From Creams to Lasers: Regulating the Beauty Industry in the New Millennium

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Abstract

The paper examines the development and use of lasers for cosmetic procedures. Given the lack of legal and regulatory literature in this important and growing area, the sole focus of this author in writing the paper is to highlight current dangers inherent in the widespread use of cosmetic lasers, as well as to raise considerations that need to be addressed by the government and FDA vis-à-vis the laser industry itself. The use of lasers on the eye, which presents different issues in and of itself, is not discussed except where it reflects generally on the issues relating to cosmetic lasers, and is mentioned briefly in this paper only for the sake of completeness.

Part I provides an overview of the regulation of medical devices in the US; part II discusses the use, development, and regulation of medical lasers in the cosmetic industry, and part III details the dangers involved in the current practice of laser treatment, as well as providing a critical overview of the laser industry itself.
“They say God made humans in His image, and humans have been trying to repair the handiwork ever since.”

- Tony Simmons, The News Herald

“Looking good is a sign of virtue. The body . . . has become not only a window into the soul but an expression of it.”

- Judith Gaines, The Boston Globe Magazine

“It’s been clear all along that with changing demographics and pressures to remain youthful, lasers have the potential to penetrate the consumer market nearly as quickly as the beam of light they emit.”

- Pam Reynolds, The Boston Globe

INTRODUCTION: COSMETIC SURGERY TODAY

Where Aristotle once said that “beauty is the gift of God”, today it is the gift of cosmetic surgeons. In the new millennium, we are increasingly treating our bodies like works of art, to be redesigned and sculptured where nature and nurture have failed us. In our quest for youth and perfection, so much can be done to alter the skin’s texture, color, shape and look that our body and face can be manipulated at will.

Cosmetic surgery, once considered within the exclusive domain of the rich and famous, has over the last few decades been made available to the public at large, thanks to the advent of technology. No more is cosmetic surgery considered a luxury, for now the bottom line when deciding on cosmetic surgery is not how much will it cost you, but how much do your physical imperfections bother you.

The idea that you could let a total stranger permanently alter your face and body used to be generally feared, but is now embraced. Traditionally cosmetic surgery involved days, if not weeks, of surgery, but

4 To avoid repetition, please note that all websites referenced in these footnotes were last visited between March 25 – 29 2002.
today, many cosmetic procedures are over in an hour enabling you to have a quick transformation during your lunch break. The factors that formerly made us reluctant to alter our appearance have disappeared – no more do we accept ourselves just as nature made us; no more is vanity a sin; and no more is cosmetic surgery an extravagant use of money.[5] Spas offering cosmetic services are springing up as fast as Starbucks, and with roughly the same clientele.[6]

While traditionally we relied on creams and herbs to cure our physical imperfections, today, thanks to improved medical devices, we can perfect our face and body through such techniques as liposuction for fat removal,[7] abdominoplasty (the “tummy tuck”) to remove excess wrinkled skin and fatty tissue from the body,[8] breast surgery for the augmentation, reduction, and lifting of breasts,[9] chin and cheek augmentation to improve the appearance of the chin,[10] laser resurfacing and dermabrasion[11] to reduce and smooth scars; rhytidectomy to lift the face and neck,[12] forehead lift to life the forehead skin and remove excess skin,[13] hair transplants or replacement to help treat hair loss for both men and women,[14] otoplasty to correct protruding ears,[15] sclerotherapy to remove spider veins, varicosities, broken capillaries or sunburst vessels,[16] and, blepharoplasty to remove baggy eyelids.[17]

Laser treatment is an exciting “futuristic” surgery. No instrument in medicine has the sex appeal of a laser, or is surrounded by such an inordinate amount of hype. Patients think of it as a magical tool that will somehow eliminate their cosmetic problem without pain.[18]

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[6] For an interesting discussion of the increasing cultural acceptance of cosmetic surgery, see Judith Gaines, Body Works, The Boston Globe Magazine, February 6, 2002, where she addresses the question of “How did Americans, who two generations ago rarely even pierced their ears, come to embrace all this cutting, sucking, and sanding of their flesh?”
[7] According to the American Academy of Cosmetic Surgery, approximately 300,000 people a year had liposuction in the US in the 1990s.
[9] For further information, see American Academy of Cosmetic Surgeons information sheets at http://www.cosmeticsurgery.org/procedures/abdominoplasty_tummy_tuck.asp?mn=pc
[11] This is accomplished by inserting a small synthetic implant over the natural bone. See id. at http://www.cosmeticsurgery.org/procedures/chin_and_cheek_augmentation.asp?mn=pc
[14] Id. at http://www.cosmeticsurgery.org/procedures/forehead_lift.asp?mn=pc
[16] Id. at http://www.cosmeticsurgery.org/procedures/sclerotherapy__vein_surgery_.asp?mn=pc
Today, in our consumer-driven and time-demanding culture, for many, life is about finding the quickest and easiest way to do something. In fact, many medical treatments that currently exist are geared towards youthifying individuals quickly. Whether trying to regrow hair (Propecia), gain an erection (Viagra) or lose weight (Fen-Phen) people are incredibly willing to open their wallets and subject themselves to some questionable treatments in order to regain a part of their youth without properly evaluating the pros and cons of such treatment.¹⁹

This paper examines the development and use of lasers for cosmetic procedures. Given the lack of legal and regulatory literature in this important and growing area, the sole focus of this author in writing this paper is to highlight current dangers inherent in the widespread use of cosmetic lasers, as well as to raise considerations that need to be addressed by the government and FDA vis-à-vis the laser industry itself. The use of lasers on the eye, which presents different issues in and of itself, is not discussed except where it reflects generally on the issues relating to cosmetic lasers, and is mentioned briefly in this paper only for the sake of completeness.

Part I provides an overview of the regulation of medical devices in the US; part II discusses the use, development, and regulation of medical lasers in the cosmetic industry, and part III details the dangers involved in the current practice of laser treatment, as well as providing a critical overview of the laser industry itself.

I. MEDICAL DEVICE REGULATION IN THE US

A. Overview

The U.S. Food & Drug Administration (“FDA”) currently regulates the manufacture and marketing of medical devices in the United States under the Federal Food, Drug and Cosmetic Act (“FDCA”). In 1976, ¹²¹

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²⁰See <http://www.fda.gov> for an overview of the FDA.
²¹21 U.S.C. 301 et seq. It was not until 1938, that medical devices were subject to federal regulation. However, even after this law, the degree of regulation was generally perceived as unsatisfactory, thereby entailing further amendments in 1976, 1990,
partly in response to the widely-publicized IUD and pacemaker failures, Congress passed the Medical Device Amendments ("MDA") giving the FDA broad authority over medical devices. The new law also required that in most cases marketing of a device could not legally begin until the FDA finds that the device is safe and effective. The law was most significantly amended in 1990 by the Safe Medical Devices Act ("SMDA") in 1992 by the Medical Device Amendments and, yet again in 1997 by the Food and Drug Administration Modernization Act ("FDAMA") to further expand the FDA’s authority, increase its enforcement powers, and require device manufacturers and others to report adverse device experiences to the FDA.

The main changes introduced by this new device regulatory framework included the following: (1) devices would now be classified into three distinct classes based on their perceived risk to patients; (2) a premarket notification system was introduced to enable the FDA to assess the safety and effectiveness of products prior to marketing; and (3) a premarket approval system, distinct from the New Drug Premarket Approval requirements for drugs, was introduced for high-risk devices.

B. FDA Classification of Devices

The MDA of 1976 required the FDA to classify all devices into one of three regulatory control categories, depending on the degree of regulation necessary to provide reasonable assurance of the device’s safety and effectiveness. Under the classification provisions, all products marketed prior to implementation of the 1976 MDA were categorized by a series of advisory committees.

1992, and 1997 which led to the establishment of a comprehensive system of reviewing and approving the marketing of medical devices in the US.

For a more comprehensive overview of this area, see PETER B. HUTT & RICHARD A. MERRILL, FOOD AND DRUG LAW CASES AND MATERIALS pp.742-792 (2nd ed. 1991); Robert Higgs, Wrecking Ball: FDA Regulation of Medical Devices, Policy Analysis No. 235 (August 7, 1995); William F. Pritchard & Ronald F. Carey, Primer on Medical Device Regulation: U.S. Food and Drug Administration and Regulation of Medical Devices in Radiology, 205 RADIOLOGY 1, (1997); John J. Smith, Physician Modification of Legally Marketed Medical Devices: Regulatory Implications Under the Federal Food, Drug, and Cosmetic Act, 55 Food & Drug L.J. 245; and Rodney R. Munsey, Trends and Events in FDA Regulation of Medical Devices Over the Last Fifty Years, 50 Food & Drug L.J. 163.
Class I devices\textsuperscript{27}, considered relatively safe and low-risk to patients, are only subject to general controls designed to achieve safety and effectiveness through control of manufacturing, labeling and related issues\textsuperscript{28} including FDA’s Good Manufacturing Practices (GMP)\textsuperscript{29}. Examples of Class I devices include bandages, x-ray grids\textsuperscript{30}, breath alcohol tests\textsuperscript{31} and manual and electric toothbrushes\textsuperscript{32}. Devices under this class are generally regulated by device type\textsuperscript{33}. Class I devices, unless specifically exempted by regulation, must also be cleared by the FDA prior to marketing through a premarket notification filing\textsuperscript{34}.

Following the FDAMA (which amends the FDCA), most Class I and certain low risk Class II devices are exempt from the pre-notification requirement\textsuperscript{35}. All other devices are still subject to the notification requirement\textsuperscript{36}.

A premarket Notification filing must be submitted to the FDA before a manufacturer can market its device in the United States, or before any significant changes are made to an existing device that could significantly affect the safety or effectiveness of the device or would be a major change or modification in the intended

\textsuperscript{27}Defined as products that are not purported or represented to be for a use that is of substantial importance in preventing impairment of human health, and that do not present a potentially unreasonable risk of patient injury (FDCA § 513(a)(1)(A)(ii) (21 U.S.C. § 360c(a)(1)(A)(ii)).

\textsuperscript{28}General controls include: prohibition against adulteration and misbranding (FDCA §§ 501 and 502); banned devices (§ 516); notification, repair, and replacement or refund (§ 518); records and reports (§ 519); and restricted devices (§ 520). Unless specifically exempted by regulation, general controls contain requirements for device manufacturers or other designated persons to: (i) register their establishment with FDA; (ii) list their devices with FDA; (iii) comply with labeling regulations in 21 C.F.R. pts. 801, 809, or 812; (iv) submit a premarket notification to FDA; and (v) design and produce devices under good manufacturing practices. See generally Lee H. Monsein, Primer on Medical Device Regulation, Part II: Classification, 205 RADIOLOGY 2 (1997); Rodney R. Munsey, Trends and Events in FDA Regulation of Medical Devices Over the Last Fifty Years, 50 Food & Drug L.J. 163, 166 (1995); CDRH, FDA, Device Advice (see www.fda.gov/cdrh/devadvice).

\textsuperscript{29}The FDA’s Good Manufacturing Practices (GMP) regulation requires all domestic and foreign manufacturers of medical devices (except certain exempted Class I devices) that are commercially distributed in the United States to have in place a quality assurance program. Adequate specifications and controls must be established and finished devices must meet these specifications. The FDA may periodically inspect the operations and records of domestic and foreign manufacturers to determine compliance with the GMP regulation. The GMP regulation covers the methods, facilities, record-keeping (such as complaint, device master-record, and production history files), and controls used in manufacturing, packaging, labeling, inspecting, storing, and installing medical devices. All devices must meet general GMP requirements, but critical devices must meet additional GMP requirements.

\textsuperscript{30}21 CFR 892.6500.

\textsuperscript{31}21 CFR 862.3050.

\textsuperscript{32}21 CFR 872.6855, 872.6865.

\textsuperscript{33}Under the FDAMA §510(l), most Class I devices are § 510(k) exempt. However, even when such devices are subject to the 510(k) process, they are regulated by the type of medical product, though they are approved individually. In contrast, a Class III device that is subject to a premarket approval application (PMA) is subject to general controls and, depending on the novelty of the device, a unique set of regulatory controls.

\textsuperscript{34}See id.

\textsuperscript{35}FDAMA § 206.

\textsuperscript{36}i.e. nonexempt Class I and II devices, and Class III devices, are subject to the premarket notification requirement.
use of the device.

The general controls discussed above are relevant for all types of devices and also apply to devices in Classes II and III.

Class II devices which present a greater risk of injury to the patient than class I devices must comply with both the general controls discussed above, as well as certain “special controls” which may be established by FDA regulation. Class II devices are also subject to the premarket notification procedures. Examples of Class II devices include oxygen masks; artificial eyes and, other devices that do not by themselves maintain life, such as cardiac monitors.

Class III devices are defined as those used for “supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health” or those devices that “present a potentially unreasonable risk of illness or injury”. Given that such devices entail the most significant risks, in addition to meeting the above requirements, they must also be shown to be safe and effective before being marketed. Class III devices are therefore subject to a premarket approval (“PMA”) process by which the FDA reviews clinical evidence as to the safety and effectiveness of the device before granting approval for the device to be marketed or manufactured. Examples of Class III devices include replacement heart valves and extended wear contact lenses.

Medical lasers, depending on their application, are usually categorized in Class II or III. Manufacturers can, however, request a reclassification from the FDA.

The MDA further distinguishes between those devices legally marketed before implementation of the leg-

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37 An example of such controls include performance standards (if adopted by the FDA) requiring the device to meet certain functional characteristics (the FDA has been notoriously lax in adopting such standards); postmarket surveillance; patient registries; development and dissemination of guidelines; recommendations; and other appropriate actions. In the absence of any special controls established by regulation, only general controls apply to class II devices. See FDCA §513(a)(1)(B) (21 U.S.C. § 360c(a)(1)(B)(ii)).
38 As with Class I devices, Class II device are evaluated individually under § 510(k) (if applicable), and then regulated by the type of medical product. See supra note 33
39 21 CFR 868.5580.
40 21 CFR 868.3200.
42 21 U.S.C. §360e(b).
43 21 CFR 870.3925.
44 21 CFR 886.5925.
46 21 C.F.R. Sec. 860.123.
islation in May 1976 (pre-1976 devices) and those marketed after that date (post-1976 devices). Pre-1976 Class III devices can continue to be legally marketed until FDA requests data (clinical or otherwise) that demonstrates safety and effectiveness. Any new device after 1976 is automatically treated as a Class III device, and must go through the PMA process requiring demonstration of reasonable assurance of safety and effectiveness before it may be marketed in the United States.

However, by way of an exception, certain Class III devices that are “substantially equivalent” to a pre-1976 device will be placed in the class of its “predicate” product and may be marketed immediately, subject to existing regulations imposed on the predicate product.

C. Substantial Equivalence

Since the PMA process is time-consuming and expensive, most manufacturers generally attempt to avoid it by claiming their device is “substantially equivalent” to a “predicate” (pre-1976) device. If this is the case, the new device will be placed in the predicate’s class and can be marketed immediately subject to any regulations applicable to the predicate device. As one commentator has noted: “510(k) submission has become the option of choice for bringing a new device to market.” However, devices without predicates and not judged to be substantially equivalent to a pre-1976 device, are placed automatically in Class III and are subject to the PMA process.

The term “substantial equivalence”, although originally undefined and left to the interpretation of the FDA, was eventually defined in the SDMA of 1990. A device is “substantially equivalent” if, in comparison to a predicate device it (1) has the same intended use and technological characteristics as the predicate device; or (2) has different technological characteristics that do not raise new questions of safety and effectiveness, and the manufacturer demonstrates that the device is as safe and effective as the legally marketed device.

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47 See id. § 360c(a)(1)(C)(ii) (FDCA § 513(a)(1)(C)(ii)).
48 See 21 U.S.C. § 360c(a)(1)(C) (FDCA § 513(a)(1)(C)).
49 See § 360c(f)(1)(A)(ii) (FDCA § 513(f)(1)(A)(ii)).
52 For the purpose of this definition, the term different technological characteristics means that when compared to the predicate device it can be shown that there is a significant change in the materials, design, energy source, or other features of the device from those of the predicate device. See CDRH Device Advice at: http://www.fda.gov/cdrh/devadvice/
Once the device is determined to be substantial equivalent, it can then be marketed in the U.S and is generally subject to the same regulatory requirements as its predicate. However, if FDA determines that a device is not substantial equivalent, the device is placed in Class III and must go through the PMA process (alternatively, the applicant may resubmit another 510(k) with additional data, petition for reconsideration or reclassification, or seek judicial review).

Significantly, prior to the 1990 amendments, the FDA did not generally require human clinical trials in determining substantial equivalence. However, following the 1990 amendments, the FDA were given express authority to require the submission of performance data, including data from clinical trials, in order to make a substantial equivalence determination.

Furthermore, in addition to this lack of a mandatory requirement for clinical human testing, the introduction of “piggybacking”, a process that allowed post-1976 devices judged substantially equivalent to pre-1976 devices to serve as predicates themselves, made it even easier for manufacturers to market their products and avoid the FDA PMA process. The significance of this applies particularly to cosmetic lasers (as will be discussed later) given that laser manufacturers are able to avoid the more demanding premarket approval process by making incremental changes to the lasers and relying on the substantial equivalence procedure to obtain marketing approval.

It should further be noted that the legislative history of substantial equivalence reveals that the introduction of the concept was not to insure safety and effectiveness, but rather was a concession to industry to treat pre- and post-amendment devices equally. Indeed, the effect of the introduction of the substantial equivalence

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54 Although with individually regulated Class III devices, the situation is more complicated. If the predicate is a pre-1976 device for which the FDA has not requested safety and effectiveness data, the new device may be marketed legally after the product has received §510(k) clearance (see John J. Smith, Physician Modification of Legally Marketed Medical Devices: Regulatory Implications Under the Federal Food, Drug, and Cosmetic Act, 55 Food & Drug L.J. 245).

55 See id.


58 See supra note 56.

requirement was to enable manufacturers to evade the more stringent PMA requirements giving them a fast-track for getting their products on the market. A 1988 General Accounting Office report stated that of the 36,000 medical devices marketed after FDA review, only 6% went through the PMA process while the other 94% went through the substantial equivalence procedure. Furthermore, the FDA rarely found that a new device was not substantially equivalent to a predicate device selected by the applicant. The rejection rate was approximately 2%.

Criticism arose as to use of the substantial equivalent test for deciding whether a device should be marketed, especially given the fact that the test did not focus on the most relevant question, namely is the device safe and effective? Instead, the test focuses on a secondary question, namely, is the device substantially equivalent to a pre-enactment device with regards to safety and effectiveness? Furthermore, there was general criticism of CDRH’s unofficial policy to reject only 2% of 510(k) applications which “encouraged approvals in all but the most obviously deficient 510(k) applications.”

The FDAMA addressed the issue of delays in premarket notification review time and the need to speed up the introduction of new technologies. An important FDAMA provision required the FDA to consider only the “least burdensome means” of evaluating effectiveness that would have a reasonable likelihood of resulting in approval. The FDAMA amended the definition of substantial equivalence by enabling the CDRH to request clinical data as part of the substantial equivalence determination, but limiting the type...
of data requested to the “least burdensome” data needed to determine substantial equivalence – therefore information not directly relevant to substantial equivalence, e.g. information regarding absolute safety and effectiveness of a device, may not be requested.\textsuperscript{67} Thus, the Senate report, prior to the implementation of the FDAMA, stated that the FDA “must ask for the least burdensome type of valid scientific evidence that will meet Congress’ criteria for effectiveness.”\textsuperscript{68}

This drive for efficiency so as to ease the process by accelerating device approval, as well as to reduce the cost for private companies to get their products on the market was, in this writer’s opinion, to the detriment of the public welfare in terms of proper assessment of device safety and effectiveness, even though supporters of the FDAMA stated that this improved patient access to important new technologies.

A further development introduced by the SMDA and the Medical Device Amendments of 1992 was the requirement for users (i.e. manufacturers, distributors, hospitals and clinics) to report to FDA any deaths or serious injuries caused by a device. Annual reports of such events to the FDA also are mandated. However, by narrowing it to only reporting of “serious injuries”, severely limits post-market surveillance of devices like lasers, which have the capacity for causing injury but on a more moderate level\textsuperscript{69}.

However, the position with substantial equivalence remains very much the same with the FDA requiring submission of clinical data for only a small percentage of 510(k) applications, and, in complying with the “least burdensome means” test to establish substantial equivalence, pre-clinical data is generally considered satisfactory for most applications\textsuperscript{70}.

D. Investigational Device Exemptions

Another route used by device manufacturers is the Investigational Device Exemption (IDE) (or an exemption from the IDE regulations themselves, such as for certain diagnostic or custom devices) which permits clinical study of unapproved devices (or study of new uses for approved devices). The exemption in an IDE is from certain regulatory requirements that would otherwise apply to such a device, such as PMA, performance

\textsuperscript{67}See 21 U.S.C. §360c(i)(1)(D); and Richard Cooper etc at supra note 63.
\textsuperscript{68}S. REP. NO. 105-43, at 25 (1997)
\textsuperscript{69}See 21 U.S.C. §360i(b) and §360i(a)(3).
\textsuperscript{70}See CDRH Device Advice: Premarket Notification [510(k)], at: \url{http://www.fda.gov/cdrh/devadvice/314.html#link_2}
standards, and GMP regulations, though an effective quality assurance system must be in place that, in anticipation of premarket approval by the FDA, should be based on or exceed the GMP requirements. Extensive record-keeping, reporting, and monitoring of the clinical studies is also required.

E. Special Issues For Radiation-Emitting Devices

Particularly pertinent for lasers, any device that emits radiation must additionally comply with the Radiation Control for Health and Safety Act passed in 1968\textsuperscript{71} which is also administered by the FDA and which authorizes the development of performance standards and general controls for ionizing radiation products. The Act was designed to protect the public from the dangers of electronic product radiation. Devices that either intentionally emit radiation (such as x-ray equipment) or emit radiation as a consequence of their operation (such as CRTs and television sets) are covered. Furthermore, certain light-emitting products, which emit intense, directed radiation, such as lasers\textsuperscript{72}, sunlamps\textsuperscript{73} and ultraviolet lighting\textsuperscript{74} are also covered. In addition to specific emissions standards, and to prevent unnecessary exposure to such radiation due to the use of these products\textsuperscript{75}, manufacturers and distributors of products meeting the definition of electronic product radiation\textsuperscript{76} are required to comply with certain formalities, for example, record keeping, specific labeling requirements, and reporting to the Center for Devices and Radiological Health (“CDRH”)\textsuperscript{77}.

II. LASERS IN COSMETIC SURGERY: ONE SMALL WRINKLE FOR MAN, ONE GIANT STEP FOR MANKIND.

\textsuperscript{71}42 U.S.C. Sec. 263b.
\textsuperscript{72}For performance standards for lasers, see 21 CFR 1040.10 and 1040.11. In determining the applicable reporting category for a laser product, the CDRH bases its decision on the worst-case hazard present within the laser product.
\textsuperscript{73}For an overview of the regulation of tanning salons in the US, see Leigh R. Fraser, Should Tanning Salons Be Banned? (1995), Unpublished, but stored at Harvard Law School’s Food & Drug Law Archives held by Peter Hutt (email: phutt@cov.com).
\textsuperscript{74}Other examples of radiation emitting electronic products subject to the provisions of the FDCA and therefore regulated by FDA are listed in 21 CFR 1000.15.
\textsuperscript{75}For an overview of this area, see CDRH Device Advice on products emitting radiation at: http://www.fda.gov/cdrh/devadvice/311.html and PETER B. HUTT & RICHARD A. MERRILL, FOOD AND DRUG LAW CASES AND MATERIALS pp.794-805 (2nd ed. 1991).
\textsuperscript{76}FDCA §531.
\textsuperscript{77}The final regulations are contained in 21 CFR 1000- 1299.
A. Overview

Over the last decade, lasers have gradually been transformed from a figment of science fiction to a powerful medical tool for surgeons and dermatologists in the fight for skin perfection. In this short time span, medical lasers have been used for removal of birthmarks (port wine stains), moles, tattoos, acne scars and other blemishes. Lasers are also used for a growing number of other cosmetic procedures including hair removal, treatment of wrinkles, and tooth whitening.78

Indeed, according to the American Academy of Cosmetic Surgery in Chicago, nearly 170,000 Americans underwent laser resurfacing of the face in 1998, which is approximately twice the number of the more traditional surgical facelifts performed in the same year.79

Compared to traditional surgical tools, lasers offer significant advantages. First, unlike a knife or scalpel, a laser can cut through tissue without causing excessive bleeding. In fact, lasers can actually coagulate tissue to stop bleeding – something which a knife cannot do.80 Second, lasers can reach or impact areas of the body more easily than with a scalpel, a fact that is today increasingly important with many internal procedures. Third, lasers are more precise, enabling surgeons to pinpoint the laser light on a specific area, such as a mole or hair follicle, without affecting the neighboring tissue.81 Precision is vital when it comes to invasive or cosmetic surgery.

B. What is a Laser?

The term ‘laser’ is an acronym for ‘Light Amplification by Stimulated Emission of Radiation’. Put simply, a laser tool emits a beam of light which, when focused on the skin, will “vaporize” its target.82 This is made possible because of the way lasers interact with electrons. The beam of light is sensitive to different colors thereby allowing lasers to remove colored or pigmented areas on the skin, such as brown spots (known by

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80 See id.
81 See id.
dermatologists as café-au-lait marks) and tattoos.

There are many different types of lasers, some designed to remove discolorations and other imperfections on the skin, whilst others designed for resurfacing the skin by vaporization of the skin’s upper layer. It is beyond the scope of this paper to attempt to describe the many different kinds of lasers available, and therefore the descriptions in this paper are confined to the essential basics.

C. Common Cosmetic Uses for A Laser: Quick Fixes To Old Problems

1. Wrinkles and Scars - Skin Resurfacing

Prior to lasers, there were few safe and effective solutions to help remove or improve wrinkles or scars (caused by acne, chicken pox or trauma), as well as for improving the appearance of photo damaged skin. Dermabrasion was one often-used solution. This involves using a tiny electric sander revolving at high speeds which literally “sands” the surface of the skin thereby removing or reducing wrinkles and scars. However, dermabrasion produces significant bleeding, and scarring is common. Another solution, acid peeling, which, rather than sanding the skin surface, applies one of two acids to produce an injury to the old skin. Unfortunately, permanent color loss occurs in most cases with patients often ending up with a white patch on their faces and some patients experiencing scarring. Despite this, superficial or light trichloracetic (TCA) peels, are generally successful with very low concentrations of TCA being used on the face for minor skin complaints.

Lasers have superseded these two solutions by introducing an arguably safer and more predictable procedure to remove wrinkles and facial scars. Laser resurfacing offers a number of advantages over other resurfacing methods: precision, little (if any) bleeding; less post-operative discomfort; and allowing more accurate...
depth control with distinct color changes in the skin\textsuperscript{91}.

Laser resurfacing is a controlled burning procedure during which the laser vaporizes superficial layers of facial skin (generally the epidermis and papillary dermis\textsuperscript{92}), removing not only wrinkles and lines, but also acne scars, folds and creases around the nose and mouth. Effectively, the laser resurfacing creates a fresh surface over which new skin can grow\textsuperscript{93}.

An explanation of the procedure is provided by Dr. Robert Yoho:

\begin{quote}
\textit{The laser zaps small areas on the face as the doctor moves carefully from one area to the next, treating each in turn, making sure to blend everything evenly. In the past, lasers could only work on very small spots, about an eighth of an inch at a time. But now, the technology has improved to the point where we can laser spots about 1.5 centimeters (about two-thirds of an inch) in diameter, using a laser pattern generator... The laser doesn't actually burn the skin, because there's very little heat transfer involved. Instead, it vaporizes the skin surface by making the water boil inside the skin. During the process, the treated skin changes in a way that allows the doctor to wipe off the top layers with a wet gauze pad. With each zap of the laser, the doctor can see new, fresh skin appear. Almost no bleeding occurs. Each laser zap lasts a fraction of a second... The whole process lasts about an hour...} \textsuperscript{94}
\end{quote}

Carbon Dioxide (\textquotedblright CO2\textquotedblright) and Erbium\textsuperscript{95} lasers are the two lasers generally used in laser resurfacing, each, with different effects.

Several manufacturers have received FDA clearance to advertise their lasers for the treatment of wrinkles, while others may claim skin resurfacing more generally.

Overall, as one surgeon notes:

\begin{quote}
\textsuperscript{91}See id.
\textsuperscript{92}Although for deeper resurfacing, the upper levels of the reticulas dermis is also removed. See Plastic Surgery Information Service at \url{http://www.plasticsurgery.org/surgery/lasersrg.htm}
\textsuperscript{93}See supra note 82.
\textsuperscript{94}See supra note 82, A NEW BODY IN ONE DAY, chapter 5. See also Iain McKay FRCS, Laser Skin Resurfacing, Skinlaser Directory (produced by the Disfigurement Guidance Centre in the UK): \textquotedblleft All patients will have a raw, weeping, uncomfortable superficial burn for about one week... skin erythema (redness) will last for 5 weeks to 6 months depending on which laser is used, the depth of injury and individual variation.\textquotedblright
\textsuperscript{95}As with the Carbon Dioxide laser, the Erbium laser reacts with the water moisture in the skin to create a vaporization effect. However, the Erbium laser treats the skin in much smaller increments, allowing for finer control of the resurfacing, and creates much less heat damage than the CO2 laser. This usually allows for faster post-op healing time and faster disappearance of the red face of healing often seen with resurfacing. The trade-off may be less wrinkle and scar removal than with the CO2 lasers. See id. A NEW BODY IN ONE DAY, Chapter 15.
\end{quote}
“Used properly . . . resurfacing lasers are a useful additional tool in managing patients with disfiguring problems such as acne scarring, with a degree of control not previously possible.”

2. Tattoo Removal

Lasers which are sensitive to different colors are used to remove tattoos with different lasers being used to remove the different colors of the tattoo. The lasers used deliver extremely high energy which shatters the tattoo ink particle or pigment without destroying the surrounding skin. However, although these procedures have a high rate of patient satisfaction, the side effects sometimes include a change in skin texture or pigment.

3. Red Marks on the Face or Body

Lasers can treat vascular or abnormal blood vessels and red birthmarks on the skin surface. A flash lamp pulsed dye laser is generally used on the most common birthmark, known as a ‘port wine stain birthmarks’ (the Gorbachov birthmark), as well as other red marks. Effectively, the laser used produces a wavelength of light which is selectively absorbed by the hemoglobin in the birthmark thereby fading the redness on the skin.

4. Freckles, Moles, Age or Sun Spots and Other Pigment Irregularities

Using a laser that responds to color (usually the Q-Switched Yag and Q-Switched Alexandrite lasers), will often remove freckles, age spots, moles and other colored marks, as well as fading the appearance of brown birthmarks (known as café-au-lait marks).

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96 See supra note 92.
97 See supra note 82, A NEW BODY IN ONE DAY, Chapter 15.
98 The Q-Switched Yag laser is used to fade red inks, while the Q-Switched Ruby and Alexandrite lasers fade the green colors. All three lasers can remove the dark blue/black inks. See id. A NEW BODY IN ONE DAY, Chapter 15.
100 See id. A NEW BODY IN ONE DAY, Chapter 15.
102 See supra note 82, A NEW BODY IN ONE DAY, Chapter 15.
5. Hair Removal

Apart from for cosmetic reasons, hair removal can be a medical necessity in many cases, such as for skin graft preparation and for ingrown hairs which cause infections.

In August 1997, the FDA approved the Cynosure Photogenica LPIR, a long-pulse Alexandrite laser which offers quick and relatively painless laser hair removal. Lasers are becoming the most convenient, economical, and less painful method to remove hair from large sections of the body as well as from the face, underarms, and bikini areas (especially when one considers the more traditional methods of hair removal including shaving, depilatories which chemically dissolve hair, waxing, and tweezing).

The primary principle behind laser hair removal is “selective photothermolysis” (literally destruction from heat caused by light). Lasers can cause localized damage by selectively heating dark target matter in the area that causes hair growth while not heating the rest of the skin.

Given the increasing popularity of laser hair removal, many laser manufacturers have sought FDA clearance for their lasers for this indication. The market is growing so quickly that the FDA cannot maintain an up-to-date list of all laser manufacturers whose devices have been cleared for hair removal, as this list continues to change daily.

Furthermore, given that laser hair removal is relatively new compared to other laser treatments, the longest observation period reported in the scientific literature (as of 1998) is two years. Four out of the seven patients followed up still had stable hair loss. Hair follicles are not completely destroyed by laser treatment, and therefore it is difficult to claim that laser hair removal is permanent; indeed most people will experience

\[103\] Andrea James, Hair Removal Methods: Laser Hair Removal Overview, August 2001 (available at: http://www.quackwatch.com/01QuackeryRelatedTopics/Hair/lasermain.html).


\[105\] To learn if a specific manufacturer has received FDA clearance, you can check FDA’s Website at http://www.fda.gov/cdrh/databases.html under the 510(k) database.

some regrowth within a year.\textsuperscript{107}

6. *Dental Treatments*

FDA has given clearance for argon and carbon dioxide lasers to activate tooth-bleaching solutions and to treat gum disease. Several lasers have clearance for hard tissue use on teeth.\textsuperscript{108} In May 1997, FDA cleared the first laser system for treating tooth decay, an erbium YAG laser made by Premier Laser Systems.\textsuperscript{109} Recently, American Dental Technologies received FDA clearance to market its “PulseMaster” laser for caries (decay) removal.\textsuperscript{110}

According to studies conducted by the manufacturers, the laser is as safe and effective as a high-speed drill for removing dental decay and preparing a cavity for a filling. Furthermore, fewer patients require a local anesthetic.\textsuperscript{111}

7. *Eye Surgery*\textsuperscript{112}

Lasers are also used to remove tissue in eye surgery, including removing tumors and cataracts. Several manufacturers have lasers cleared for photorefractive keratectomy (PRK) and Laser-Assisted In Situ Keratomileusis (LASIK), two procedures for correcting nearsightedness, farsightedness, and astigmatism. The laser is used to reshape the cornea and focus images correctly on the retina.\textsuperscript{113}

\textsuperscript{107}See id.
\textsuperscript{109}See Premier Laser Systems site at: \url{http://www.premierlaser.com/}
\textsuperscript{110}See American Dental Technologies site at: \url{http://www.americandentaltech.com/PulseMaster.htm>}
\textsuperscript{112}As mentioned in the introduction, the use of lasers in eye surgery presents other issues which are not dealt with here given the confines of this paper. The topic is only mentioned briefly for the sake of completeness.
\textsuperscript{113}See supra note 81. For information on laser eye surgery and which lasers have received clearance, see FDA’s Website at: \url{http://www.fda.gov/cdrh/LASIK}
D. How does the FDA Regulate Lasers?

It is important to note that the FDA only regulates the sale and marketing of medical devices and does not regulate physicians or nurses in the practice of medicine or in the use of a device.

Before a laser can be legally sold in the U.S., the company wishing to sell or market the laser must seek approval from the FDA. Medical lasers, depending on their application, are usually categorized in Class II or III and must have premarket approval or premarket clearance from the FDA prior to marketing for any indication. The majority of laser manufacturers manage to market their lasers through the substantial equivalence procedure discussed earlier. However, there are two minor exceptions to this. Certain unapproved, nonsignificant risk Class III medical devices may be distributed in the U.S. to individual practitioners who have approval from an Institutional Review Board (IRB) for the investigational clinical use of the device. Alternatively, lasers may be distributed to investigators participating in a study under an IDE approved by the CDRH (although various IDE requirements need to be complied with).

Generally, as discussed in part I, to gain FDA approval under the PMA process, a laser manufacturer must present evidence that the laser is reasonably safe and effective for a particular use (or indication). Once the FDA approves a particular laser, the manufacturer is allowed to promote the medical use of their laser only for the specifically approved indication (as will be discussed later, a physician may nevertheless use the laser for treatments outside the laser’s approved applications).

By way of a further regulatory hurdle, all laser devices distributed for both human and animal treatment in the U.S. are subject to Mandatory Performance Standards. Laser manufacturers therefore have to meet the federal laser product performance standard and must submit an initial report to CDRH’s Office of Compliance prior to distributing the laser. This performance standard specifies the safety features and labeling that all lasers must have in order to provide adequate safety to users and patients, and includes

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115 See supra note 81.
116 as specified in 21 CFR 812.
117 such as monitoring investigations, maintaining records, making reports, and complying with prohibitions on promotion and commercialization of investigational devices. See 21 CFR 812. See supra note 81.
various technical and service requirements. A laser product manufacturer must certify that each laser model has passed a quality assurance test and complies with the performance standard before introducing the laser into the market. This includes distribution for use during clinical investigations prior to device approval.

The company/manufacturer certifying a laser assumes responsibility for product reporting to CDRH; record keeping, and notification of defects, noncompliances, and accidental radiation occurrences.

However, as will be discussed later in part III, once the FDA has approved a laser, a doctor may decide to use that laser for other indications if he/she feels it is in the best interest of a patient. The use of an approved device for other than its FDA-approved indication is called off-label use. The FDA does not regulate the practice of medicine. Therefore, the FDA does not have the authority to regulate a doctor’s practice and activities (and therefore cannot regulate what doctors tells their patients; require the patient to be provided with the patient information booklet from the laser manufacturer prior to treatment; make recommendations for training or credentialing laser practitioners; nor can the FDA maintain or have access to lists of people performing laser surgery).

The FDA does, however, regulate the claims manufacturers assert for their devices. Thus, for hair “removal” lasers, a manufacturer may not claim that laser hair removal is “permanent”, unless the FDA determines that there is sufficient data to demonstrate such result. Nevertheless, several manufacturers have received FDA permission to claim permanent reduction, but not permanent removal for their lasers. This means that although laser treatments with these lasers will permanently reduce the total number of body hairs, they will not result in a permanent removal of all hair.

Indeed, in the early 1970s, laser-like devices for hair removal which selectively targeted individual hair follicles by delivering energy through a wire-thin fiberoptic probe were rushed through the market without adequate

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For further details of the FDA Technical and Service Requirements relating to laser power calibrations and service manuals, see The Laser Training Institute, FDA Rules (available at http://www.lasertraining.org/fdarules.htm).

Reporting guides and related regulatory information are available from the CDRH website at: http://www.fda.gov/cdrh/devadvice. See supra note 81.

See supra note 81.

See CDRH Information Sheet at: http://www.fda.gov/cdrh/lasik/what.htm

See id.

Permanent hair reduction is defined as the long-term, stable reduction in the number of hairs regrowing after a treatment regime, which may include several sessions. Permanent hair reduction does not necessarily imply the elimination of all hairs in the treatment area. See supra note 81.
testing and were illegally marketed by making claims that the treatment was “painless and permanent”\textsuperscript{127}.

Other claims made in relation to hair removal lasers that the FDA have disallowed (in the absence of published clinical data to substantiate such claims) include the claim that treatment is “painless”, or that the use of the laser “guarantees 0% regrowth.”\textsuperscript{128}

In 1995, FDA cleared the first laser for hair removal in the US, the SoftLight\textsuperscript{TM} Nd:YAG produced by ThermoLase\textsuperscript{129}. The device was rushed to the market without adequate testing of effectiveness and was marketed illegally as being “painless and permanent” until the FDA stepped in\textsuperscript{130}. By the time a medical paper appeared in 1997 which criticized the effectiveness of the laser and observed full regrowth of all hair in patients, consumers had already spent thousands of dollars on treatments\textsuperscript{131}. In 1998, ThermoLase was sued by a consumer (in a class action suit) alleging that the company advertised its SoftLight laser as having a “long lasting” effect knowing that such treatments did not achieve that result\textsuperscript{132}. The case was later settled. However, following a number of other lawsuits, the company stopped marketing its SoftLight laser\textsuperscript{133}.

Improvements in laser technology following 1997, together with the publication of clinical observations on laser safety and effectiveness, have led to improvements in the overall effectiveness of treatment for patients.

\textbf{E. Other Regulation}

Although beyond the scope of this paper, brief mention will be made of other mechanisms available to an aggrieved consumer.

A laser manufacturer who designs and markets a medical laser that causes injury to a patient may be held

\textsuperscript{127}Andrea James, Hair Removal Methods: Laser History and Current Issues, August 2001 (available at: \url{http://www.quackwatch.com/01QuackeryRelatedTopics/Hair/lasermain.html}).

\textsuperscript{128}See supra note 81.

\textsuperscript{129}See FDA Docket K950019 (5 April 1995).

\textsuperscript{130}For a description of the treatment using this laser, see Andrea James, Hair Removal Methods: Laser History and Current Issues, August 2001, p.1 (available at: \url{http://www.quackwatch.com/01QuackeryRelatedTopics/Hair/lasermain.html}).


\textsuperscript{132}\textit{Tester v ThermoLase}, Calif Superior Court (S.F. County, case #995285).

\textsuperscript{133}See supra note 130.
liable under general product liability law based on the negligent design or manufacture of the laser; for breach of an express or implied warranty of safety and/or may be held strictly liable in tort.\footnote{134}

A physician who performs laser treatment resulting in injury to a patient could also be subject to a malpractice suit brought by the injured patient based on the tort of negligence (where a technical or judgmental error has occurred) or based on a lack of informed consent (where a negative result or complication occurs through no fault or negligence of the doctor).\footnote{135}

\section*{F. Limits on Device Regulations: Pre-emption}

Regulation of medical devices, particularly lasers, is arguably severely limited by the doctrine of ‘pre-emption’. The MDA of 1976 specifically preempts state laws that are different from, or in addition to, any federal requirement applicable to the device which relates to safety or effectiveness.

The possibility of device manufacturers avoiding state product liability claims on the basis that such claims are preempted by the FDCA\footnote{136} is one of the more controversial aspects of the 1976 MDA. While the result of this may not be so harmful in the case of a device that has undergone the PMA process, this is not the case where a device avoided the procedure by relying on the §510(k) substantial equivalence procedure. In such cases, manufacturers of medical devices would enjoy immunity from state tort claims. Without this fear of lawsuits, laser manufacturers have arguably less incentive to ensure their laser equipment is safe.

However, the scope of preemption under MDA is unclear following the Supreme Court’s decision in \textit{Medtronic, Inc v Lohr}\footnote{137} where the court held that a 510(k) would not always preempt state tort claims. Justice Stevens stated that a finding of substantial equivalence under 510(k) was not a statement by the FDA regarding the safety and effectiveness of a device, but simply permission to market the device without going through the PMA process. Indeed the CDRH has agreed with this interpretation: “A finding of substantial equivalence does not represent, and should

\footnote{134}For an elaboration of this, see John R. Irwin MD, Legal Aspects of Lasers, April 30, 1999 (available at \url{http://www.lawyerdoctor.com/lasers.htm}).
\footnote{135}See id.
\footnote{137}518 U.S. 470 (1996).
not be construed as, a statement of a devices’ safety and effectiveness. However, a majority of the court believed that the MDA could preempt state tort claims, but that Lohr’s claims in the case were not preempted.

Unfortunately, the trend after Lohr in the circuit courts is to find that both a PMA and a §510(k) submission has preemptive effect. Indeed, in the recent case of Kemp v. Medtronic Inc, the Supreme Court denied an appeal by an Ohio woman seeking to overturn a lower court ruling that her state law tort claims were preempted by the MDA. The case involved an allegedly defective pacemaker, which the FDA had approved for sale pursuant to §510(k).

In the case of laser manufacturers, the benefits of preemption are clear but for consumers unable to sue under the common law of tort, preemption is an assault on the fundamental right of injured persons to legal redress. Proponents of federal preemption of state claims, such as the American Medical Association, argue that product liability claim have a negative impact on the development of new medical technologies such as lasers. Nevertheless, as already mentioned, the threat of product liability suits may act to ensure that device manufacturers exercise a certain level of care when producing their devices. Indeed, device manufacturers gain a double benefit by avoiding the time, costs and investment needed for premarket research as to a laser’s safety by using the substantial equivalence procedure, whilst gaining immunity from tort claims based on their devices being unsafe and defective.

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138 See LESS THAN THE SUM OF ITS PARTS, supra note 82 at 8.
139 See also Buckman Co v Plaintiffs’ Legal Committee, 121 S.Ct. 1012 (2001) where it was held that the MDA preempted state “fraud on the FDA” claims which attempt to recover for injuries suffered from devices which would not have obtained FDA approval if the device manufacturer had not defrauded the FDA during the premarket review process.
140 No. 00-1766, cert. denied (U.S., Oct. 1, 2001)
III  CRITICAL CONSIDERATIONS REGARDING LASERS AND THE LASER INDUSTRY

A. Side effects and other considerations of the treatment itself.

Patients are generally warned to avoid prolonged exposure to the sun for a few months after laser treatment. This is to protect the new layer of skin that is being formed as a result of laser resurfacing, and which is extremely sensitive. Furthermore, patients experience bruising and swelling for between 7 and 10 days after treatment depending on the healing capacity of the individual. It should be further borne in mind that the results are not perfect – patients should see an improvement in the skin, but will not have perfect unlined and unscarred skin.

Unfortunately, darker skinned ethnic groups are not generally suitable candidates as the laser alters the skin color too unpredictably and dramatically.

As with all medical procedures, complications are possible with laser surgery, including a prolonged redness of the skin and pigmentary changes such as hyperpigmentation when the skin appears darker than normal. Other more serious risks include permanent hypopigmentation (lightening of the skin) in the area of the resurfacing, as well as scarring, burns, lesions and infections (especially if the surgeon removes more layers of skin than necessary or uses an excessively high settings). Indeed postoperative infections can be devastating. Herpes simplex virus infections can also occur resulting in severe scarring.

The more common problem with lasers, however, is the risk of burning. A recent newspaper report cited the case of a cosmetic surgeon in Florida who disfigured 5 women when a laser he used to remove wrinkles caused serious burns instead.

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142 In other laser treatments aimed at removing skin discolorations, the skin is also very sensitive following treatment, necessitating the wearing of sun block for at least 6 months after treatment.
144 See supra note 79.
146 See Dennis Jacobson MD & Lawrence S. Bass et al, Carbon Dioxide And ER-YAG Laser Resurfacing, Aesthetic Laser Surgery 27:2, p.241-250 (April 2000); Alexandra Greeley, FDA Consumer, May-June 2001; and Andrea James, Hairfacts: Lasers, at www.hairfacts.com/medpubs/lasermed.html ("Skin discoloration which can last several months can occur in 1% to 10% of patients, with a higher likelihood in darker skin").
147 This is why patients most at risk should receive a course of an antiviral prior to the laser treatment. See supra note 148.
There have also been reports in the US of patients who have developed severe anaphylactic shock following laser treatment which indicates the necessity of having resuscitation equipment available in all establishments using lasers (especially for tattoo removal), and to have staff fully conversant with resuscitation techniques.\textsuperscript{149}

The following horror story, reported in the FDA Consumer Magazine\textsuperscript{150} serves to illustrate some of the problems:

“Consider the case of Anne Jones (not her real name) in semi-rural Mississippi, a stay-at-home mom and a doctor’s wife. Wanting to remove some mild acne scars, she went to a well-respected local plastic surgeon, but after a five-month recovery period, Jones realized that something had gone very wrong. He had just burned my face, she says. It was red, with scar tissue all over, she adds.

Eventually, Jones went for help to an ophthalmologist who had extensive laser knowledge—many ophthalmologists use lasers for corrective eye surgery. He took one look at her and exclaimed, Oh, I am so sorry this has happened to you. He told her that the surgeon had been too aggressive and had not used the right settings, so that her skin had retained too much heat and had been severely burned.

... Two years after her procedure, [Jones] has spent nearly $70,000 for both the initial surgery and subsequent consultations and corrective surgeries to remove the scarring. She says she has partially reclaimed her life. But she bitterly regrets undergoing the initial surgery. I will never look right, says Jones. I would never do this again.

B. Long-Term Effects.

Because laser resurfacing and laser hair removal are new methods, long-term data on safety and effectiveness have not yet been established. However, a number of studies on laser resurfacing using microscopic examination have shown that the physical changes that occur to laser-treated skin are essentially identical to those that occur with either dermabrasion or chemical peel.\textsuperscript{151}

Furthermore, response rates to treatment have not been established; nor have regrowth rates (for hair

\textsuperscript{14B.}}

\textsuperscript{149}Dr J A Cotterill BSc MD, The Management Of Tattoos With Lasers, Skinlaser Directory (produced by the Disfigurement Guidance Centre in the UK, available at:}

\textsuperscript{150}See supra note 79.

\textsuperscript{151}See Plastic Surgery Information Service at:}

\textsuperscript{14B.}}
removal treatment) been accurately established and cannot be predicted due to a number of variables.

Indeed, results of laser treatment vary widely, and despite promotional claims by laser manufacturers, there is insufficient comparative data to determine if one type of laser is more effective and safer than another.

Results of resurfacing are also difficult to quantify. How do you measure improvement? Most studies have provided only subjective evaluation and no comparative objective data.

Accordingly, at present time, results can only be reviewed on a short-term basis, which includes evaluating such criteria as recovery, immediate cosmetic improvements, and complications. Gradually, over the years, results will need to be looked at on a long-term basis, which will include reviewing the longevity of the cosmetic improvements, and again, the complications.

Given that lasers have been rushed to the market without a full evaluation of their capabilities and limitations, it is important, if not vital, that researchers and practitioners publish their experiences and findings.

Fortunately, skin cooling and pain management techniques continue to be improved, although the risks of side effects have not been eliminated. Indeed, a consumer death was reported in 2001 due to a combination of pain medications prior to laser treatment.

C. Cultural Factors about our Society

As mentioned in the introduction, today, in our consumer-driven and time-demanding culture, for many, life is about finding the quickest and easiest way to do something. Lasers offer a ‘quick-fix’ enabling us to rejuvenate ourselves over a lunch break.

Demand and supply for laser treatment has been heavily influenced by the media. Among the public at

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152 See Andrea James, Hairfacts: Lasers, at www.hairfacts.com/medpubs/lasermed.html and See supra note. Also, see id.
154 See supra note 146.
155 See id.
157 See supra note 130.
large, the idea of laser treatment invokes ideas of painless, speedy treatment enabling us to attain beautiful unblemished skin with little effort. Indeed, thanks to the media, the laser has been given magical powers. Many people are convinced by the preliminary findings that these surgeries are safe and beneficial. Nevertheless, caution must be taken. As already mentioned, there is no long-term data on the effect of lasers. Nor are there comparable studies that would allow physicians to accurately predict what sort of effect these surgeries can have forty years from now. As one commentator notes:

“the United States has a tendency to immerse itself in medicine that enhances life. Ironically, without proper testing and enough data, such life-enhancers can prove to be detrimental. Before anyone undertakes such a procedure whether it is for their eyes, their weight or their hair, they must realistically understand the implications of their undertaking.”

Unfortunately, in today’s fast-paced society, most patients do not have the time or energy to do the necessary homework on the treatment they plan to undergo. As a result, the tendency is to trust the first laser physician a patient encounters. Objectivity is removed and the patient subjects him/herself to a limited perspective. An example is that of a physician who only uses one type of laser (and spent a great deal of money on it) who may neglect to inform the patient that another laser has been found to be more effective for the patient’s condition. Indeed, it is conceivable that some physicians may try to use the one laser they have so heavily invested in to treat a multitude of cosmetic complaints, which may not be in a patient’s best interests.

D. Promotional Claims by Laser Manufacturers and the Need for Clinical Data

The massive public interest in lasers, and the patient’s demand for laser treatment have been fueled by the media, and more particularly, by effective advertising and marketing from the laser companies. As noted by laser researcher Christian Raulin, M.D.:
to advertise newly developed lasers for which the efficacy has not been determined by means of objective, randomized trials. When a laser is first marketed, there are thus no dependable data available from studies; instead, physicians must rely upon the often unfounded claims from the advertising literature.  

To many physicians, the rapid increase in demand for laser treatment offers a new source of income, as well as presenting a new pressure for them to buck the trend and to purchase a laser or risk losing out to competitors.

Unfortunately, however, promotional material from manufacturers and practitioners is often unreliable. It is common for the industry to advertise new lasers whose effectiveness has not been determined by objective clinical evidence. When a laser is first marketed, there is therefore no dependable date available and thus, physicians must rely on the unsubstantiated claims in the advertising material. Self-promotion is also common among laser practitioners, especially given that they have incurred significant expense for a new laser. The pressure to recoup such expense as well as an attempt to use the one laser for a number of treatments (when other lasers would be more effective) leads to a series of expensive, ineffective and, sometimes, unsafe treatments.

The laser industry is being driven by market forces, with minimum consideration being given to evidence-based medicine. There is little comparative data to allow physicians and their patients to make rational choices. This has led to the result whereby well-founded scientific studies are no longer the basis for the widespread use of lasers. Therefore, as noted by some commentators:

"Careful clinical assessment cannot occur under such conditions, and the absolute opposite of the Hippocratic Oath to do no damage can easily be achieved."

Rox Anderson M.D., one of the pioneers in the field of laser dermatology, comments, that there is a big problem brewing:

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165See id.
167See supra note 164.
“Unfortunately, there is relatively little good, hypothesis-driven research on lasers in dermatology. These studies are expensive and slow to perform, analyze, present, and publish. The laser companies are quick to promote their new devices and procedures, even before efficacy and safety are well established, and before a specific FDA clearance is given...

But the problem lies mainly with us, the professionals. We should simply refuse to believe infomercials over peer-reviewed studies... Those industry salesmen who can’t support their claims well, should be tolerated only as village idiots. In short, the patients are ours, and we should make better patient care the only real bottom line.”  

In a perfect world, the laser would be able to do what its makers claim it will do. However, as one commentator notes:

“today laser salesmen tell you their lasers can do anything: figure out your taxes, improve your sex life, open your garage door. Don’t buy this. Claims must be measured against proven performance”

The Federal Trade Commission and the Consumer Product Safety Commission, as well as a variety of other federal agencies, regulate the advertising of medical devices, including lasers, however, whether they can comprehensively regulate all the claims made by laser manufacturers is open to doubt.

Part of the reason why we have reached this position, is because of the ability of laser manufacturers to avoid the PMA process by using the substantial equivalence provision. This has led to unfortunate consequences in the medical laser industry with the majority of new lasers entering the market via this route to the detriment of the consumer given that in many cases, no clinical data has been submitted to the FDA as to the laser’s safety and effectiveness. Indeed, focusing on substantial equivalence rather than absolute safety and effectiveness has led to laser manufacturers to design clinical and pre-clinical tests focusing on the question of substantial equivalence, rather than proving safety and effectiveness. Surely, efforts would be better spent researching absolute safety and effectiveness given that this is the main patient concern.

In an interview with Dr Larry Bass, he notes that most cosmetic lasers today have been marketed via


\[170\] Indeed, the FDAMA reinforces this focus by instructing the FDA to limit its clinical data submission requirements only to information related to substantial equivalence. See 21 U.S.C. §360c(i)(1)(D) and Richard Cooper etc, see supra note 63.

\[171\] See supra note 63, Richard Cooper etc.

\[172\] Interview with Dr Lawrence Bass. M.D., F.A.C.S on 31 January 2002 at his New York clinic. Dr Bass is Co-Director of
the substantial equivalence procedure and not through the PMA process, with the result that no clinical
testing has been done on lasers employing this procedure (laser manufacturers generally not being required
to submit clinical data). Indeed, even on the relatively few occasions when clinical testing on a new laser is
done, and when clinical data has been submitted to the FDA by a laser manufacturer, such data (including
any test results) is generally not made available (either to the public or to practitioners). Larry Bass notes
that most laser manufacturers do not like disclosing such test results for fear of competition.

As will be discussed later, most laser manufacturers are relatively small and specialized compared to other
companies within the medical device industry. Many laser manufacturers obtain funding from venture
capitalists who, as a condition of financing, oblige the manufacturer to either repay the loaned funds or
generate minimum revenues within a short-time frame (between 2-5 years). Given such financial pressures,
laser manufacturers have a strong incentive to market the device as quickly as possible and to avoid spending
substantial time and incurring costs to engage in clinical studies that would require long-term follow-up (in
any case, most laser companies due to their relatively small size do not have the finances to fund clinical
research).[173] Indeed, as Larry Bass notes, another important consequence of the lack of clinical testing is
that lasers are not optimized for human application when first placed on the market.

E. The Unregulated Use Of Lasers

As mentioned above, the FDA regulates medical devices on the basis of their manufacturing and distribution,
and not on the basis of the use of such devices by physicians. The so-called “practice of medicine” doctrine
which provides that the FDA lacks authority to regulate treatment practices by licensed physicians, effectively
allows licensed practitioners to use any legally marketed device for any indication, even if that indication is
not approved specifically for that device – off-label use is thus allowed giving the physician a wide latitude
in treatment options.[175] Significantly, the FDA does not distinguish between the off-label use of drugs and
device. [176]
Indeed, the FDAMA explicitly recognized the practice of medicine doctrine by providing that:

“Nothing in this Chapter shall be construed to limit or interfere with the authority of a health care practitioner to prescribe or administer any legally marketed device to a patient for any condition or disease within a legitimate health care practitioner-patient relationship”. 177

As Dr. Smith, M.D, Assistant Radiologist at Massachusetts General Hospital, states:

“The practice of medicine doctrine stands firmly for the proposition that regulatory efforts are directed primarily at device marketing by manufacturers, not device use by physicians. Under the doctrine, a licensed physician enjoys wide latitude in the treatment use of a physician-modified product . . .” 178

This is particularly significant for lasers. Given the cost of lasers, and the fact that such lasers often become outdated given rapid developments in the area, physicians, only able to afford, one or two cosmetic lasers, have the incentive to use the lasers for a variety of patient conditions rather than go to the expense of purchasing a specific laser that would best treat the patient condition. 179

As the FDA does not regulate the practice of medicine, medical practice in the US is generally regulated at state level via state licensing of healthcare professionals. 180

States regulate who can use lasers for various therapeutic procedures. But Class 2 and 3 medical lasers are prescription devices available for sale only to “licensed practitioners”. It is therefore up to each state to determine who qualifies as a licensed practitioner, including what training, if any, should be required.

However, inconsistencies occur in the US given that each state’s medical licensing board determines who qualifies as a licensed practitioner in their state. Physicians, electronologists, and beauticians have all claimed permission to use lasers, but its up to each state to decide. 181

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178See supra note 56, John J. Smith, Physician Modification etc.
179A reported example of this is the use of lasers designated for the treatment of port-wine stains (red/pink birthmarks) to treat brown café-au-lait marks (which generally requires a more specific laser to remove the melanin produced by a café-au-lait mark).
More significantly, Larry Bass notes that the requirement is only for the treatment to be ‘supervised’ by a licensed practitioner, and therefore the treatment itself can be performed by anyone without the licensed practitioner even being present. According to reports, many places that offer laser treatment claim that it is done under the supervision of a physician; however, in some cases the physician may not be on site when a technician performs the procedure.

One of the main areas of concern within the laser industry is the use of lasers by unregulated and unqualified ‘practitioners’. Indeed, unqualified people are flooding the cosmetic laser market which, in itself, presents a grave risk to consumers.

One commentator notes that as with x-ray use 100 years ago, “use of dermatological lasers is in danger of being rapidly debased into a cosmetic procedure”. Self-proclaimed “laserologists” have set up “training institutes” for beauticians and other non-physicians. Some even offering laser treatment to consumers without direct medical supervision. The increased availability of lasers to non-physicians will increase the likelihood of injury and quackery.

As noted by Christian Raulin, MD:

“Anyone, including healers, hair stylists, tattoo artists, and cosmeticians, can buy lasers and then advertise for their services. There are no legal requirements for training, no quality control measures, no official quality standards of guidelines . . . We must demand the extensive scientific evaluation of new and existing systems; objective and trustworthy marketing by laser manufacturers; well-founded training for laser operators; and legislation which restricts the use of lasers to physicians alone.”

Indeed, given the investment involved by laser manufacturers in marketing a laser, they are so eager to sell their lasers that they stage one- or two-day training courses, which has led to the situation that now dentists, obstetricians, gynecologists, and family doctors are offering laser surgery.

Unlicensed practitioners cannot assess skin types, nor develop an understanding of how lasers affect the skin.

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183 See supra note 172.
185 See supra note 130.
186 See id.
188 Tina Alster, M.D., director of the Washington Institute of Dermatological Laser Surgery. See supra note 79.
In the weekend courses offered by some laser manufacturers, very little practical training is given and no mention is made of potential complications and how to deal with them. Instead, as Raulin et al notes, “hands-on training is performed on apple and orange peels under the guidance of so-called ‘specialists’.”

According to Richard Felten, a senior reviewer in FDA’s Center for Devices and Radiological Health:

“The person planning to do laser surgery must understand the basic physics of how laser energy is absorbed by tissue and how tissue responds. Then that person should go where the surgery is performed and watch a skilled surgeon use the equipment.”

Ideally, the best people to use lasers are the dermatologists and plastic surgeons who best understand skin and surgery of the skin.

Indeed, as Tina Alster notes:

“sometimes people may choose the wrong laser, or a surgeon may believe more is better, which can lead to significant burning.”

Without an understanding of the basic physics of how laser energy is absorbed by tissue and how tissue responds, as well as an understanding of dermatology generally, fatal mistakes can be made by an untrained or rogue laser users.

Accordingly, problems and complications do not generally happen with dermatologists and plastic surgeons, but occur with nurses, beauticians and other unqualified users who take crash weekend courses and rent laser equipment that they are not familiar with (especially where the rental equipment tends to be older and not tuned up).
The American Society of Plastic Surgeons acknowledge a death rate of 1 patient per 57,000 surgeries (not limited to laser surgeries), and that 0.5% of patients develop serious complications. Some argue that as such treatment is optional (the patient not being ill or diseased), even this relatively low rate of death or injury is unacceptable.\textsuperscript{195}

As regards differing state regulation across the US, this also presents a problem, given that residents of different states receive different standards of care depending on their state’s credentialing policy for laser practitioners. Rhode Island, for example, requires that all electrologists be licensed. To obtain a license they must go to school, serve an apprenticeship for 650 hours, and pass a national exam.\textsuperscript{196} But, like many states, Rhode Island has no such regulations or licensing requirements for people using lasers and laser-like devices for hair removal.\textsuperscript{197} In comparison, New Jersey provides that all laser treatments must be performed by an MD.\textsuperscript{198}

Nevertheless certain states have passed laws relating to the ownership, registration, and use of lasers.\textsuperscript{199} However, state law varies considerably in this area so that one would need to review the laws of their particular state.

Furthermore, as physicians must effectively police themselves, the doctor may need to discourage patients from treatment when such treatment would be detrimental no matter how much the patient wants it. If a patient has low self-esteem, they may never be happy no matter what you do – they may need counseling more than surgery.\textsuperscript{200}

Despite the FDA regulating the marketing of lasers for the specific indications requested, the FDA can only recommend training needed to operate the lasers. Credentialing is a state function, since states are responsible for the licensing of doctors and nurses, and standards for laser training vary from state to state. To date, no national policy exists for credentialing those planning to practice laser surgery,\textsuperscript{201} nor is there any single agency or authority which provides laser certification or credentialing of physicians.

\textsuperscript{196}Laura Meade Kirk, “First Razors, Now Lasers”, South Coast Today, 20 April 1999.
\textsuperscript{197}See id.
\textsuperscript{198}See supra note 172.
\textsuperscript{199}See John R. Irwin MD, Legal Aspects of Lasers, April 30, 1999 (available at \url{http://www.lawyerdoctor.com/lasers.htm}).
\textsuperscript{201}See supra note 79.
Despite this, some positive developments have occurred. National Council on Laser Excellence has been formed to provide voluntary certification of laser service engineers, laser operators and laser safety offices (although this Council does not address the certification of physicians). The American National Standards Institute has promulgated a variety of standards with respect to medical devices. There are currently proposed standards relating to the medical use of lasers, which, if adopted uniformly across America, will have significant effect on the industry.

A further problem that is unfortunately ignored in the laser industry is that very few clinics have the facilities to offer a comprehensive care program for patients undergoing laser treatment, including having staff qualified in administering general anesthesia or sedating the patient, as well as offering CPR. Nor do many clinics provide adequate post-operative care, especially to those patients who have extensively damaged skin due to laser treatment. Resuscitation equipment should be available in all establishments using lasers, as well as having staff fully conversant with resuscitation techniques.

A recent story in the Washington Post reported the death of a 20-year old man who suffered an allergic reaction whilst undergoing treatment for laser hair removal. According to the report, at the moment of crisis, no suitably qualified doctors were around in the clinic to administer CPR or other lifesaving treatment that could have saved the patient. There have been other reports of severe anaphylactic shock following laser treatment.

The above story illustrates the dangers of inadequately staffed and ill-equipped clinics that provide laser treatment.

F. The Laser Industry Itself and Financial Pressures: Just Big Business?

Lasers are extremely expensive to own and operate, costing between $30,000 to $250,000 (vision correction lasers cost $500,000!), and some doctors own several, with up to a million dollars invested in their equipment. The technology changes so rapidly that in a few short years the equipment becomes outmoded and has to

202 See The Laser Training Institute, About Credentialing (available at http://www.lasertraining.org/about.htm).
203 See ANSI Z136.1. See also supra note 194, John R. Irwin MD, Legal Aspects of Lasers.
204 See supra note 200.
be replaced.

The costs of buying and operating a laser are enormous. Furthermore, given this expense, most laser practitioners and clinics can only afford one laser, which necessitates them choosing the “right” laser from a wide selection of ever-increasing lasers. Unfortunately, there is no “universal laser” that will work for every condition \(^{206}\), yet once a laser has been purchased, practitioners have a financial incentive to use that laser as often as possible and to treat as many conditions as possible to the detriment of the consumer patient (especially where alternative treatments would be safer and more effective, as well as less costly \(^{207}\)).

Furthermore, like personal computers, lasers become outdated within a very short time with technical developments in the field taking place daily. As one commentator notes: “before the first payment has been made, there are already better, higher-performance alternatives which are often more expensive that the earlier models” \(^{208}\). Yet, very few practitioners or clinics have the funds to regularly expand their armory of lasers. Some clinics rent laser equipment giving them access to the lasers they need. However, this option is highly impractical. Careful planning and coordination is needed to manage patient appointments and visits. Further, to be economical, a laser clinic must ensure it has a minimum number of patients to be treated by a particular laser on the day it rents out that laser, which may encourage the liberal use of the laser for a variety of conditions outside the laser’s labeled indications \(^{209}\).

Furthermore, given that each laser is unique, those renting lasers will not always be able to attain the detailed knowledge and significant hands-on experience required for each laser. Indeed, being an intermittent laser surgeon, as one laser researcher puts it, “is like trying to be an electrician on the weekend after taking a crash course in the past” \(^{210}\).

By way of an example, the cost for a LASIK laser is approximately $2,500 per eye. LASIK is big business in the American corporate world. Lasers cost approximately $500,000 and run about $90,000 annually in maintenance costs. One company that produces such equipment called VISX has a market capitalization of $3.5 billion dollars. This means that all of VISX’s stock is worth this dollar amount. In fact, the recent

\(^{206}\) See supra note 159.
\(^{207}\) See id.
\(^{208}\) See supra note 194, ABC News, April 18, 2001.
\(^{209}\) Dr. David Goldberg, Director of Laser Research at Mount Sinai School of Medicine (quoted in ABC New Report on April 18, 2001 – see id).
\(^{210}\)
run-up in VISX’s stock price over the past year combined with the lofty price-to-earnings ratio of 100 that it carries, suggests that shareholders expect this company to earn a lot of money. For investors to pay such an expensive price for a stock, indicates that people expect VISX to continue to make as much money in the future as they have in the past.\footnote{211}

However, many laser companies are experiencing financial troubles. Premier Laser System (mentioned above) has been experiencing financial troubles necessitating it to petition for reorganization under Chapter 11 of the Bankruptcy Code in March 2000\footnote{212}. Similarly, American Dental Technologies is experiencing falling revenues and profits.\footnote{213}

Indeed, according to EyeNet Magazine (an official journal published by the American Academy of Ophthalmology), the LASIK market is experiencing hard times. Large laser eye centers offering discount prices, like LASIK Vision and Icon Laser Centers, have been experiencing financial troubles and have been gradually reducing the price for laser vision correction, so that in some markets, it costs $500 for treatment. Unfortunately, as a result of falling prices due to increased competition within the industry, profits for such companies and their competitors plummet.\footnote{214} According to industry analysts, times are desperate for many laser center.\footnote{215} There are numerous reports of financial troubles in the laser industry.\footnote{216}

The pressure to sell lasers has never been so great.

A good example serves to illustrate the problem. According to a report in the Business Journal of Tampa Bay\footnote{217}, Sunshine Laser Centers Inc, which competed for business in the LASIK procedure, went bankrupt within a year of joining the market and has filed Chapter 11 bankruptcy protection in U.S. Bankruptcy Court, Middle District of Florida.

\footnote{215}per Al Kildani, a medical services and technology industry analyst at Pacific Growth Equities in San Francisco. See id, EyeNet Magazine.
Tampa Division. Court records show that Sunshine estimated its debt between $1 million and $10 million. Sixty-five entities and potential creditors were served with notice on December 23.

Of significance, the Business Journal reports that:

“The Chapter 11 filing spawned speculation that Sunshine succumbed to price competition that requires massive patient volume to sustain the high overhead of running a LASIK practice.”

Dr. Byron E. Holley, who operated at Sunshine Laser as the chief surgeon and medical director, stated that:

[Laser] businesses start up and . . . fail. When you see people willing to do it (the LASIK procedure) for $499, you have to wonder. The business is very money-driven right now. The amount of competition in this area had to be a factor. We are saturated.

Fierce competition surrounds the laser industry. It is a crowded market, and a medical practice is a business. You have to be profitable to provide care. It is indeed a challenge for all medical practices in today’s environment. Sunshine’s bankruptcy filing mirrors situations of other health care providers in the business. Expensive equipment and high overheads (especially given the pre- and post-operative care that is required), not forgetting the costs of advertising and marketing the laser itself present severe financial obstacles to any company contemplating entering the laser industry. This, combined with the competitive nature of the industry which has driven down prices (as well as encouraging price slashing) to historically low levels, has led to increased emphasis on volume and ‘getting patients through the door’. Now consumers are bombarded with aggressive advertisements, from newspapers and over the airwaves, with claims of better prices and better surgeons.

Indeed, given the nature of laser treatment, which unlike other medicine, treats the patients' subjective self-image and not objective symptoms of disease, doctors in the field wish to ensure the patient is subjectively happy. With laser treatment, it is not diseased skin which is treated, but rather it is healthy skin which is damaged on the patient’s request. As Dr. Christian Raulin MD et al notes:

218 See id.  
219 See id.  
220 See id.  
221 See id.  
222 See supra note 164, Raulin et al.
“The inevitable conclusion is that the happiness of the patient, which is of course subjective, becomes the center of medical attention, as opposed to the goal of restoring and maintaining health in the Hippocratic sense.”

Furthermore, if the patient determines his/her treatment, the doctor arguably becomes a vendor in a business transaction motivated only by profit and the need to keep the patient happy, at the expense of the doctor’s fiduciary responsibility to the patient.

Raulin et al pessimistically conclude that:

“If financial pressure coerces physicians into treating patients using lasers against their better knowledge or judgment, they will sell their souls to cosmetics and commerce.”

**CONCLUSION**

Unfortunately, as there are no official statistics of adverse reactions from laser treatments or of surgeries that have actually gone wrong due to the fault of the practitioner, it is difficult to get a sense of how significant the problems of laser surgery are.

Certainly, one of this paper’s goals was to highlight the dangers inherent in the unregulated cosmetic laser industry, and although not specifically advocating a need for regulation both of the laser industry itself and of those qualified to use lasers, this is implicit throughout.

However, one must be careful not to castigate the industry without objective evidence. Properly-tested and approved lasers, in the right hands, are a fantastic tool to genuinely help both those suffering from cosmetic deformities, as well as those just wanting a little boost to their self-image. It is however, inevitable, that developing technologies should be subject to proper scrutiny from the FDA, and medical authorities, before

223 See id.
224 See id.
225 See id.
they are allowed out into the market. The substantial equivalence procedure does not provide this adequate level of scrutiny.

There is an important need for scientific evaluation of lasers based on evidence collected from objective third-party clinical trials over a long-term period. This, together, with established training programs instigated by appropriate medical boards on a federal basis, and legislation restricting the use of lasers to appropriately qualified physicians, should help ensure that the laser becomes a justifiably popular and potent tool for the foreseeable future.

A concluding quote from an expert would be appropriate:

“In good hands, lasers are among the safest, most effective, unique, useful tools we have for treating skin. When oversold or misused, lasers are just another way of courting disaster. . . . The sky is not falling (yet). But what can be come about the decrепit standards for quality of introducing new aesthetic laser applications? Somewhat tighter FDA regulation for the 510k process of clearing devices might help. . . . But the problem lies mainly with us, the professionals. We should simply refuse to believe infomercials over peer-reviewed studies. We don’t have to buy every latest gadget appearing in cosmetic magazines. Those industry salesmen who can’t support their claims well, should be tolerated only as village idiots . . .”