employee of the Humane Society of the U.S. (HSUS)—exposed the scandals, providing essential information from inside industries that were committing fraud and concealing the conduct.

In March 1994, the paralegal, who was working for the tobacco industry, released thousands of internal documents that were otherwise unlikely to reach the public. These documents revealed the knowledge the industry had managed to keep hidden for thirty years.<sup>126</sup> One memorandum, by general counsel for Brown & Williamson Tobacco, reads, “We are in the business, then, of selling nicotine, an addictive drug.”<sup>127</sup> It was dated 1963, thirty-one years before the first state lawsuit was ever filed.<sup>128</sup> One month after the paralegal’s revelations, a former research director for the company told both the media and the Food and Drug Administration (FDA) that manufacturers manipulated the level of nicotine in cigarettes to make them more addictive; he and other industry insiders also provided this infor-

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<sup>122</sup> Steven W. Feldman, *West’s Federal Administrative Practice* vol. 1, § 616 (4th ed., West 2012).

<sup>123</sup> 31 U.S.C. § 3729(b).

<sup>124</sup> Feldman, *supra* n. 122.

<sup>125</sup> 31 U.S.C. § 3730(d); see Memo. of U.S. Dept. of Just., *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits 2* (June 13, 2012) (available at [http://www.justice.gov/usao/pae/Civil\\_Division/InternetWhistleblower%20update.pdf](http://www.justice.gov/usao/pae/Civil_Division/InternetWhistleblower%20update.pdf) [<http://perma.cc/0QK9apDJHLZ>] (accessed Nov. 17, 2013)) (“Fewer than 25% of filed qui tam actions result in an intervention on any count by the Department of Justice.”).

<sup>126</sup> Stanton A. Glantz et al., *The Cigarette Papers* 14 (U. of Cal. Press 1996).

<sup>127</sup> Gifford, *supra* n. 85, at 108.

<sup>128</sup> *Id.*

mation to private attorneys involved in the Mississippi tobacco suit.<sup>129</sup> Similarly, the Hallmark scandal laid the foundation for a criminal investigation that resulted in convictions, sparking a massive beef recall, national outrage, and a lawsuit.<sup>130</sup> Both industries seemed impenetrable from the outside; the best solution was to work from the inside.

As required by the *qui tam* statute, an insider must provide information from an animal-based food company showing that the company knows its product is dangerous. The whistleblower provision of the False Claims Act expressly authorizes private persons to bring actions for false claims in the name of the government.<sup>131</sup> But unless the individual is an “original source of the information,” the court must dismiss private citizen actions if “substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed” in certain enumerated ways, including by the media.<sup>132</sup> To constitute an original source, the private party bringing the suit (the “relator”) “need only have direct and independent knowledge and voluntarily provide the information to the government.”<sup>133</sup> Thus, the whistleblower must have personal knowledge, as did the tobacco industry paralegal and the HSUS investigator who became a slaughter plant employee. Persons acting as whistleblowers receive a percentage of recovery—up to 30%—in accordance with the statutory directives.<sup>134</sup>

Recent medical studies establish that animal-based foods are causing serious illness, but the industries have always refuted these claims. Therefore, as in the tobacco cases and *Hallmark*, the first key to this hypothetical case is to blow the whistle. The whistleblower must disclose that the company knows animal-based food is dangerous and is deliberately concealing this information, which constitutes fraud under the tobacco precedent. Under the False Claims Act, a good faith whistleblower has a financial incentive to come forward. If a whistleblower can uncover documents showing that the company knows its products are harmful—for example, e-mails stating that casein is addictive and causes diabetes, or falsified scientific studies hiding the carcinogenic nature of chicken—that individual could be responsible for increasing public awareness and fueling further litigation, thereby leading to more stringent regulation of the industries.<sup>135</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> See *supra* pt. III (discussing the Hallmark scandal).

<sup>131</sup> 31 U.S.C. § 3730(c).

<sup>132</sup> *Id.* at § 3730(e)(4)(A).

<sup>133</sup> 32 Am. Jur. 2d *False Pretenses* § 94 (1995).

<sup>134</sup> 31 U.S.C. § 3730(d)(2).

<sup>135</sup> See e.g. Neal D. Barnard, *Breaking the Food Seduction*, 12 Good Med. (2003) (available at <http://www.pcrm.org/good-medicine/2003/summer/breaking-the-food-seduction> [<http://perma.cc/0DjSVAnJyAh>] (accessed Nov. 17, 2013)) (discussing research indicating that casein in cow’s milk releases opiates when digested, which in turn seems to perpetuate a desire to eat cow milk products); R.B. Elliott et al., *Type I (Insulin-Dependent) Diabetes Mellitus and Cow Milk: Casein Variant Consumption*, 42 *Diabetologia* 292 (1999) (available at <http://link.springer.com/content/pdf/10.1007%2Fs0012500511>

For decades, tobacco companies insisted that their products were not addictive or dangerous. Hallmark denied inhumane slaughter at its facility; and now, the animal-based food industries not only deny claims that their products are harmful, but often promote them as essential to a healthy diet. That is what they are telling the public; but what are they saying internally? If the tobacco litigation and *Hallmark* are any indication, it is shocking, horrifying, and sickening.

### C. Lesson 2: *Allege Fraud*

Allegations of fraud permeated both the tobacco litigation and the *Hallmark* case. For four decades, numerous plaintiffs accused the tobacco industry of fraud. It was not until after the disclosure of documents revealing the companies' pattern of deliberate concealment that the public finally viewed the industry as untrustworthy.<sup>136</sup> The egregiousness was not just that the tobacco companies harmed people, but that they harmed people and lied about it. In the *Hallmark* case, the abuse of the animals secured the criminal convictions, but it was the fact that this conduct was in violation of federal contracts that gave the whistleblower standing to file suit. Fraud was the legal hook that the HSUS used to get into court to address animal cruelty.

A suit under the False Claims Act alleging that an animal-based food company is aware that its products cause disease would also need to claim that the company is defrauding the federal government. Dr. T. Colin Campbell, author of *The China Study*, asserts that few people know how to eat to improve their health despite the research linking health and nutrition. This is in part because "the real science has been buried beneath a clutter of irrelevant or even harmful information—junk science, fad diets and food industry propaganda."<sup>137</sup> This raises the question concerning the industries' knowledge, and whether they are concealing this knowledge and manipulating information to sell more products at the expense of public health. The fraud claim here, just as in the tobacco scandal, is that the industries know that the products are harmful, yet they continue to profit by selling those products to the government for consumption. Even if the animal-based food industries are not making health claims, or even if their contractual obligations are nothing more than to supply milk, for example, supplying milk while knowing that milk causes cancer and concealing that information from the purchaser is fraudulent.<sup>138</sup>

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53.pdf [<http://perma.cc/3R68-NTYL>] (accessed Nov. 17, 2013)) (asserting a correlation between casein consumption and the incidence of diabetes); Crystal Whitney, *The Harmful Effects of Arsenic-Based Feed Additives in Poultry Production*, 13 Drake J. Agric. L. 583, 586, 590–591 (2008) (discussing the Lasky study, noting that humans may ingest arsenic when eating chicken, and discussing arsenic's carcinogenic properties).

<sup>136</sup> LaFrance, *supra* n. 77, at 192–93.

<sup>137</sup> Campbell & Campbell, *supra* n. 8, at 1.

<sup>138</sup> See e.g. Corydon Ireland, *Hormones in Milk Can Be Dangerous*, Harvard U. Gazette (Dec. 7, 2006) (available at

*D. Lesson 3: Position the Government as Plaintiff (Intervenor)*

Positioning the government as plaintiff (or intervenor) was key to the success of both the tobacco litigation and the *Hallmark* case. Private citizens sued tobacco companies for years and were met with unrelenting no-pay positions. However, the risk of facing powerful government plaintiffs in trial changed the nature of the litigation.<sup>139</sup> First, the balance of power was no longer so heavily tipped in favor of the deep-pocketed industry; state governments were able to pool their resources and present a more united front than any of the private litigants had in the past.<sup>140</sup> Second, because the state was the plaintiff, rather than the individual, the defendant was barred from asserting the smoker's conduct as a defense.<sup>141</sup> The defenses of "common knowledge, assumption of risk, or comparative fault"<sup>142</sup> theories that had been the bedrock of the tobacco companies' litigation strategy for decades, were no longer in the tobacco companies' arsenal.

Similarly, essential to the *Hallmark* case was the fact that HSUS was asserting the claim on behalf of the federal government and had standing under the False Claims Act. The U.S.'s decision to intervene illustrates that it considered the matter worth the national attention it obtained. Assistant Attorney General Tony West of the Justice Department explained, "Our intervention in this case demonstrates how seriously we will pursue allegations such as these [affecting the health of school children]."<sup>143</sup> The U.S. also sought treble damages, in addition to civil penalties, under the False Claims Act as well as common law damages.<sup>144</sup> Additionally, the federal government alleged that Hallmark violated the False Claims Act by falsely representing to the USDA that none of the individuals connected with Hallmark were convicted felons, when it had in fact concealed that a partner at the establishment was a twice-convicted felon.<sup>145</sup> The government also asserted several related common law claims, including fraudulent concealment and breach of contract.<sup>146</sup> Thus, by filing the original suit, the HSUS revealed abuses and cruel practices that reached the level of fraud. From there, the government was able to add allegations and claims from its own investigation. Filing a suit against an animal-based food company on behalf of the government would be essential because it could potentially bar the assumption of risk and contributory negligence defenses. The familiar refrain of "personal responsibility" is a

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dairy.html [<http://perma.cc/0FzFrbtJgTa>] (accessed Nov. 17, 2013)) (discussing the link between milk consumption and cancer).

<sup>139</sup> Bitas & Barros, *supra* n. 77, at 16.

<sup>140</sup> LaFrance, *supra* n. 76, at 195.

<sup>141</sup> Gifford, *supra* n. 85, at 137.

<sup>142</sup> *Id.* at 121.

<sup>143</sup> DOJ Press Release, *supra* n. 17.

<sup>144</sup> Pl.'s 2d Amend. Compl. at ¶ 1.

<sup>145</sup> *Id.* at ¶ 2.

<sup>146</sup> *Id.* at ¶¶ 104–117, 121–125.

favorite when discussing food habits. An action arising under the False Claims Act could preempt this defense if properly invoked to emphasize the harm was to unsuspecting third parties. Additionally, the government has resources beyond that which a whistleblower can muster. If warranted, the government could intervene to identify additional defendants and bring other causes of action. Moreover, the government has an interest in seeking reimbursement for tremendous health care expenses. Americans spend more, per capita, on health care than any other society in the world.<sup>147</sup> According to Dr. Dean Ornish, adopting a plant-based diet could reduce annual medical care costs from chronic diseases, which exceed \$1 trillion.<sup>148</sup> The False Claims Act is the ideal procedural vehicle because it can award treble damages.<sup>149</sup>

#### *E. Lesson 4: Think of the Children*

The state Medicaid litigation, as well as the recent legislation regulating tobacco under the FDA's authority, makes clear that youth smokers were one of the government's primary concerns regarding tobacco. Part of what made the industry's conduct so abhorrent was that it preyed on children, and it was that specific behavior that the Master Supply Agreement (MSA) and the Family Smoking Prevention and Tobacco Control Act sought to restrict. The Center for Tobacco Products, created by the 2009 legislation, notes that one of its top goals is to prevent American youths from starting to smoke.<sup>150</sup> The agency emphasizes its commitment to educating youth and preventing them from smoking.<sup>151</sup> The Family Smoking Prevention and Tobacco Control Act, by its very name, demonstrates the extent to which the protection of children played a role in the government advocating against tobacco.

Similarly, Assistant Attorney General West explained why the Department of Justice intervened in the *Hallmark* case: "The alleged misrepresentations by Hallmark and Westland could have impacted the health of many of our nation's most vulnerable citizens—our schoolchildren."<sup>152</sup>

The focus on the harm to children in both the tobacco litigation and the *Hallmark* case is instructive. Cartoon characters encouraging youths to smoke and the serving of contaminated meat in school cafeterias violate a sense of fundamental fairness; children, as Attorney General West explained, are vulnerable, and therefore entitled to protection. The industries' argument that consumers are responsible for their own food choices is not convincing when applied to school children whose federally provided lunch may be their only meal for the day.

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<sup>147</sup> Campbell & Campbell, *supra* n. 8, at 3.

<sup>148</sup> Brown, *supra* n. 10.

<sup>149</sup> 31 U.S.C. § 3729(a).

<sup>150</sup> FDA, *Tobacco Fact Sheet*, *supra* n. 68.

<sup>151</sup> *Id.*

<sup>152</sup> DOJ Press Release, *supra* n. 17.

Therefore, a suit filed under the False Claims Act against an animal-based food company should allege that children sustained harm as a result of the company's fraud, thereby incentivizing the U.S. Department of Justice to intervene. The government's decision to intervene in the *Hallmark* suit led to the addition of numerous defendants and causes of action in the case. And like the *Hallmark* litigation, the claim alleging the negative health consequences of animal-based foods should arise out of the National School Lunch Program. Instead of focusing on the inhumane slaughter, which was a violation of Hallmark's contract with the Agricultural Marketing Service, the suit should allege violations of the animal-based food company's contract with the USDA concerning health claims. Even if the contracts do not explicitly require that the food supplied be wholesome and healthy, they do implicitly require it to be safe. Thus, the allegation is that the company has known and concealed the harmful effects of its products—effects otherwise supported by medical literature and science.

#### F. A Warning about Compromise

While to some extent the MSA was groundbreaking, arguably the states gave up too much. Obtaining a similar agreement with the animal-based food industries—an enormous settlement, complete with restrictions on advertisements and promotional activities, with particular restraint when directed to children—would surely be a victory, and could be the pathway to legislative or regulatory success, as it was in the tobacco cases. However, under close scrutiny, the MSA had perverse consequences. For example, Oregon objected that the amount it would receive under the settlement was far less than the tobacco-related expenditures under Medicaid would warrant and was certainly insufficient to change the companies' conduct.<sup>153</sup> The specific dollar amount that each state receives per the agreement depends on the state's tobacco sales, thereby incentivizing the state to increase its sales of tobacco, binding industry and state in a financial partnership.<sup>154</sup>

The government recognizes that tobacco is deadly and advises against its purchase and consumption, but pursuant to the MSA, states profit from its purchase and consumption. Despite the warnings and attendant health risks, the government has a financial interest in promoting the purchase of tobacco products. The parallel is clear: the animal-based food industries and the government will remain partners, and the government remains charged with the impossible task of both promoting the consumption of animal-based food while protecting its citizens from the harm those foods cause. Thus, while a \$206 billion settlement sounds impressive, it is important to remember the strings attached to such an agreement.

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<sup>153</sup> LaFrance, *supra* n. 76, at 196.

<sup>154</sup> *Id.* at 197–98.

On the other hand, the tobacco dispute did not end with the MSA. In 2006, a federal court admonished the tobacco industry,<sup>155</sup> and in 2010, the FDA was authorized to regulate tobacco.<sup>156</sup> Regardless of how the MSA is characterized, it laid the foundation for these judicial and legislative changes, and it was instrumental in educating the public about the dangers of tobacco. Furthermore, the *Hallmark* settlement was a historic, if only symbolic, win and provides compelling evidence that animal-based foods could be the next tobacco. It also demonstrates the usefulness of the False Claims Act as a method of challenging these industries.

## VI. CONCLUSION

The animal-based food industries are likely aware that consuming animal products is detrimental to health, yet the industries continue to market their products as essential to a healthy diet. These industries are liable for their deceptive practices and fraudulent conduct, and must be held accountable.

Even if litigation against the meat, egg, and dairy industries does not result in multi-million dollar verdicts, it will raise further awareness of the dangers of consuming animal products. Litigation may foster a paradigm shift, placing previously inaccessible information into a more public sphere. This may result in a society that is more conducive to favorable legislation, further litigation, and increased regulation of the animal-based food industries. Those fighting for the health and safety of American consumers—and the lives of billions of animals—should seek to harmonize these strategies and utilize each one, because a single strategy alone cannot combat such powerful industries.

The “war” on tobacco has not been won. However, as evidenced by ongoing and contentious litigation, the Food & Drug Administration continues to attempt to institute more dramatic tobacco warning labels.<sup>157</sup> Perhaps it should do the same for animal-based foods.

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<sup>155</sup> *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 920–21 (D.D.C. 2006), *aff’d in part and vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009) (per curiam); Bitas & Barros, *supra* n. 77, at 17.

<sup>156</sup> FDA, *Tobacco Fact Sheet*, *supra* n. 68, at 4–5.

<sup>157</sup> U.S. Food & Drug Administration, *Cigarette Health Warnings*, <http://www.fda.gov/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels/default.htm> [<http://perma.cc/04QiMwz3Epx>] (updated June 3, 2013) (accessed Nov. 17, 2013). The webpage notes throughout its subpages that “[t]he implementation date is uncertain, due to ongoing proceedings in the case of *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Administration*, No. 11-1482 (D.D.C.), on appeal, No. 11-5332 (D.C. Cir.)” *Id.*