

Portfolio Media. Inc. | 111 West 19<sup>th</sup> Street, 5th Floor | New York, NY 10011 | www.law360.com Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

## No Smoke But Alarms Are Ringing: Insurance For E-Cigarettes

By Jonathan Viner (May 16, 2018, 2:39 PM EDT)

News about e-cigarettes and "vaping" is everywhere, and little wonder: global ecigarette sales for 2017 exceeded \$10 billion, and one source projects sales will reach an astonishing \$86 billion by 2025.[1] Vape-pen maker JUUL Labs Inc. alone sells more than 20 million nicotine-containing pods each month.[2]



Jonathan Viner

Currently, litigation over e-cigarettes has been limited to claims arising out of malfunctioning devices that injure users or damage property.[3] These claims typically do not involve complicated issues involving liability insurance coverage.[4] In contrast, it seems likely that injury claims that result from widespread use of e-cigarettes that function exactly as intended will involve numerous interesting and contested insurance coverage issues.

It's useful to understand vaping before discussing the coverage issues. Electronic nicotine delivery system, or ENDS, products — commonly known as e-cigarettes — consist of a battery, an atomizer with a heating coil, absorbent materials, electronics and a cartridge containing e-liquid, often called "e-juice."[5] E-liquid consists of chemicals, glycerin and propylene glycol; frequently, the chemicals include flavorings and/or nicotine. Inhalation activates the heating process, turning e-juice into an aerosol suspension containing chemicals from the e-liquid and/or produced by the heating process.[6] The user inhales the aerosol, some of which is exhaled into the environment.[7] Not technically vapor, the aerosol is a mixture of liquid particles suspended in a gas.[8] Evaporation leaves chemical residues in the environment.[9]

In addition to glycerin (soap) and propylene glycol (anti-freeze), e-juice typically contains flavorings and nicotine, an addictive stimulant.[10] E-cigarette aerosols can also include compounds that appear on the U.S. Food and Drug Administration's list of potentially harmful substances, like benzene (carcinogen), formaldehyde (embalming fluid, disinfectants), toluene and acetone (paint thinner, nail polish remover), and metals (e.g., arsenic, silver, nickel, cadmium).[11] E-cigarettes therefore deliver some, though fewer, of the substances in traditional cigarette smoke.[12] Direct inhalation by nonusers of exhaled e-cigarette aerosol might not pose risks akin to second-hand smoke.[13] However, residue from the exhaled aerosol remains on surfaces and in dust, also known as third-hand smoke, and can impact nonusers through respiration, dermal exposure or ingestion.[14]

The FDA has taken steps toward stricter regulation. E-cigarettes can no longer be sold to minors, and the FDA now has authority to require warnings, analyze ingredients and review and approve or reject

product design and marketing.[15] E-cigarettes are subject to new rules requiring specific nicotine addictiveness warning statements, and the FDA recently initiated rulemaking concerning the use of flavorings.[16] Some states are considering restricting sales to purchasers 21 years old and up. In fact, some municipalities have already done just that.[17]

Knowledge concerning the health effects of e-cigarettes is evolving. E-cigarettes potentially present lower risks than tobacco cigarettes for some forms of cancer and could prove useful as an alternative to tobacco cigarettes or as a smoking-cessation aid.[18] At the same time, studies have noted strong associations between vaping and use of tobacco cigarettes and marijuana, prompting some to contend that e-cigarettes serve as a gateway to using those.[19]

There is concern that e-cigarettes could prove to have significant and diverse long-term health impacts. Beyond addiction, nicotine is associated with elevated heart rates, trouble breathing, lung damage, acid reflux, increased insulin resistance, damage to reproductive organs and fetal injury.[20] Scientists are studying the risks potentially posed by the chemical residues from exhaled e-cigarette aerosol.[21] The many and varied flavorings, which reduce the bitter taste and serve as a marketing tool, contain varying chemical components.[22] These chemicals can include, among others, cytotoxic compounds, benzaldehyde and diacetyl, also used as a butter-flavoring for microwave popcorn that is associated with "popcorn lung."[23] Other byproducts in the aerosols, including the various solvents, metals and other potential carcinogens noted above, pose potential health risks, including DNA damage.[24]

The e-cigarette industry has been accused of engaging in advertising strategies like those used to promote tobacco cigarettes, supposedly targeting young users.[25] Some "big tobacco" companies have taken financial interests in e-cigarette makers.[26]

None of this is to say that the rising use of e-cigarettes will necessarily result in civil litigation or that the magnitude will approach that of asbestos or tobacco litigation. Given that sales have already reached the billions and governmental agencies are voicing serious concerns over their usage, however, it is worth thinking about issues that could arise as to whether and to what extent commercial general liability insurance policies might provide coverage for defense expenses and damages that result from civil litigation arising out of injury caused by long-term e-cigarette usage.

## **Bodily Injury Occurring During the Policy Period**

CGL policies typically apply to claims seeking damages because of "bodily injury," defined in part as bodily injury, sickness or disease sustained by a person, but only if the "bodily injury" occurs during the policy's effective dates, is caused by an "occurrence" and is not otherwise excluded from coverage. Whether CGL coverage is potentially implicated, therefore, depends upon whether there is "bodily injury." Furthermore, determining precisely what constitutes the "bodily injury" goes hand-in-hand with analyzing whether "bodily injury" occurred during a particular policy period, possibly triggering that insurer's obligations. This issue is sometimes referred to as "trigger of coverage." Put another way, whether "bodily injury" occurred during the policy period hinges partly upon what is "bodily injury."

Trigger of coverage has long posed a difficult issue for parties analyzing the existence of insurance coverage for claims arising out of injury allegedly resulting from toxic exposures to inhaled substances; these include claims arising out of asbestos used in construction, tobacco smoke, food flavorings and chemical fumes, to name a few. Courts therefore have grappled with whether "bodily injury" encompasses adverse bodily impacts, caused by exposure, that typically go undetected until much later.[27]

For example, in analyzing the nature of asbestos-related injuries, medical experts seemed to agree that lung tissue is adversely impacted almost as soon as an individual first begins inhaling free asbestos fibers.[28] In deciding trigger-of-coverage disputes, some courts concluded that those adverse changes constituted "bodily injury" under CGL policies, even when manifest sickness or diagnosable disease was not detected until years later.[29] Depending upon the medical evidence presented, courts applying a similar rationale to e-cigarette claims could conclude that "bodily injury" begins occurring with the first inhalation of aerosol from an e-cigarette.

Insureds will presumably argue that subsequent policies are also implicated. One could foresee injured claimants asserting that nicotine in their e-cigarettes prevented them from quitting, resulting in long-term usage. Claimants might assert this continuous, long-term exposure to e-cigarette aerosols resulted in continuous and/or progressive, yet nondetectable, injury over the entire period that they vaped, and that the cumulative effects of this exposure increased the risks of, and ultimately caused, illness and diagnosable disease. Policyholders might argue that, just as some courts did with respect to asbestos claims, courts should find that any policy that was in effect during the period in which the individual used e-cigarettes is potentially implicated.[30] Indeed, under the guise of the "injury-in-fact" theory of coverage trigger, this very approach has been applied to different kinds of injuries and damage of a continuous and/or progressive nature, ranging from asbestos-related personal injuries to construction defects.[31]

This is not, by any means, a foregone conclusion. It might be established that, when a user stops vaping for a period, not only does injury or disease stop advancing, the chances of future sickness or disease are reduced.[32] Parties could find themselves disputing whether, in fact, each policy between first use and manifestation of disease is necessarily triggered.[33]

Notwithstanding the above, insurers might contend that the presence of so-called Montrose endorsements in CGL policies limits coverage, if any, to coverage available under the primary and excess liability policies in effect at the time of the claimant's first injurious usage. Montrose endorsements issued in response to a California Supreme Court decision involving that chemical company, applying a "continuous" trigger-of-coverage theory to a coverage dispute over environmental property damage liabilities — purport to exclude coverage for continuing or progressive "bodily injury" and property damage if the injury first occurred prior to policy inception. Depending upon which iteration of the endorsement is used and the specificity in the pleading, Montrose endorsements could provide the basis for an argument that an insurer has no duty to defend or indemnify unless the policy was in effect on the date of first usage; alternatively, an insurer might agree to defend, but subject to a reservation of its rights to decline indemnification if evidence shows that first usage predated its policy.

## **Bodily Injury Caused by an Occurrence**

As noted, CGL coverage for "bodily injury" is implicated only if the injury is caused by an "occurrence," typically defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Given the existence of studies that suggest that e-cigarettes introduce toxic chemicals into users' respiratory systems and the environment, and the ongoing study of the risks posed by e-cigarettes, disputes over whether claimed injuries are accidental are readily foreseeable. Presumably, the industry would dispute the proposition that injuries are not accidental; industry would perhaps contend that, given the lack of certainty in the existing science, warnings cautioning against excess use, and/or the use of e-cigarettes as a smoking cessation tool preclude a legal conclusion that injuries were something other than unintended and unexpected.

## **Pollution Exclusion**

As noted, so-called "third-hand" exposure is being studied. It is conceivable that, similar to claims arising out of so-called "sick building syndrome," [34] individuals could assert claims against premises owners, employers and others for permitting vaping in or near the premises, due to alleged illness or sensitivity resulting from third-hand smoke exposure.

CGL policies typically exclude coverage for "bodily injury" arising out of exposure to "pollutants"; many policies exclude coverage for injury that would not have occurred but for the discharge, dispersal, seepage, migration, release or escape of "pollutants," defined in relevant part as solid, liquid, gaseous or thermal irritants or contaminants, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.

CGL insurers might deny coverage for e-cigarette injury claims, and particularly third-hand smoke claims, based upon the pollution exclusion. Whether insureds can successfully challenge that position will depend partly upon the nature of the claims and the applicable jurisdiction's existing law. For example, it seems likely that jurisdictions disfavoring the application of pollution exclusions, except in cases of "traditional environmental pollution," will reject the application of the exclusion. Similarly, to the extent claims involve exposure to tainted indoor air or dermal exposure, courts might conclude that such claims do not involve a "discharge, dispersal, seepage, migration, release or escape" of a pollutant sufficient to trigger the exclusion. Jurisdictions that liberally construe pollution exclusions, however, might uphold an insurer's coverage denial.

Beyond the pollution exclusion, some insurers might attempt to impose exclusions for ENDS-related claims in their policies, just as some insurers have inserted tobacco products and diacetyl exclusions in their policies in response to prior waves of litigation. To the extent vaping is omni-present in 2018, though, the use of such exclusions at some juncture down the road would operate only to limit the exposure of insurers at some as-yet undetermined time in the future, and leave insurers whose past policies are triggered to contend with the claims.

As sales of e-cigarettes increases, parties will experience a more highly regulated environment and increased study and understanding of the long-term impacts of e-cigarettes. Nevertheless, it is not difficult to foresee a wave of injury claims at some point in the future. Parties might find themselves contesting many issues of coverage in the courts or through arbitration. Unless and until courts address these issues specific to e-cigarettes, though, parties might find themselves arguing coverage based upon existing law resulting from coverage litigation over other alleged toxins that came before.

Jonathan T. Viner is a partner at Nicolaides Fink Thorpe Michaelides Sullivan LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] CISION PR Newswire, Global E-cigarette and T-vapor market to Reach \$86.43 billion by 2025, Reports BIS Research, March 5, 2018, https://www.prnewswire.com/news-releases/global-e-cigarette-and-t-vapor-market-to-reach-8643-billion-by-2025-reports-bis-research-675808803.html.

[2] How a Startup Behind the 'iPhone of Vaporizers' Reinvented the E-cigarette and Generated \$224 million in Sales in a Year, http://www.businessinsider.com/juul-e-cigarette-one-million-units-sold-2017-11.

[3] See, e.g., Red Hed Oil, Inc. v. The H.T. Hackney Co., --- F.Supp.3d ---, 2017 WL 5476383 (E.D. Ky. 11/14/17) (seeking damages from e-cigarette distributor for fire that destroyed convenience store after expiration of devices). In 2017 alone, such incidents resulted in more than 120 lawsuits. Vape Battery Explosion Lawsuits On The Rise, December 29, 2017, Courthouse News Service (https://www.courthousenews.com/vape-battery-explosion-lawsuits-on-the-rise/).

[4] Not to say there is no coverage litigation. See, e.g., Atlantic Cas. Ins. Co. v. Bellinger, 2017 WL 3996408 (E.D. Wash. 9/8/17) (exclusion for injury within the products hazard clearly and unambiguously barred liability coverage for injury claim arising out of e-cigarette explosion).

[5] Stanford Medicine Tobacco Prevention Toolkit, Modules for Tobacco and Nicotine Education ("Tobacco Toolkit"), https://med.stanford.edu/tobaccopreventiontoolkit/E-Cigs.html.

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] Id.; Centers for Disease Control and Prevention, Smoking and Tobacco Use, https://www.cdc.gov/tobacco/basic\_information/e-cigarettes/index.htm

[12] Tobacco Toolkit; National Institute On Drug Abuse, Drug Facts, Electronic Cigarettes (Rev'd March 2018) ("NIDA Drug Facts"), https://www.drugabuse.gov/publications/drugfacts/electronic-cigarettes-e-cigarettes.

[13] Tobacco Toolkit.

[14] Id.

[15] The Facts On the FDA's New Tobacco Rule, https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm506676.htm.

[16] Vaporizers, E-cigarettes, and Other Electronic Nicotine Delivery Systems (ENDS), https://www.fda.gov/TobaccoProducts/Labeling/ProductsIngredientsComponents/ucm456610. htm.

[17] Chicago Tribune, April 27, 2018, Raise the Age to Buy Tobacco and Vaping Products, http://www.chicagotribune.com/news/opinion/editorials/ct-edit-tobacco-21-ecig-illinois-20180426-story.html. [18] Chicago Tribune, January 25, 2018, Do E-cigarettes help or harm? Report Says Not Clear Yet, http://www.chicagotribune.com/business/sns-bc-us--e-cigarettes-help-or-harm-20180123-story.html.

[19] Id.; NIDA Drug Facts; Chicago Tribune, April 24, 2018, Vaping May Lead to Pot Smoking Among Teens, New Study Shows, http://www.chicagotribune.com/lifestyles/health/sc-hlth-teen-vaping-pot-use-0425-story.html.

[20] Tobacco Toolkit;

[21] Id.

[22] Id.

[23] Id.

[24] Id.; ScienceDaily, June 12, 2017, E-cigarettes Potentially as Harmful as Tobacco Cigarettes, Study Shows, https://www.sciencedaily.com/releases/2017/06/170612094027.htm.

[25] Tobacco Toolkit; NIDA Drug Facts.

[26] Tobacco Companies Taking Over the E-Cigarette Industry, February 27, 2017, https://www.huffingtonpost.com/entry/tobacco-companies-taking-over-the-e-cigarette-industry\_us\_58b48e02e4b0658fc20f98d0.

[27] See, e.g., Zurich Ins. Co. v. Raymark Industries, Inc., 118 Ill.2d 23 (1987).

[28] Id.

[29] Id.

[30] See, e.g., Armstrong World Industries, Inc. v. Aetna Cas & Sur. Co., 45 Cal.App.4th 1 (Cal. Ct. App. 1996).

[31] See, e.g., Continental Cas. Co. v. Rapid-American Corp., 80 N.Y.2d 640 (1993); Air Master & Cooling, Inc. v. Selective Ins. Co. of America, 452 N.J. Super. 35 (App. Div. 2017).

[32] E-cigarettes: Where Do We Stand? March 5, 2018, https://www.cnn.com/2015/12/31/health/where-we-stand-now-e-cigarettes/index.html.

[33] Zurich Ins. Co. v. Raymark Industries, Inc., 118 Ill.2d 23, 47-48 (1987) (bodily injury does not necessarily occur between the end of exposure and illness/sickness that might ultimate result).

[34] See, e.g., West American Ins. Co. v. Band & Desenberg, 925 F.Supp. 758 (M.D. Fla. 1996) (employees claimed contaminants in office building's air, due to poorly-designed HVAC system, caused a series of symptoms collectively referred to as sick building syndrome).