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Vaping Crisis Raises New Liability And Insurance Issues

By **Jodi Green and Jonathan Viner** (October 3, 2019, 3:18 PM EDT)

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The statistics regarding the recent vaping-related lung illnesses plaguing the nation are staggering. The word "crisis" permeates the rhetoric. Some call it a public health emergency, or an outbreak. Some even suggest it's the new opioid epidemic. As of Sept. 27, the Centers for Disease Control and Prevention has reported over 800 cases of lung injury, across 46 states, along with more than 14 deaths.[1] The numbers compound daily. It is compelling. It gives us pause.

As with other product liability claims, all parts of the e-cigarette and cannabis vaping supply chain could be implicated, from manufacturers to retail and convenience stores that sell those products. As a result, it is not clear that major retailers, such as drug stores, convenience stores and gas station franchises, are immune from potential exposure.

Complicating the issue, legal e-cigarettes and cannabis products, as well as black-market products, have been flagged as potentially responsible. The New York Times recently reported that state and federal officers have confiscated hundreds of thousands of illegal vaping cartridges, noting that the government has been so busy battling opioids that they did not view vaping as a threat until recently.[2]

Many cases involve users of both types of products, further limiting the efforts to pinpoint a cause of the vaping illness. With the vaping crisis approaching epidemic-level proportions, fears of exposure similar to that involving Big Tobacco or the opioid litigation abound.

The specific chemicals causing the vaping crisis remain uncertain, and no single product or substance has been linked to all reported cases. Similarly, no specific company, product or device has been linked to all of the respiratory illnesses. Initial investigations have identified a substance or used in many e-cigarettes and cannabis cartridges — vitamin E acetate — that appears to be implicated in a number of cases. Samples of similar products have been found to also contain a fungicide known as myclobutanil, which can transform into hydrogen cyanide when burned.[3]

While the current focus is on acute injuries, medical experts have limited information as to the long-term health effects of vaping, and studies are ongoing. Government officials, legislators, and those in the medical field, like former U.S. Food and Drug Administration Commissioner Scott Gottlieb, are calling for regulatory scrutiny.

Although causation and overall exposure remain elusive concepts, historical precedent arguably provides a framework for understanding the liability and insurance coverage implications arising from the vaping crisis.

Product Liability Claims Involving Vaping

Product liability losses are not a new phenomenon for the e-cigarette and cannabis industry. These types of risks are among the most prevalent faced by the vaping industry. To date, however, litigation over e-cigarette and cannabis products has not involved respiratory illnesses. E-cigarette claims have involved malfunctioning vaping battery devices that injure users or damage property, which do not involve complex insurance coverage questions, as we reported earlier this year.[4]

In turn, while plaintiffs have filed lawsuits against cannabis companies arising from things like mislabeling, most do not involve bodily harm. Despite speculation that claims involving e-cigarettes could lead to mass tort litigation, that fear had not yet manifested until now.

Fast forward to the present, and the vaping claims are starting to look and sound a lot more like Big Tobacco or the opioid epidemic. The media's use of the loaded word "contaminant" to describe the potentially harmful chemicals in vaping cartridges is particularly concerning from a liability standpoint, as it will likely garner the attention of the plaintiffs' bar. It already has. As of Sept. 25, over 30 lawsuits — brought by individuals and as class actions — have been filed against e-cigarette manufacturers, such as Juul Labs Inc., and many more lawsuits are anticipated.[5]

Many of the lawsuits include fraudulent marketing claims, alleging that Juul misrepresented that its e-cigarettes are a safer alternative to traditional cigarettes, when they are in fact equally addictive. The plaintiffs also allege that e-cigarettes are defectively designed and inherently dangerous. Alleged injuries include claims of addiction, cardiovascular disease, seizures, birth defects and respiratory illness. Juul has moved to consolidate these lawsuits in a federal multidistrict litigation.

Governmental entities are also targeting e-cigarette companies, alleging that the industry is preying on America's youth and that fraudulent marketing will cause state governments to incur significant costs to undo the damages caused by the vaping crisis.[6] Causes of action include violations of consumer fraud statutes, negligence and unjust enrichment, among others.

The lawsuits seek compensatory damages, declaratory and injunctive relief, the creation of abatement funds, disgorgement, fines and punitive damages. These lawsuits are reminiscent of the massive opioid litigation brought by state and municipal entities, comprised of thousands of lawsuits. The opioid lawsuits make similar claims of fraudulent misrepresentation against opioid manufacturers for allegedly concealing the addictive properties of those drugs and marketing them as safe for long-term use.

Starting in late September, plaintiffs have also begun commencing lawsuits against cannabis companies arising from the vaping health crisis. As one example, in Wilcoxen v. Canna Brand Solutions LLC, the plaintiff, a police officer, initiated a lawsuit in Washington state against every entity in the cannabis supply chain, including the Chinese vaporizer battery manufacturer and distributor, the THC cartridge manufacturers, the cartridge distributor and the retail store where he purchased the products at issue.

According to the complaint, Wilcoxen purchased the vaporizer battery in January 2018 and purchased THC cartridges from January 2018 to September 2019, when he became ill. He alleges that he was

diagnosed with pneumonia and asserts that the long-term health consequences from his injury and vaping remains unknown. The complaint asserts causes of action for negligence and strict liability against each defendant and seeks joint and several liability.

Insurance Coverage Issues Associated with the Vaping Crisis

Bodily Injury

At the threshold, to trigger insurance coverage under a commercial general liability insurance, or CGL, policy, a claim must seek damages because of or for bodily injury. Most vaping lawsuits likely satisfy that initial requirement, although some might not. As stated above, lawsuits initiated by municipalities, which seek to recover damages incurred to provide public services as a result of the vaping crisis, are evocative of the pending opioid litigation.

The majority of courts to evaluate insurance coverage for the opioid cases have held that the lawsuits were not brought to recover for harm to individual citizens but for the government's economic losses, reasoning that references to any physical harm to citizens merely provide context for the economic loss and do not create a causal nexus to actual bodily injury.[7]

Along with the media reports of contaminants in vaping liquids, we also foresee a rise in other vaping-related lawsuits, which may involve mislabeling of products, violation of statutes such as California's Proposition 65 or failure to warn of the presence of certain chemicals without alleging bodily injury. Brandon Flores et al. v. LivWell Inc. offers a helpful example.

There, a class-action lawsuit was brought by cannabis purchasers against LivWell, a cannabis company. The lawsuit alleged that LivWell used a controversial pesticide, Eagle 20, in its marijuana. The court dismissed the lawsuit on the basis that the plaintiffs did not allege damages, but sought only to recover for mere overpayment for the product (marijuana).[8] Because the plaintiffs alleged no cognizable injury from their purchase of the product, the case would likely be deemed to lack the requisite bodily injury to trigger insurance under a CGL policy.

As is typically seen in lawsuits asserting claims of latent injury because of long-term exposure to toxins like asbestos, moreover, anticipated vaping lawsuits might assert claims involving alleged fear of injuries that are currently undetected (or, perhaps, are not yet detectible) that do not necessarily involve bodily injury as defined.

Plaintiffs attorneys, seeking to bring early claims and avoid running into statute of limitations issues, might attempt to certify classes of e-cigarette users who are uncertain whether they are injured and, like the government, wish to establish medical-monitoring funds. Claims of these kinds typically require a nuanced analysis with respect to whether the alleged injuries constitute bodily injury sufficient to trigger a duty to defend or, in the event of a settlement or judgment, indemnify.

During the Policy Period

Coverage is typically dependent upon the requirement that the bodily injury must occur during the policy period. This requirement generates numerous coverage-related questions, including the fact-intensive question as to the timing of bodily injury, including whether various stages of alterations arising out of toxic exposure necessarily constitute bodily injury, sickness or disease.

To the extent injuries are deemed to occur during more than a single policy period, a further issue that requires analysis is the allocation of losses among several years of insurance. In many cases involving other types of toxic exposure — and again asbestos is a useful benchmark — courts have reached differing conclusions as to whether bodily injury occurs solely at the time of first exposure (or, in the case of vaping products, inhalation), whether it occurs only when the injury manifests as illness, or, alternatively, whether bodily injury is considered to have occurred continuously throughout the course of all injury, disease and/or manifest illness, in which case the bodily injury triggers all insurance policies potentially in place during the entire period.[9]

The current spate of vaping injuries do not necessarily generate complex issues of coverage trigger, as a number of reported illness occurred within a few months of using the particular product. However, there is often a lag between the first inhalation and onset of illness. Taking the Wilcoxen case as an example, all insurance policies issued from the time the plaintiff first started vaping in January 2018 could be implicated. Moving beyond this particular crisis, moreover, future claims might involve long-term usage over three, four or more years – similar to traditional cigarettes.

Insurers might also attempt to limit exposure on the basis of Montrose endorsements that are already in their policies, which exclude coverage for continuing bodily injury if the injury first occurred before the applicable policy incepted. Using Wilcoxen as our hypothetical again, this would mean that insurers issuing policies commencing in 2019 could argue that coverage is precluded because the plaintiff started vaping a year earlier, in 2018.

Occurrence and Fortuity Principles

Bodily injury must be caused by an occurrence and involve a fortuitous loss to trigger insurance coverage. Put another way, insurance does not protect against known losses. As such, the claims must be accidental and not expected or intended by the policyholder.

Looking at the allegations in the most recent vaping-related lawsuits, it is easy to anticipate arguments that any bodily injuries were not accidental or were not fortuitous and, therefore, are not covered by insurance. Many plaintiffs allege that the e-cigarette companies, much like tobacco companies and opioid manufacturers, knew e-cigarettes were addictive and harmful and that the companies misrepresented the risks of use.

This insurance coverage issue once again finds an analogy in opioid litigation. As we discussed in a prior article, a California court, in The Travelers Property Casualty Co. of America v. Actavis Inc., held that the injuries alleged in opioid lawsuits, including the existence of an opioid-induced public health epidemic and related costs were not “additional, unexpected, independent, or unforeseen” effects of the defendants’ actions in fraudulently marketing opioids as nonaddictive.[10] Consequently, in Travelers, the court found no duty to defend under a general liability policy because the complaint at issue did not allege an occurrence, or accident. We expect similar arguments to take root in vaping cases.

A related issue that could potentially arise is whether a claim, or an entire group of claims, constitutes an uninsurable known loss. The known-loss doctrine is related to the fortuity requirement and typically operates to preclude coverage for injuries occurring during the policy period, in the event the insured was aware, before the policy incepted, that a loss has already occurred or has begun.

Some CGL policies incorporate language of this kind in the bodily injury insuring agreement. To illustrate the issues that might arise, an insured might become aware, before its policy becomes effective, of an

unfortunate incident — for example, an injury arising out of what has been identified as a tainted batch of vaping fluid the insured sold or distributed. An insurer might seek to establish that the known-loss doctrine or policy language precludes coverage for any and all subsequent injury claims arising out of the tainted fluid, even if additional individuals are injured during the policy period.

Depending upon further developments on this front, insurance underwriters might consider revising applications for certain applicants, to inquire whether and to what extent they are involved in some aspect of the vaping industry. Depending upon the insured's responses, vaping-related claims might cause the insurer to review the insured's application for potential claims of rescission based upon incomplete or incorrect responses.

Pollution, Public Policy and Specific Product Exclusions

Given allegations that vaping products contain contaminants, insurers may also cite the pollution exclusion as a basis to deny coverage for these lawsuits. CGL policies often exclude coverage for bodily injury arising out of exposure to pollutants, which is typically defined to include liquid, gaseous or thermal irritants or contaminants, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Choice of law may be outcome-determinative on this issue, as some jurisdictions refuse to apply a pollution exclusion to cases involving bodily injury if the pollution is not traditional environmental pollution, which is often limited to large-scale outdoor environmental incidents.[11]

Even in jurisdictions typically conferring a broader construction upon such exclusions, doubts might arise as to whether substances intended for bodily consumption can be considered pollutants, even if they carry a risk of causing illness (indeed, insureds might point out that a similar argument can be made with respect to alcohol consumption).

Some policies might also contain general products/completed operations exclusions, public policy exclusions, illegality exclusions and specific exclusions for psychotropic substances and cannabis. In the case of cannabis vaping, insureds would presumably argue that such exclusions are unenforceable to the extent cannabis forms an essential part of the policyholder's operations.

In particular, some courts have held that insurers issuing policies directly to a cannabis company cannot rely similar exclusions to deny coverage. For example, in Green Earth Wellness Center LLC v. Atain Specialty Insurance Company, a Colorado federal court specifically held that coverage would be rendered illusory by the enforcement of the contraband exclusion, which precluded coverage for "contraband, or property in the illegal course of transportation or trade."[12]

The claim arose from harvested marijuana that was damaged in a fire, under a commercial property policy issued to a medical marijuana dispensary. The insurer denied coverage on the basis that marijuana was federally illegal, even though it was legal under Colorado state law. The court refused to apply the exclusion or to invalidate coverage based on public policy, noting a "continued erosion of any clear and consistent federal public policy" relative to cannabis.

On the other hand, existing insurance for noncannabis-related industries (such as commercial lessors or retail stores where vaping products are sold) might not provide coverage for claims involving vaping even if the policy language appears to cover that risk, depending on public policy and the state of federal law.

Take, for example, Tracy v. USAA Casualty Insurance Co., where a Hawaii federal court found no

coverage under a homeowner's insurance policy for the theft of 12 medical marijuana plants.[13] Although the policy specifically covered the loss of "trees, shrubs, and other plants," the court held that public policy precluded coverage because "the cultivation of marijuana, even for the State-authorized medical use, violates federal law."

This article identifies just some of the complex issues likely to arise in connection with vaping. Further investigation and state and federal regulation and oversight will help define the potential risks and long-term health concerns, and maybe help the country avoid an epidemic in the making. And while precedent in the insurance coverage sector is currently lacking, as with all insurance coverage issues, we can draw upon prior claims and precedent to determine the potential exposure and coverage issues on the horizon.

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[1] Centers for Disease Control and Prevention, Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping, Sept. 27, 2019, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html#latest-outbreak-information.

[2] Police Crack Down on Vaping, Surfacing Stockpiles of Illicit Cartridges, The New York Times, Oct. 1, 2019, https://www.nytimes.com/2019/10/01/us/vaping-law-enforcement.html.

[3] Tests show bootleg marijuana vapes tainted with hydrogen cyanide, NBC News (September 27, 2019), https://www.nbcnews.com/health/vaping/tests-show-bootleg-marijuana-vapes-tainted-hydrogen-cyanide-n1059356.

[4] No Smoke but Alarm Bells Are Ringing: Insurance for E-Cigarettes, Law360, (May 16, 2018).

[5] Factbox: U.S. lawsuits take aim at vaping, Reuters, September 25, 2019, https://www.reuters.com/article/us-health-vaping-lawsuit-factbox/factbox-u-s-lawsuits-take-aim-at-vaping-idUSKBN1WA250.

[6] See, e.g., People of the State of Illinois, et al., v. Juul Labs, Inc. (Lake County, Illinois).

[7] See, e.g., Acuity v. Masters Pharmaceutical, Inc., No. A 1701985 (Ct. Com. Pl. Hamilton Cty., Ohio Feb. 1, 2019); Travelers Prop. Cas. Co. of Am. v. Anda, Inc., 90 F. Supp. 3d 1308 (S.D. Fla. 2015), aff'd on other grounds, 658 Fed. App'x 955 (11th Cir. 2016); Cincinnati Insurance Co. v. Richie Enterprises LLC, Case No. 1:12–CV–00816, 2014 WL 3513211 (W.D. Ky. July 16, 2014). But see Cincinnati Ins. Co. v. H.D. Smith, L.L.C., 829 F.3d 771 (7th Cir. 2016).

[8] Id.

[9] See, e.g., Armstrong World Industries, Inc. v. Aetna Cas & Sur. Co., 45 Cal.App.4th 1 (Cal. Ct. App. 1996); Zurich Ins. Co. v. Raymark Industries, Inc., 118 Ill.2d 23, 47-48 (1987).

[10] See Fortuity Rules May Incite Coverage Row Over Opioid Lawsuits, Law360, August 7, 2018. See also The Travelers Property Casualty Co. of America v. Actavis, Inc., 16 Cal. App. 5th 1026, 1043 (2017).

[11] See, e.g, Doerr v. Mobil Oil Corp., 774 So. 2d 119, 136 (La. 2000).

[12] Green Earth Wellness Center, LLC v. Atain Specialty Ins. Co., 163 F. Supp. 3d 821, 834-35 (D. Colo. 2016).

[13] Tracy v. USAA Cas. Ins. Co., No. 11-00487 LEK-KSC, 2012 U.S. Dist. LEXIS 35913 (D. Haw. Mar. 16, 2012).