Emerging Vaping Issues for the Cannabis Industry

By Tori S. Levine

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Quote of the Week

“From the errors of other nations, let us learn wisdom.”

Emerging Vaping Issues for the Cannabis Industry
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One of the difficult issues facing any industry is risk management. For those in the cannabis industry, risk management includes a unique blend of onerous state and local regulations, a lack of federal regulation, and a healthy illicit market. Recently, the outbreak of a mysterious lung disease allegedly caused by “vaping” created havoc in two emerging industries—cannabis and electronic nicotine delivery Systems (ENDS)—and this is only the tip of the iceberg.

Regulatory History and Current Issues
Veterans in the cannabis industry know all too well the regulatory challenges of an industry that is subject to varying regulations on a city, county, and state level. Although the industry supports and has even requested federal regulation, its opinions have fallen on deaf ears. The cannabis industry is in favor of standards and regulation for health and safety reasons and welcomes them as a means to eliminate the illicit market, which recently dominated the national news. Andrew Kline, NCIA’s Safe Vaping Task Force Latest News and Recommendations, Nat’l Cannabis Industry Ass’n Policy Council (blog archive).

The legal accessibility of products coupled with increasing taxes has facilitated a healthy illicit market even in states where cannabis is legal. In California, for example, only a minority of counties and cities allow licensed commercial cannabis activity, which has led to what some refer to as “cannabis deserts.” Nick Kovacevich, Cannabis Black Market Thriving Despite Legalization, Forbes (Mar. 13, 2019). At least 20 percent of legal users in California save money by frequenting illicit sources, which not only undermines legitimate businesses by diverting revenue, but also puts the general public at risk for potential harm caused by the consumption of unsafe and unregulated illicit-market products. Id. Personal injuries arising from substandard products are propelling the cannabis industry into the litigation arena.

Spotlight on the Illicit Market
No one in the cannabis industry will forget the outbreak of mysterious lung injuries beginning in the summer of 2019. Various opponents of the ENDS and cannabis industries lined up to blame both industries, but no one immediately focused on the illicit market. A few months later, we saw the arrests of illicit-drug manufacturers in multiple states who decided to use vitamin E acetate as a cutting agent for THC-containing vaping products. Julie Bosman & Matt Richtel, Vaping Bad: Were 2 Wisconsin Brothers the Walter Whites of THC Oils?, N.Y. Times (Sept. 15, 2019). Months later, it was confirmed that a vitamin E acetate contamination was found in up to 50 percent of the illicit-market samples, while no vitamin E acetate was found in more than 200 legally sold brands of THC-containing products. Jayne O’Donnell & David Robinson, People Are Vaping a Deadly Substance Along with THC, USA Today (Nov. 15, 2019). Vitamin E acetate is used by many unregulated producers as a cutting agent to dilute the cannabis oil. Id.

Initial communications from the Centers for Disease Control and Prevention (CDC), however, failed to distinguish between vaping oil-based e-liquids, which were used in the illicit-THC cartridges that have given rise to multiple arrests in Arizona and Wisconsin and cause lipoid pneumonia, as reported by Bosman and Richtel (see above), and vaping the water/alcohol-based e-liquids, which are used in virtually all e-cigarette and non-lipid-based oils that are used in legitimate THC-containing products. As the dust settled at the end of 2019, the CDC finally publicly identified vitamin E acetate in THC-containing products as a chemical of concern. Ctrs. for Disease Control & Prevention, Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products (updated Jan. 16, 2020).

In the midst of the “public hysteria,” however, the cannabis industry suddenly found itself battling in court against regulations imposed by executive orders. For example, in Massachusetts, despite particularly stringent requirements that every cannabis product be tested by a state-approved lab, the cannabis industry nevertheless was forced to seek judicial intervention to stay an executive order issued by the governor that banned all vaping products for four months. The legitimate cannabis industry was forced into courtroom battles to defend against the regulations that the executive orders would impose because of problems caused by the larger illicit market, not legitimate products. Fortunately for the cannabis industry, the court in Massachusetts refused to enforce the ban for legitimate THC-containing products; however, the ban was allowed to continue for nicotine containing e-liquid.
The Vaping Future

The recent “epidemic” of lung injuries has highlighted several emerging issues for the cannabis industry.

First, the illicit market is very real and very prolific. Some estimate that the illicit market is three times bigger than the legitimate market for THC-containing products. O’Donnell & Robinson, supra. The latest illicit-market experience with vitamin E acetate has left many people injured and concerned over product safety, especially since many of the people who became ill had no idea that the products were contaminated with vitamin E acetate.

Second, the latest illicit-market experience has demonstrated that due to the lack of federal regulation, there was no (1) access to a system to address an issue on a national level, or (2) national registry of products with ingredients. Due to the illegality of the illicit market, many were hesitant to report accurately the substances that they used.

Third, the industry is not only subject to varying legislation; it also is subject to emergency executive orders that are difficult and expensive to address.

Finally, the legitimate cannabis industry is now subject to personal injury and consumer claims caused by the illicit market.

In September 2019, the first lung injury case was filed against multiple companies in Washington. Charles Wilcoxson v. Canna Brand Solutions LLC et al., No. 19-2-10995 (Wash. Super. Ct., Pierce Cnty. filed Sept. 23, 2019). Wilcoxson alleged that he developed lipoid pneumonia caused by vaping products manufactured by Conscious Cannabis, Rainbow’s Aloft, Leafwerx, MFused, and Jane’s Garden. All of these products, allegedly purchased in retail stores, gave the impression that none were illicit-market products. Interestingly, however, none of the products identified in the lawsuit were actually listed on the CDC’s website; they were all found to be counterfeit THC-containing products with vitamin E acetate. Ctrs. for Disease Control & Prevention, Outbreak of Lung Injury, supra.

Thus, the legitimate manufacturers and distributors of THC-containing products are now left defending themselves against what is most likely illicit-market products, given that more than one brand has been counterfeited. Adding to the difficulty of the defense is that many vaping devices are designed and sold with empty cartridges, which allows the user to fill his or her own cartridges. These do-it-yourself users can purchase nicotine-containing e-liquid, CBD e-liquid, THC oil, or other substance that they desire to vape.

Determining the vitamin E acetate culprit may be difficult if not impossible. If this fact pattern were not already complicated enough, add to it that Wilcoxson also sued the manufacturer of the vaping device. Most of the vaping devices available can be used to vape all types of e-liquids. Given the number of lipoid lung injuries, the cannabis industry should expect more personal injury lawsuits involving THC-containing e-liquid, as should the manufacturers of vaping equipment.

Penetrating the future in this industry is hazy. As long as the illicit market remains strong, challenges will always exist for legitimate cannabis companies. With the popularity of ENDS and the increase in litigation against nicotine-containing e-liquid manufacturers, such as JUUL, there is a good probability that the cannabis industry will find itself as a co-defendant with nicotine-containing e-liquid manufacturers in other idiopathic lung injury cases. It may be some time until the smoke clears and risk management issues are better defined.

Tori S. Levine is a trial attorney with Wilson Elser Moskowitz Edelman & Dicker LLP in Dallas, Texas, who has significant experience representing a broad range of clients in diverse industries. During the last several years, she has actively represented a variety of clients in the vaping industry on business and regulatory issues as well as in litigation. These vaping clients include manufacturers, distributors, and retailers of a variety of products, including e-cigarette devices, batteries, and e-liquid. Ms. Levine received her education from the University of Oklahoma (B.B.A., 1985) and Baylor University (J.D., cum laude, 1988). She is a member of the bar in Texas, Oklahoma, Arkansas, and California as well as admitted in various federal district and appellate courts. She will serve on a panel on February 7 during the upcoming DRI Product Liability Conference. Ms. Levine is a member of the DRI Product Liability Committee.
Keep The Defense Wins Coming!

Please send 250–500 word summaries of your “wins,” including the case name, your firm name, your firm position, city of practice, and e-mail address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (minimum 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in “And the Defense Wins,” and it may take several weeks for The Voice to publish your win.

Jonathan R. Hammond and Steven R. Stocker

Trial attorneys Jonathan R. Hammond and Steven R. Stocker of the Spokane, Washington, firm Bohrnsen Stocker Smith Luciani Adamson, achieved a 12–0 defense verdict on behalf of a Hispanic grocery store in Pasco, Washington, in a slip-and-fall suit. The plaintiff alleged that he slipped and fell to the floor in an aisle near the checkout area, adjacent to the produce department, sustaining an injury to his low back and necessitating lumbar fusion surgery. The plaintiff could not identify what he slipped on, stating only that the store manager told him afterward that it was “a vegetable” (which the manager denied). Surveillance footage partially captured the incident.

After the incident, the plaintiff had a two-level lumbar fusion surgery at an ambulatory surgery center in Yakima, Washington, which was staged in two separate operations (one for each level). The plaintiff was charged in excess of $665,000 for the surgeries, injections, and other pre-and post-operative care by the doctor who performed the surgeries and cared for the plaintiff. During the trial, the defense established that the plaintiff was referred to that doctor by his attorneys; his counsel signed a letter of guarantee of payment to that doctor from the settlement or jury verdict (before any funds were disbursed to the plaintiff); and the final amount of any bill was negotiable after the lawsuit, rendering the doctor’s testimony biased, because his compensation was dependent on the outcome of the suit. The court denied the plaintiff’s motion to exclude the letter of guarantee.

The plaintiff also moved unsuccessfully to exclude the defendant’s health care economist, who was allowed to testify regarding billing methodologies used by private insurance, Medicare, and Medicaid, which gave the jury insight into how excessive the plaintiff’s doctor’s charges were.

Other critical testimony came from the defense neurosurgeon expert, who testified that the biomechanical mechanism of the plaintiff’s fall was a trip and fall forward, rather than a slip backwards, based on the type of injuries that plaintiff sustained (stretching of his low back, confusion to his right knee cap, and possible fractures to his wrists). Other key testimony was that of store employees who credibly testified about the store’s training and policies regarding customer safety and housekeeping practices in the high-traffic areas of the store. The plaintiff failed to present any testimony from an expert pertaining to how the store’s procedures measured up against industry standards.

The plaintiff requested $830,000 from the jury. Defense counsel argued that the plaintiff had failed to meet his burden to establish any fault by the grocery store by not identifying what he slipped on or defining what the store should have done differently to prevent him from falling. The jury asked for permission to watch the surveillance video in the courtroom outside of the presence of the court staff or counsel. After viewing the video for 45 minutes (and after less than three hours of deliberation), the jury came back with a unanimous defense verdict. The case was Miguel Martinez v. SuperMex, LLC, Franklin County Superior Court Cause No. 17-2-50578-11.
Amicus Update

Supreme Court’s Call for the Views of the Solicitor General Aligns with DRI Amicus Brief

On Monday, January 27, the Supreme Court issued an order in *CACI Premier Technology, Inc. v. Al Shimari*, No. 19-648, inviting the solicitor general to file a brief expressing the view of the United States. The Court’s order is consistent with what DRI argued in its petition-stage amicus brief: The question of whether federal contractors can immediately appeal, as-of-right, district court denials of immunity-from-suit claims necessarily implicates important federal interests—even in supposedly “private” tort litigation.

View DRI’s brief, filed through the DRI Center for Public Policy, here.
**WITL Seminar Attendees Support Scottsdale Food Bank**

Thanks are due to each and every one of the attendees of the DRI Women in the Law Seminar who were able to join the community service project with the Vista del Camino Food Bank earlier this month. Volunteers came together and were able to accomplish so much—so early in the morning. They couldn’t believe how much they were able to get through in just two hours! (For those who attended but didn’t sign the sign-in sheet, please email Nicollette Dailey so you can get your DRI Dividend points.) Also, here’s a great LinkedIn post of the action.

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**MDLA Collects More than 80 Coats in “Golden Coat Drive”**

Minnesota Defense Lawyers Association members and their firms recently participated in DRI’s Second Annual Golden Coat Drive by collecting over 80 coats during December. The coats were donated to Kids in Need Minnesota, which ensures that every child is prepared to succeed in the classroom by providing free school supplies and other items of necessity to students in need. Last year, the Kids in Need Foundation helped nearly 200,000 teachers and more than six million students in some of the most challenged communities across the country. MDLA is proud to have taken part in this coat drive, and help ensure that Minnesota children are warm as they travel to and from school. MDLA member firms competed to see which firm could collect the most coats, with the winning firm, Larson King, receiving one free registration to MDLA’s Mid-Winter Conference held January 24–26 in Bloomington, Minnesota. #DRICares #MDLACares
Upcoming Seminars

Artificial Intelligence in Construction, February 6, 2020

Stay on the cutting edge. Artificial intelligence (AI) is not just coming, it’s here. Robots already are working in the construction industry, and workers are wearing artificial intelligence. Attend this seminar to learn more about the use of AI today, potential liability issues, contract risk transfer, and new legal theories. Click here to view the brochure and to register for the program.

Toxic Torts and Environmental Law, February 19–21, 2020

Head to Phoenix February 19–21 for DRI’s Toxic Torts and Environmental Law Seminar—the premier gathering for the defense bar. Earn up to 9.75 hours of CLE by attending sessions focused on litigation strategies and regulatory updates. Learn how to be more effective counselors and advocates in toxic tort litigation and environmental compliance. Explore the role and effect of media and PR in toxic tort and environmental law litigation. Find out how toxic tort and environmental law will play a role in plastics, cannabis, and consumer products in 2020. Click here to view the brochure and to register for the program.

Insurance Coverage and Claims Institute, April 1–3, 2020

From dozens of bridges to Marina City and Cloud Gate, Chicago’s art and architecture are diverse, mixing buildings and structures that have made Chicago one of the great cities of the world for sightseeing. Like its host city, the 2020 DRI Insurance Coverage and Claims Institute promises to provide an incredible array of presentations, topics, and networking opportunities, making this program a mandatory event for every insurance law practitioner and claims professional. Click here to view the brochure and to register for the program.
Upcoming Seminars

Construction Law, April 1–3, 2020

Registration is open for DRI’s 2020 Construction Law Seminar, April 1–3 in Chicago. This forward-looking program features interactive sessions about the challenges and opportunities in the construction industry. Construction professionals, attorneys, and claims professionals will benefit from the seminar’s hands-on education and networking. Register online by March 3 to save $100. Be sure to book your room at the Hyatt Regency Chicago by March 3 be eligible for the group rate of $249 single/double. Click here to view the brochure and to register for the program.

Trucking Law Seminar, April 30–May 1, 2020

DRI’s Trucking Law Seminar is now open for registration! Register now for a one-of-a-kind event for trucking lawyers and industry personnel. Help humanize the trucking industry by participating in sessions led by Chris Spear, president of the American Trucking Association; Jim Mullen, general counsel for the Federal Motor Carrier Safety Administration; and other subject-matter experts. This seminar will set the standard for how trucking companies and their drivers are perceived in the future. Register online by April 1 for the best rate. Click here to view the brochure and to register for the program.
Upcoming Webinars

**Not the Same Old Mediation: Coloring Outside the Lines, February 4, 2020, 12:00 pm–1:05 pm CST**

Jacqueline R.A. Root and Stacy E. Yates will discuss an alternative approach to negotiation and conflict resolution based on the concepts of collaborative negotiation. After discussing how to “expand the pie” in litigation matters and moving outside the typical bracket-style mediation, the program will also cover how to deal with problematic mediators and how to use ADR scenarios to accomplish strategic goals in litigation. [Click here](#) to register.

**Avoiding Hidden Catastrophes—The Healthcare Professional as a Witness, March 3, 2020, 12:00 pm–1:00 pm CST**

Despite significant differences in personalities and emotional expression among healthcare professionals, physician and nursing witnesses are repeatedly dealt with in a universal manner when preparing for depositions in medical malpractice cases, resulting in ineffective, and often damaging, testimony. Among physicians, two primary personalities can be identified, while nursing staff can similarly be broken down into distinct personalities. Individual healthcare personalities must be identified and uniquely addressed early on from both a cognitive and emotional perspective to avoid destructive testimony that will unnecessarily increase both the value and exposure of the case. [Click here](#) to register.

**Predicting Jurors’ Verdict Leanings in the Trump Era, March 26, 2020, 12:00 pm–1:30 pm**

Increasing polarization in American politics has led to a substantial shift in civil juror decision-making and jury verdicts. This webinar examines the effects of political beliefs on trial outcomes. Research results indicating the extent to which individual jurors’ political orientation affects verdict preference will be presented, followed by discussion of how case characteristics and juror political orientation can interact to produce unexpected outcomes. Attendees will learn how socio-political changes can affect deliberation dynamics and how to evaluate the composition of a jury. Finally, presenters will review evidenced-based strategies for identifying favorable and unfavorable jurors. [Click here](#) to register.
Leadership Opportunities in DRI

Maybe it’s time to swim in a bigger pond. Do you want to join other up-and-coming defense lawyers at the state and national level and make that jump in your career? How can you stand out from all the others and increase your bottom line?

DRI’s Substantive Law Committees (SLCs) get you on your way. DRI has 29 SLCs specific to different practice areas and affinity groups: Product Liability, Insurance Law, Litigation Skills, Medical Liability and Health Care Law, Women in the Law, and Toxic Torts and Environmental Law, just to name a few. As a DRI member you can join as many as you like at no cost. You can put a toe in and make new connections and you can build your resume by taking advantage of DRI’s numerous leadership opportunities. It’s easy to join and become active. Click on the link “Join the Committee.”

And the SLCs have online communities and subcommittees where you can exchange ideas and build connections with other defense counsel within specialized areas of practice. If you are a young lawyer, DRI’s Young Lawyers Committee is specially built for you to give you the tools and connections you need to advance your career.

Participation in a DRI committee allows you to forge professional networking relationships with other attorneys across the country.

It’s up to you. Remember: if you keep doing what you’re doing, you will keep getting what you are getting.
State Membership Chair/State Representative Spotlight

Pennsylvania

State Membership Chair

**Mohamed Nabil Bakry**, Marshall Dennehey Warner Coleman & Goggin PC

Areas of Practice: Toxic torts, premises liability, product liability, and criminal law.

DRI member since 2015.

Mohamed’s experience with DRI: “I have been the editor of the DRI Diversity and Inclusion Committee newsletter. I have overseen the publication of numerous newsletters, and I have attended the annual DRI Asbestos Medicine Seminar.”

Fun Fact: “Because I was born abroad in Alexandria, Egypt, I have become a world traveler—visiting the following: Egypt, Israel, Greece, Germany, Spain, Netherlands, Italy, Turkey, Philippines, Canada, Costa Rico, Puerto Rico, and Mexico.”

State Representative

**C. Scott Toomey**, Littleton Park Joyce Ughetta & Kelly LLP

Areas of Practice: Product liability, complex tort litigation, tort class action, environmental & toxic tort litigation, construction litigation, crisis management, and commercial litigation, among others.

DRI member since 2009.
New Member Spotlight

Kyle B. Lawrence, Garan Lucow Miller, PC

Kyle B. Lawrence is an associate attorney with Garan Lucow Miller PC and is based in the firm’s Merrillville, Indiana, office. Mr. Lawrence practices in both Indiana and Illinois. His practice focuses on insurance defense litigation. Specifically, he has defended cases in the following areas: auto accidents, premises liability, medical malpractice, property damage, and general personal injury civil litigation. Mr. Lawrence is a graduate of Indiana University Maurer School of Law. When not practicing law, he enjoys spending time with his family and dogs, attending games at Wrigley Field to cheer on the Cubs, and traveling (preferably somewhere warm in the winter).

Quote of the Week

“From the errors of other nations, let us learn wisdom.”