



## E-cigarette litigation

### SUCCESS OFTEN HINGES ON UNCOVERING THE CHAIN OF DISTRIBUTION

Throughout the country, there has been a rise in litigation against manufacturers of the electronic cigarette. The popularity of e-cigarettes among American youth has resulted in a dramatic increase of injuries as a result of defective component parts of the electronic cigarette. Batteries contained in the e-cigarette have been known to explode while the individual is using the e-cigarette, and also while the e-cigarette is in the users' personal belongings or pockets.

Injuries from defective e-cigarettes range from minor burns to permanent life-changing injuries such as severe burns, loss of teeth, facial burns, loss of tongue, lips and facial lacerations. In addition, metal from the e-cigarette casing has caused shrapnel to be lodged into the user's cervical spine and head. Because of the severity of injuries and the increasing popularity of these devices, consumer attorneys have been presented with opportunities to file lawsuits and seek justice on behalf of injured consumers.

Litigating these cases has presented unique challenges and attorneys are often deterred from pursuing the case based on the lack of transparent defendants. This article will elaborate on those challenges and provide insight on how to ensure all defendants responsible for the defective product are successfully brought into the case.

#### The defendants

One of the biggest challenges when filing an e-cigarette product liability case will be determining which defendants should be added to the complaint. Many questions will arise when determining which defendants to sue for your client's injuries. Is it the retailer? Distributor? Manufacturer? The answer is simple. Attorneys should name and serve all defendants in the "chain of distribution." In a product-liability case, a consumer injured by a defective product may sue any business entity in the chain of production and marketing, from the

original manufacturer down through the distributor and wholesaler to the retailer; liability of all such defendants is joint and several. (*Becker v. IRM Corporation* (1985) 38 Cal.3d 454.)

Courts have held that all entities in the stream of commerce will be accountable for the injuries of a plaintiff because all entities have profited from the production and selling of the defective product and should bear the social costs associated with an injured consumer. (*Becker, supra*, 38 Cal.3d at 459.)

Attorneys often decline e-cigarette product liability cases because they are concerned that the retailer is uninsured or judgment proof. On the other hand, most of the time, you will find a viable defendant in the chain of distribution, increasing your chances for a larger recovery for the client.

Moreover, the fact that an entity in the chain of distribution was acquired or bought by another business does not shield that acquiring business from liability. California courts have provided additional protection for consumers injured by defective products by holding successor entities accountable. Any entity that has been acquired by a retailer, distributor, or manufacturer who engages in the marketing, production or selling of a defective product will be held liable.

The courts have reasoned that because the successor entity is taking advantage of the acquired entity's good will, corporate assets, and facilities to inject into the predecessors product line into the stream of commerce, the successor entity should bear the costs of injuries resulting from defective products. (*Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 262.) Therefore, the fact that an entity in the chain of distribution may no longer exist due to the entity being acquired or bought out, should not deter you from adding the acquiring entity as a defendant in the lawsuit.

Based on the supporting case law, extensive discovery into each possible defendant for an e-cigarette should be conducted and should not stop with the

first retail location the client knows about. Clients will assume that the local smoke shop on the corner street will be the only defendant in the case. As a result, attorneys must draft well-written discovery which is targeted at identifying the next entity on the chain of distribution such as the retailer, wholesaler, distributor and manufacturer.

#### Foreign-entity defendants

During the discovery process, it can be expected that a foreign entity or corporation may be connected in the manufacturing process. Upon the discovery of a foreign entity, the attorney will likely need to use the procedures set forth in the Hague Convention to effectuate service of process.

The Hague Convention is a treaty which specifies the procedures to be employed in serving process on the foreign nationals, otherwise known as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial matters. (20 U.S.T. 361, T.I.A.S. No. 6688.) It should be expected that obtaining a proof of service through the Hague Convention procedure will take at least a few months. The process can be costly and time consuming. Therefore, attorneys must evaluate whether the potential value of the case outweighs the time and costs in litigating towards trial.

#### Component parts of the e-cig

Although an e-cigarette contains different component parts manufactured by different entities, the law protects plaintiffs by holding the main manufacturer liable for the defectiveness of an individual component. Upon a deconstruction of the e-cigarette, it is apparent that all e-cigarettes contain similar component parts. Most e-cigarettes include a cartridge, which holds the nicotine liquid mixture, a lithium-ion battery, an atomizer to heat the liquid mix, and a microprocessor. Although there are different components

*See Sepulveda-Sanchez, Next Page*

to an e-cigarette, the courts have held that the main manufacturer of the e-cigarette will be strictly liable for the defect of the one individual component part not manufactured by the main manufacturer. Because products liability is strict, it encompasses defects regardless of their source, and a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another entity. (*Vandermark v. Ford Motor Co.*, *supra*, 61 Cal.2d at p. 256.)

Through the development of litigation across the country, it has been discovered that many of the lithium-ion batteries being used for e-cigarette are low quality batteries which failed to pass quality control standards for other battery manufacturers. Battery manufacturers have chosen to sell these defective batteries at a lower cost to distributors of lithium-ion batteries.

The new distributor will simply “rewrap” the battery and distribute them to be used for e-cig manufacturing. Lithium-ion batteries are commonly used in portable electronics such as laptops, cell phones, and other rechargeable technologies. These batteries require caution and protection from being over-charged and overheated. The “rewrapping” of a lithium-ion battery

must be carefully considered when determining whether to add another individual defendant. Attorneys should be prepared to retain experts to determine if the battery was rewrapped. The expert will perform testing on the battery to identify characteristics or markers that are unique to each manufacturer. These tests will allow attorneys to determine the manufacturer and consider the cost-benefit analysis of whether to bring the entity into the lawsuit.

### **Gathering evidence and filing suit immediately**

E-cigarette defendants will point the blame on each other in an attempt to deflect blame onto the e-cigarette itself or the charging mechanism used by the client. It is important to obtain evidence from the client such as the exploded battery, e-cigarette device, charger used to charge the device, and proof of purchase from the client. Filing the lawsuit early is important as it will take time to discover each defendant in the chain of distribution. In addition, filing the lawsuit early will give the attorney sufficient time to determine if the local retailer has insurance coverage. If the local retailer does not have insurance coverage, the attorney can get started on

uncovering the defendants in the chain of distribution.

### **Conclusion**

California attorneys have ample case law to support their pursuit of negligent retailers, manufacturers, and distributors in e-cigarette cases. The chain of distribution doctrine should be perceived as an incentive and motivator for pursuing these cases and holding each defendant joint and severally liable for their clients’ injuries. Although, there are challenges in uncovering the chain of distribution, attorneys should consider whether the injuries warrant the investment to uncover the chain of distribution and obtain justice for their clients. The process of uncovering the chain of distribution will ensure that the consumer is able to obtain just compensation for their injuries.

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