



# The Vaping Crisis: Potential Implications for the Insurance Industry

## Abstract

In recent weeks, reports linking the use of vaping products to serious lung illness have brought the potential dangers of e-cigarettes to the forefront.

This paper explores the vaping crisis from an insurance perspective and includes information on the latest research findings, litigation trends, consumer protection measures, and liability concerns related to vape shops and retailers. This paper also outlines the steps that insurers can take to understand and proactively limit their exposure to this potential new source of liability.

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Vaping can be defined as using e-cigarettes, vapes, e-hookahs, vape pens, tank systems, mods, or electronic nicotine delivery systems (ENDS) to heat a liquid in order to produce an aerosol that users inhale into their lungs. This liquid can contain nicotine, tetrahydrocannabinol (THC), and cannabinoid (CBD) oils, as well as other substances and additives.

According to the Centers for Disease Control and Prevention (CDC), as of November 5, 2019, 2,051 lung injury cases associated with the use of e-cigarettes or vaping products have been reported across 49 states and 1 U.S. territory, with 39 deaths confirmed in 15 states.<sup>1</sup>

Symptoms of vaping-related illness include coughing, shortness of breath, chest pain, difficulty breathing, nausea, vomiting, diarrhea, fatigue, fever, abdominal pain, and weight loss. Juul dominates about 75% of the e-cigarette market, but products made by Marlboro maker Altria Group Inc., Dank Vapes, Moon Rocks, Off White, and TKO are also alleged to be tied to the illnesses.

Most of the affected patients have reported a history of using products containing THC, which suggests this substance likely plays a key role in the outbreak. Most recently, the CDC has identified vitamin E acetate, an additive in some THC-containing products, as one potential culprit specifically linked to the disease.<sup>2</sup> This is the first time an identified chemical of concern has been

detected in the biological samples from patients with the lung disease.

Because much is still unknown, the CDC highly recommends that anyone using a vape device stop until the investigation has been concluded.

### The Latest Research

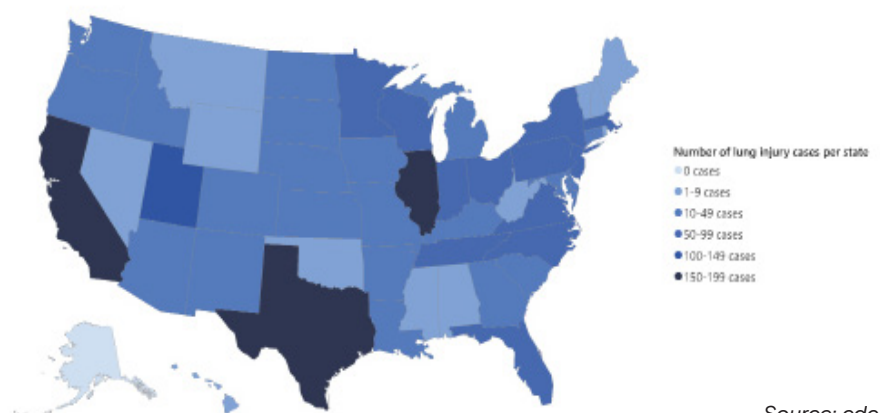
A recent research study funded by the National Institutes of Health<sup>3</sup> has been one of the first to definitively link vaping nicotine to cancer.

In a study involving mice, researchers found that

e-cigarette vapor caused DNA damage in the lungs and bladder and inhibited DNA repair in the lung tissue. Out of 40 mice exposed to e-cigarette vapor with nicotine over 54 weeks, 22.5% developed lung cancer and 57.5% developed precancerous lesions on the bladder.

The study utilized a nicotine level equivalent to the amount a person would be exposed to over the course of vaping for three to six years.

Number of Lung Injury Cases Reported to CDC as of November 5, 2019



Source: cdc.gov

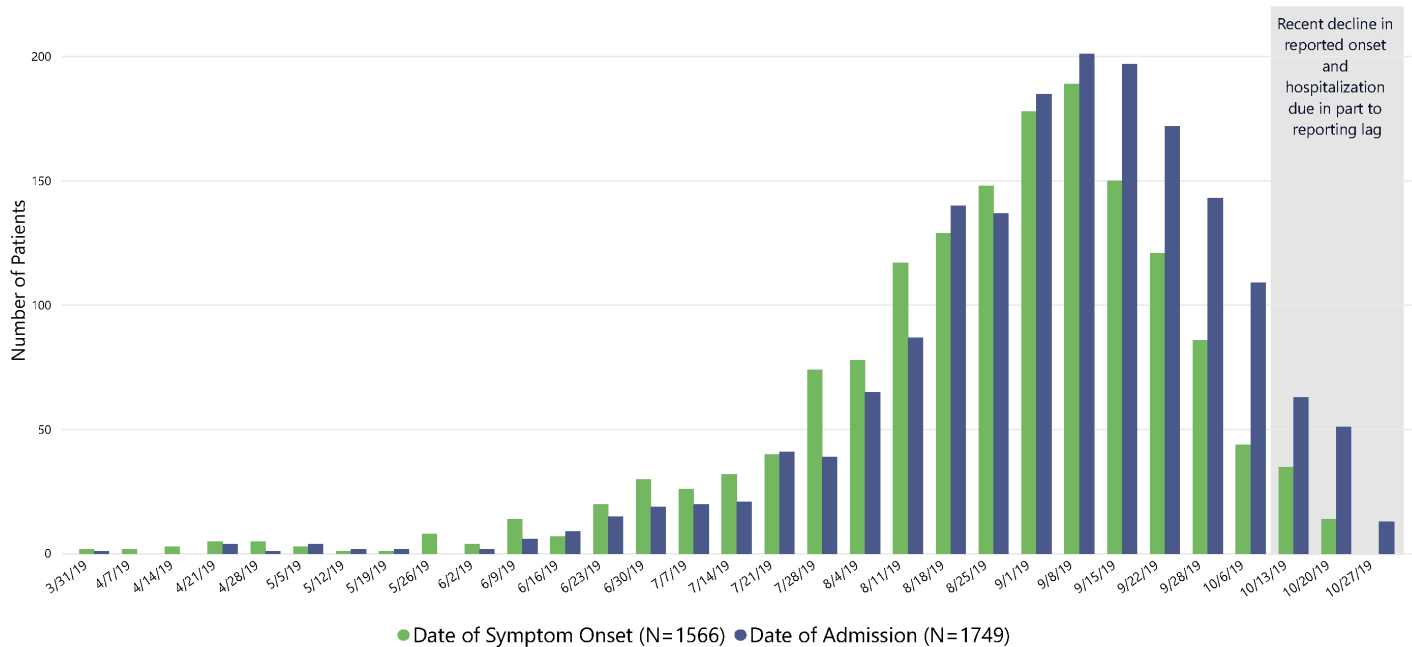
<sup>1</sup> Centers for Disease Control & Prevention. Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products. [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html)

<sup>2</sup> Ibid.

<sup>3</sup> Bursztynsky, J. (2019, October 7). Researchers find e-cigarettes cause lung cancer in mice in first study tying vaping to cancer. <https://www.cnn.com/2019/10/07/e-cigarettes-cause-lung-cancer-in-mice-finds-first-study-tying-vaping-to-cancer.html>

## Graph 1 Dates of symptom onset and hospital admission for patients with lung injury associated with e-cigarette use, or vaping

United States, March 31 – November 2, 2019



Researchers from the Mayo Clinic<sup>4</sup> have also found that the lung damage caused by vaping products is similar to a chemical burn, consistent with exposure to toxic chemical fumes, poisonous gases, and toxic agents. In studying lung biopsies from 17 patients (including 2 that have died), the researchers found accumulations of fatty substances such as oils within the lungs.

According to studies, it is suspected that most of the illness cases involve or are related to chemical contaminants, toxic byproducts, or other noxious agents within the vape liquids inhaled.

### Litigation Is Growing

Manufacturers have advertised that vaping products are a safer alternative to ‘heat and burn’ cigarettes, since they have fewer than the 7,000 various chemicals found in cigarettes.<sup>5</sup> Lawyers allege that this is a fraudulent marketing focus, as many vaping products contain higher

dosages of nicotine than cigarettes. For example, one Juul pod contains 40 mg of nicotine, which is equivalent to the yield from a pack of cigarettes.<sup>6</sup>

The tendency to gear the flavors and products toward minors and young adults is another concern – one study revealed that the number one reason teens use e-cigarettes or vape is due to the flavors.

Many lawsuits (both individual as well as class action) have been filed by both users and parents of minors against the prominent e-cigarette maker Juul Labs Inc., and more are expected.

These lawsuits allege addiction for the most part, but some cases go further, stating strokes and seizures are caused by the use of vaping products. Additionally, claims center on product liability, alleging that Juul’s products are defectively designed because they are inherently dangerous and the manufacturer breached its duty to warn the general public.

Most lawsuits against Juul allege addiction, but some also focus on product liability.

In recent months, extensive measures to protect consumers have been taken, with some states requiring either termination of sales altogether or that certain flavors be discontinued, and more stores or retailers are refusing to carry the product. Most recently Kroger, the parent company of King Soopers and City Market, announced their effort to address the epidemic by discontinuing all sales of e-cigarettes.

Additionally, other state attorneys general and the U.S. Federal Trade Commission continue to intensely investigate Juul’s marketing practices and influencing strategies.

<sup>4</sup> Holcombe, M. and Bonifield, J. (2019, October 3). Research shows that vaping-related lung disease may be caused by chemical exposure. <https://www.cnn.com/2019/10/03/health/vaping-lung-disease-chemicals/index.html>

<sup>5</sup> Raven, K. (2019, September 7). Teen Vaping Linked to More Health Risks. <https://www.yalemedicine.org/stories/teen-vaping/>

<sup>6</sup> Ibid.



## Endorsements to Consider

The following ISO liability endorsements or similar endorsements can be used to exclude vaping and e-cigarette exposures:

- ☑ CG 21 33 Exclusion – Designated Products
- ☑ BP 14 23 Exclusion – Designated Products
- ☑ CU 21 43 Exclusion – Designated Products
- ☑ CX 21 15 Exclusion – Designated Products

## Why Should Insurers Be Concerned?

One of the largest concerns from a liability standpoint is that vape shops and retailers are not only selling a variety of products, but also mixing and preparing liquids for direct sale to consumers for use in devices or modifying aerosolizing apparatuses for direct sale to consumers for use in the devices.

Although product retailers and manufacturers are subject to inspection by the FDA, there is still very little oversight into what is being produced.

According to the FDA, a “tobacco product manufacturer” is defined as “any person, including any repacker or relabeler, who (A) manufactures, fabricates, assembles, processes, or labels a tobacco product; or (B) imports a finished tobacco product for sale or distribution in the United States.” This includes anyone mixing or preparing e-liquids, creating or modifying aerosolizing apparatus, repackaging ENDS products, or relabeling ENDS products.<sup>7</sup> For insurers, it is important to consider coverages and exposures such as tobacco and e-cigarette product manufacturing, formulation, production, or warehousing, since the exposures associated with the vaping industry could be interpreted to fall within those traditional categories.

A thorough review of your company’s commercial book of business and the types of occupancies written, as well as their business practices, is critical. Underwriters should consider whether these risks

are intermingled within other occupancies such as gas stations or small convenience/grocery stores.

Additionally, while evaluating use of different coverage forms, it is wise to review all potentially applicable reinsurance treaties and any exclusions that might be relevant (for example those excluding the manufacturing, formulation, production, and warehousing of tobacco products.)

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Last but not least, it is important to remember that the insurer’s duty to defend is also possibly a major issue, and depending on the policy language at issue and applicable state regulations, this could potentially be an uncapped separate limit outside the regular policy liability limits.

Carefully considering all of these issues with the current e-cigarette crisis, in conjunction with a thorough review of your commercial book of business, can be very important in understanding (and proactively limiting) a potential new source of liability for your company. It is an ever-evolving topic, so it is important to monitor the growing research, regulation, and case law as it develops.

If you have any questions, please contact Sarah Kuhn, Research & Product Development Analyst, at [skuhn@aaic.com](mailto:skuhn@aaic.com) or (847) 651-0889.

<sup>7</sup> Keith, D. (2016). *The “Deeming Rule”: Vape Shops*. <https://www.fda.gov/media/97760/download>

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