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PERSPECTIVE

Onset of vaping-related deaths implicates product liability law

By Lexi W. Myer

As of Oct. 4, the Centers for Disease Control and Prevention reported 1,080 cases of lung injury and 18 deaths in patients with a history of e-cigarette product use, commonly known as vaping. The CDC also found that most of these patients report a history of using THC-containing products and that “[t]he latest national and regional findings suggest products containing THC play a role in the outbreak.” Although the CDC has not yet identified the specific cause of these lung injuries or connected them to a particular device or product, a New York State Department of Health update reported that laboratory tests results showed high levels of Vitamin E acetate in nearly all cannabis-containing vape products it analyzed.

As a result, the department is investigating the health effects of Vitamin E acetate when inhaled “because its oil-like properties could be associated with the observed symptoms.” However, researchers at the Mayo Clinic are finding that while oils are possibly playing a role in vaping-related lung damage cases, the type of injuries are chemical in nature, suggesting that a wide variety of substances may be the culprit. As the scientific probe into these injuries continue, the legal ramifications surrounding



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A man smokes using a vaporizer.

the sale and manufacture of vaping products have started to emerge. The U.S. Food and Drug Administration launched a criminal investigation into the vaping health crisis, focusing on the supply chain. Already, Oregon marijuana retailers are removing vaping products from their shelves and a California-based retailer, among others, has been “contacting all its vendors to ensure products are additive free.” Gillian Flaccus, “Oregon pot retailers begin pulling vape brands in lung scare,” Associated Press (Sept. 12, 2019). There is a concern among regulators and vendors that due to the popularity of vaping, the black market has been allowed to thrive. Accordingly, contaminated products have been introduced to the public through both illegal means and through legitimate dispensary sales. These “bootleg” vaping products are particularly dan-

gerous, with some recently testing positive for a fungicide that can transform into hydrogen cyanide when burned.

In California, the sale of contaminated vaping products implicates product liability law, which recognizes causes of action for manufacturing defects, design defects and warning defects. See Rest.3d Torts, Products Liability, Section 2. “Manufacturing defects can arise ... when a flaw in the manufacturing process creates a product that differs from what the manufacturer intended.” *Webb v. Special Electric Co., Inc.*, 63 Cal. 4th 167, 180 (2016). “Design defects appear in products that, although properly manufactured, are dangerous because they lack a critical feature needed to ensure safe use.” *Id.* The third type of defect involves a product that is dangerous because it lacks adequate warnings or instructions.

Id. Generally speaking, a manufacturer has a duty to warn consumers about the hazards inherent in their products. This duty extends to all entities in a product’s chain of distribution. *Id.* at 181. Given the proliferation of lung injuries and the ongoing investigation of cannabis vaping products, allegations of one or more of these types of defects will likely be made.

There are several recognized defenses that can mitigate liability under appropriate circumstances, including the “obvious danger” rule, which states that warnings are unnecessary if the product’s dangers are readily observable. See Rest.2d Torts, Section 388, subd. (b), com.k, at 306-07. An offshoot of this concept is known as the “sophisticated user defense,” which provides that no legal harm will accrue when a manufacturer fails to warn a sophisticated user about dangers of which they are already aware or should be aware. See *Webb*, 63 Cal. 4th at 182. Considering how little is known about the cause of the injuries versus what is known or knowable about cannabis products, it remains to be seen whether the public properly understands the inherent risks posed by vaping or whether retailers can be considered “sophisticated users” of the manufacturer’s component parts.

Another defense protects manufacturers and sellers

of component parts, on the basis that while these sellers are responsible for the defects in their own products, they “cannot reasonably be expected to monitor the development of all potential products into which their components are integrated.” *Id.* at 183. These components can be either manufactured or raw materials. *Id.* A bulk supplier is liable for contaminated raw materials, but a “basic” raw material cannot be defectively designed. *See* Rest.3d Torts, Products Liability, Section 5, com. c, at 134. These defenses could become critical when the FDA investigation pinpoints where in the supply chain potential defects may arise.

Preemption may also play a role in these cases. In the tobacco arena, the California Court of Appeal ruled that certain state law failure to warn claims were preempted based upon the Federal Cigarette Labeling and Advertising Act of 1969. Specifically, “[f]ailure-to-warn causes of action were preempted, ‘to the extent that they rely on a state-law ‘requirement or prohibition ... with respect to ... advertising or promotion.’” *Whiteley v. Philip Morris, Inc.*, 117 Cal. App. 4th 635, 666

(2004). However, “[c]auses of action for breach of warranty, intentional fraud and misrepresentation of a material fact by either a false representation or concealment, and conspiracy were not included within the preemptive reach of the Act.” *Id.*

In December 2018, the Agriculture Improvement Act of 2018, Pub. L. 115-334 (the 2018 Farm Bill) was signed into law, which states that cannabis plants and derivatives that contain more than 0.3% THC on a dry weight basis are no longer controlled substances. According to the FDA, the 2018 Farm Bill “explicitly preserved FDA’s authority to regulate products containing cannabis or cannabis-derived compounds.” *Id.* Therefore, the “FDA treats products containing cannabis or cannabis-derived compounds as it does any other FDA-regulated products ... regardless of whether the cannabis or cannabis-derived compounds are classified as hemp under the 2018 Farm Bill.” *Id.*

As a general rule, “the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of

Congress. ... However, when the state regulates in an area where there has been a history of significant federal presence the ‘assumption’ of non-pre-emption is not triggered.” *Major v. R.J Reynolds Tobacco Co.*, 14 Cal. App. 5th 1179, 118 (2017). Until recently, cannabis has been largely regulated by the states. It will be interesting to see how the Farm Bill and the FDA’s authority will affect or restrict the application of state product liability law to cannabis vaping products.

Given the apparent link between cannabis-containing vape and the alarming increase in lung injury, tighter industry regulation and control will inevitably ensue, as will product liability litigation. In larger cases where firms may represent multiple plaintiffs alleging the same types of injuries and defects, mediation is a useful tool for settlement. Once liability has been established, defendants can settle multi-plaintiff cases globally and appoint a special master to allocate funds among the claimants. The special master and the parties can work together to establish criteria and values for various categories of injuries, allowing cases that

fall into those categories to be quickly resolved. More factually intensive cases can then be reserved for individual mediations. This type of global settlement saves the parties from having to litigate each case to conclusion or from mediating each case one by one, both of which are more expensive and time-consuming options. ■

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