

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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IN THIS ISSUE

E-cigarette use has skyrocketed in recent years, resulting in a host of legal issues, from claims related to deceptive marketing practices, to product liability claims related to exploding e-cigarette devices, to an outbreak of acute lung-related injuries that began to emerge in mid-2019. While the long-term health effects of e-cigarette use remain to be seen, this product has all of the makings for the next mass toxic tort.

Where There's Smoke, There's Fire: Are E-Cigarettes an Emerging Mass Toxic Tort?

ABOUT THE AUTHOR



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Nearly 70 years after the link between smoking tobacco and lung cancer was first established,¹ the myriad health consequences of both tobacco use in general, and cigarette smoking specifically, are now well known. Due in large part to public health initiatives, educational efforts, and laws banning smoking in public places, cigarette smoking rates in both the United States and nearly all other areas of the world have steadily declined over the past several decades.²

Although use of traditional tobacco products has declined, emerging products, such as electronic cigarettes (“e-cigarettes”) and electronic nicotine delivery systems (“ENDS”) have skyrocketed in popularity. Often promoted as a safer alternative to smoking and a means to smoking cessation, e-cigarette use increased nearly six-fold from 2011 to 2018, from 7 million users, to 41 million.³ The most dramatic rise in use has been among adolescents.⁴ In fact, the Surgeon General has declared e-cigarette usage among youth to be an “epidemic.”⁵

A variety of legal claims has followed the increasing use of these products. E-cigarette lithium battery explosions and fires,

resulting in critical injuries and incidents of property damage, have led to product liability claims. Consumer class action lawsuits accuse e-cigarette manufacturers of fraudulent marketing. A number of school districts have filed their own lawsuits, accusing e-cigarette companies of gross negligence, racketeering, and public nuisance by creating a nicotine epidemic among youth.⁶ In addition, Juul Labs is facing claims filed by a growing number of state attorneys general, including those in California, Illinois, Minnesota, New York, North Carolina, Pennsylvania, and Washington, D.C., over allegations of violations of consumer protection laws, unfair trade practices, and public nuisance, among other claims. As a result of these concerns, numerous state and local governments began taking measures to regulate the sale, marketing, and use of e-cigarette products.

Additional concerns emerged late last year, when the Centers for Disease Control (“CDC”), Food & Drug Administration (“FDA”), and state health agencies identified numerous cases of acute lung injuries among patients with a history of e-cigarette usage. As of February 4, 2020, the CDC had

¹ Richard Doll & A. Bradford Hill, *Smoking & Carcinoma of the Lung*, 2(4682) Br. Med. J. 739-48 (1950).

² World Health Organization, WHO Global Report on Trends in Prevalence of Tobacco Smoking 2000-2025 (2d. 2018).

³ Lora Jones, *Vaping: How Popular are E-Cigarettes?*, <https://www.bbc.com/news/business-44295336> (Sept. 15, 2019).

⁴ *Id.*

⁵ Office of the Surgeon General, *Surgeon General’s Advisory on E-Cigarette Use Among Youth*, <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>.

⁶ Vincent Moleski, *Davis Joint Unified School District Files Lawsuit Against Juul over ‘E-Cigarette Epidemic,’* <https://www.sacbee.com/news/local/education/article239620583.html> (Jan. 24, 2020).

reported a total of 2,758 cases of acute lung injury related to e-cigarette use in the United States.⁷ Sixty-four deaths have also been confirmed as related to e-cigarette use.⁸ The median age of these patients was 24 years, and ranged in age from just 13 years, to 85 years.⁹

What are E-Cigarettes?

Although widely thought to be a new product, tobacco giant Philip Morris actually began developing an ENDS in 1990, in response to health concerns and the decreased social acceptability of smoking, both of which were leading smokers to seek other means of nicotine delivery.¹⁰ E-cigarettes first became commercially available in China in 2003 after a pharmacist reportedly created the device after his father, who had a heavy smoking history, died due to lung cancer.¹¹ E-cigarettes were introduced into the European and American markets in 2006 and 2007.¹²

E-cigarettes are manufactured in a variety of designs, but at their simplest, they are products that aerosolize or vaporize a substance for inhalation. They are battery-

operated devices that usually consist of a mouthpiece or cartridge, a tank, pod, or other repository for e-liquid or e-juice, a heating element, a battery, and electronic circuits. As the user inhales, a sensor activates the heating element that vaporizes or aerosolizes the liquid. The e-liquid typically consists of nicotine, one of the thousands of available flavorings, propylene glycol, vegetable glycerin, and other ingredients.¹³ Some e-cigarettes are designed to resemble conventional cigarettes, cigars, or pipes, while others resemble pens or USB flash drives.

There are two main types of e-cigarette systems – closed and open. The main difference is the manner in which the e-liquid reaches the heating element. Closed systems use tanks with prefilled cartridges. These cartridges cannot be refilled, and closed-system e-cigarettes are disposed of after use. Open systems, on the other hand, are refilled with e-liquid manually and are therefore reusable. E-liquids that are either homemade or purchased on the black-market are commonly used in open systems.¹⁴ These e-liquids often have an

⁷ CDC, *Outbreak of Lung Injury Associated with Use of E-Cigarette, or Vaping Products*, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html (last visited Feb. 11, 2020).

⁸ *Id.*

⁹ *Id.*

¹⁰ L.M. Dutra, R. Grana & S.A. Glantz, *Philip Morris Research on Precursors to the Modern E-Cigarette Since 1990*, Tobacco Control (Epub. Nov. 15, 2016).

¹¹ Consumer Advocates for Smoke Free Alternatives Ass'n, *A Historical Timeline of Electronic Cigarettes*,

<http://www.casaa.org/historical-timeline-of-electronic-cigarettes/> (last visited Feb. 9, 2020).

¹² *Id.*

¹³ FDA, *Vaporizers, E-Cigarettes, and other Electronic Nicotine Delivery Systems (ENDS)*, <https://www.fda.gov/tobacco-products/products-ingredients-components/vaporizers-e-cigarettes-and-other-electronic-nicotine-delivery-systems-ends> (last visited Feb. 9, 2020).

¹⁴ Seth Kligerman, MD, et al., *Radiologic, Pathologic, Clinical, and Physiologic Findings of Electronic Cigarettes or Vaping Product Use-associated Lung*

unknown composition, and may also include contaminants.

E-Cigarette or Vaping Product Use-Associated Lung Injury (EVALI)

The acute lung injury identified by the CDC in 2019 has been termed “electronic cigarette or vaping product use-associated lung injury,” or “EVALI.” EVALI patients can present with a variety of symptoms, including a cough, shortness of breath, chest pain, nausea, vomiting, diarrhea, fatigue, fever, and weight loss. The non-specific nature of these symptoms can make EVALI difficult to quickly diagnose.

The outcome of EVALI patients varies. With an early diagnosis and treatment, most EVALI patients improve with cessation of e-cigarette usage and treatment with glucocorticoids.¹⁵ In more severe cases, severe pulmonary scarring, chronic lung dysfunction, and even death due to respiratory failure can occur.¹⁶ Little is known about long-term prognosis of EVALI patients, making it the subject of several ongoing studies.

Although it continues to monitor EVALI cases and potential causes, the CDC has concluded that Vitamin E acetate is linked to the 2019 outbreak. But in doing so, the CDC has not

yet ruled out the other chemicals of concern in EVALI diagnoses.¹⁷ Vitamin E is not the sole concern when it comes to e-cigarettes. Although regarded as safe as food additives by the FDA, very little is known to date about the impact of e-cigarette constituent ingredients such as propylene glycol and vegetable glycerin on the respiratory system.¹⁸ The CDC has acknowledged that to date, it has “little information about related harms – including flavorings, nicotine, cannabinoids, and solvents” used in e-cigarette products, leaving much to be studied.¹⁹

The Mass Toxic Tort of the Future, or Smoke and Mirrors?

Although e-cigarette usage is currently the subject of several different types of lawsuits, whether EVALI and other personal injury and product liability claims are emerging mass or toxic tort remains to be seen. But several factors indicate that e-cigarettes have all the makings of a mass tort. First, the product has been marketed as, and is widely thought to be, safer than smoking cigarettes. Second, use of the product has steadily increased since the product’s introduction to the commercial market over 10 years ago, resulting in several more potential injured parties than existed just a few years ago. Third, while an acute lung injury has been

Injury (EVALI): Evolving Knowledge and Remaining Questions. Radiology, <https://pubs.rsna.org/doi/10.1148/radiol.2020192585> (Jan. 28, 2020).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Hitendra S. Chand, *Pulmonary Toxicity and the Pathophysiology of Electronic Cigarette, or Vaping Product Use Associated Lung Injury*, <https://www.frontiersin.org/articles/10.3389/fphar.2019.01619/full> (Jan. 14, 2020).

¹⁹ *Id.*

associated with e-cigarette usage, very little is known to date, about long-term use, and its potential for chronic conditions.

These factors, along with the severity and permanency of some of the resulting lung injuries reported to date, could result in significant damages in any product liability or personal injury case. In addition, the manner in which some e-cigarette companies have marketed their products, including efforts to target young people to become consumers of the product, could lead to punitive damages claims. The potential recoverable damages in an e-cigarette product liability or personal injury case could be a lucrative incentive for many plaintiffs' attorneys, particularly those already well-versed in mass torts involving other products alleged to have caused lung-related injuries, including cigarettes, silica, diacetyl, asbestos, and talc.

The number of lung-related injuries and deaths attributable to e-cigarette use reported to date is still quite small, particularly when compared to the number of individuals who die as a result of cigarette use each year. But during the relatively short amount of time that e-cigarettes have been in use, they have generated a large amount of concern among the medical, public health, scientific, and legal communities. The long-term health effects associated with use of these products are not yet understood, but are the subject of ongoing research. The quick development of EVALI in patients has been suggested to indicate that

other not-yet-diagnosed reactions, with unknown long-term implications, are taking place in the lungs of patients diagnosed with EVALI.²⁰ At this point, it is not clear whether e-cigarette usage will be linked to the same type of malignancies, fibrosis, and cardiovascular diseases seen in cigarette smokers. If a link is established, or even suggested, in the future, one can anticipate that courts will see a marked increase in personal injury and product liability filings related to e-cigarette use.

²⁰ *Id.*

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