

# Vaping and COVID-19: Expect a Wave of Litigation Based on Unsubstantiated Public Concern and Studies with Uncertain Validity

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Vaping has been linked to several lung diseases including the one with the indicative name of “e-cigarette, or vaping, product use-associated lung injury” (EVALI)<sup>1</sup>. It is thus not unexpected that during the COVID-19 pandemic, when the virus primarily attacks the lungs, vaping is suspected to be connected with the disease in a number of ways. These suspected connections are as yet not supported by any scientific evidence. Past litigation has taught us that unsubstantiated public concern may nonetheless expose an entire industry to waves of product liability lawsuits and settlement payments in the range of billions of dollars. It is therefore important that producers and companies in the chain of distribution of vaping liquid and devices closely monitor the scientific developments on any possible associations between vaping and COVID-19, and make risk management decisions in anticipation of future lawsuits.

## Unsubstantiated Online Claims and Public Concern

During the COVID-19 pandemic, numerous articles have been circulated on the internet claiming that vaping may increase the risk of catching COVID-19, the risk of progressing to the severe type of COVID-19 requiring hospitalization and ventilation, or the risk of compounding the course of COVID-19 and making diagnosis and treatment more difficult. These claims have caused widespread public concern. A study surveying the vaping-related conversation on Twitter identified that topics such as whether vapers are more susceptible to COVID-19 infections and should be prioritized in COVID-19 testing were the most-discussed concerns among vapers during this pandemic.<sup>2</sup>

A close examination of these online claims and concerns, however, reveals very little scientific basis beyond speculation. First of all, there are no scientific data demonstrating an association between vaping and COVID-19, which the vast majority of the online articles admit. There very well may be no peer-reviewed articles focusing on vaping in the context of COVID-19 – a search on the PubMed search engine by the terms “vaping” and “COVID-19” (or “e-cigarette” and “COVID-19”) yielded only five articles, two of which did not study vaping at all notwithstanding the title indicating otherwise.<sup>3,4</sup> The remaining three include two reviews of pre-pandemic research findings on vaping,<sup>5</sup> and the above-mentioned social media survey on vaping-related topics.<sup>6</sup> In the absence of direct scientific data, the online articles looked for support somewhere else.

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Two categories of studies appeared to be most cited in these articles:

- The first category includes clinical studies done in China in the early stage of this pandemic, finding that people with a history of cigarette smoking were more likely to develop COVID-19 or more likely to require hospitalization and ventilation during the course of the disease.<sup>7,8</sup> One of these Chinese studies was a non-peer-reviewed preprint manuscript and has already been withdrawn by its authors because the number of confirmed cases had increased to about 18 times more after the manuscript's publication, which made its findings no longer representative.<sup>9</sup> These data on cigarette smoking were applied to vaping because "Inhalation of e-cigarette aerosol is similar enough to cigarette smoking in this context to warrant similar concern."<sup>10</sup>
- The second category includes studies on vaping that were conducted before this pandemic. The findings that vaping causes damage to lung tissue and suppression of the immune system in general are extrapolated to support the claim vapers must be at a higher risk to infection by COVID-19 as well.<sup>11,12</sup>

## **FDA's "No Evidence" Statement and the Federal Government's Muddled Position**

On March 27, 2020, in an email to *Bloomberg*, the FDA stated that people with underlying health issues "may have increased risk for serious complications from COVID-19 ... this includes people who smoke and/or vape tobacco or nicotine-containing products."<sup>13</sup> This informal statement met with sharp criticism from within and outside the government. On March 31, the Attorney General for the State of Iowa, joined by 12 scientists and policy experts, issued a letter characterizing the FDA's email statement as "arbitrary and ill-conceived, spreading fear and confusion with little scientific basis and with unpredictable consequences."<sup>14</sup> The letter urged that the FDA "does not assert or imply, in any circumstances, an equivalence in risk between smoking and vaping."<sup>15</sup>

On April 15, in another email to *Bloomberg*, the FDA changed its previous position and made a "no evidence" statement. The agency stated: "E-cigarette use can expose the lungs to toxic chemicals, but whether those exposures increase the risk of COVID-19 is not known."<sup>16</sup>

While the FDA's "no evidence" position was again communicated in an informal manner and appeared somewhat ambiguous, other federal agencies' positions on vaping and COVID-19 are even more muddling. On April 6, the National Institutes of Health (NIH) published a blog article authored by Nova Volkow, Director of the National Institute on Drug Abuse.<sup>17</sup> The article warned the public that vapers, along with smokers and abusers of substances such as opioids and methamphetamine, could be hit particularly hard by COVID-19.<sup>18</sup> The article discussed possible mechanisms through which each of these substance may increase the risk of contracting COVID-19. With respect to vaping, the article noted that "emerging evidence suggests that exposure to aerosols from e-cigarettes harms the cells of the lung and diminishes the ability to respond to infection," and hence vapers may be more susceptible to respiratory infections in general.<sup>19</sup> The article urged that "active surveillance" be conducted on all of these possibilities "as we work to understand this emerging health threat."<sup>20</sup> The NIH blog article cited no scientific data to support its position.

## **Lessons from Roundup Litigation: Studies of Uncertain Validity May Be More Powerful Than the Federal Government's Unequivocally Stated Position**

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The history of litigation in this country is not void of precedents showing that companies were exposed to product liability claims despite the lack of scientific evidence proving causation. The most recent one was the *Roundup* litigation.

Starting from 2016 and spanning for more than four years, more than 42,700 plaintiffs brought suits against Monsanto Co.'s pesticide Roundup, claiming that the active ingredient glyphosate in the weed killer is carcinogenic and therefore causes a risk to public health.<sup>21</sup> Monsanto argued that glyphosate had been deemed safe for 40 years, relying on statements made by the U.S. Environmental Protection Agency (EPA) during its evaluation of the potential health risks of glyphosate for more than four decades. In 1974, when the EPA first registered glyphosate, it concluded that glyphosate did not pose an unreasonable adverse effect on human health or the environment. In September 2016, December 2016 and December 2017, the EPA conducted three reevaluations of glyphosate based on more than 800 studies, and came to the same conclusion; the EPA stated unequivocally that "the weight of the evidence does not support a finding that glyphosate is carcinogenic or likely to be carcinogenic to humans."<sup>22</sup>

In dispute of these statements, the plaintiffs' attorneys relied on a designation from the International Agency for Research on Cancer (IARC) in 2015 that glyphosate is "*probably* carcinogenic to humans," and a 2010 study of 20 mice painted with a glyphosate formulation that caused 40% to develop tumors.<sup>23</sup>

The results of the litigation is well known – Bayer AG, the parent company of Monsanto Co., lost all three trials, which in total awarded plaintiffs' verdicts in excess of \$2.4 billion, including approximately \$2.3 billion in punitive damages.<sup>24</sup> The company is still in remediation to settle tens of thousands of lawsuits for a figure in the range of \$10 billion.<sup>25</sup>

Among all the lessons we can learn from the *Roundup* litigation, what is specifically important to the vaping industry at this point is that internet fear, armed by research findings that are, to put the best face on it, circumstantial and inconclusive, may have more influence on the jurors' minds than the federal government's position based on years of scientific studies, no matter how affirmative the position is.

## Conclusion

The COVID-19 pandemic presents an opportunity for plaintiffs' attorneys to manufacture another wave of Roundup type litigation. Articles purporting to analyze data to show a connection likely are on their way. Producers and companies should stay advised and prepared.

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1 It should be noted that no link has been found between EVALI and regulated cannabis products that do not contain unapproved additives

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5 Electronic cigarette and vaping should be discouraged during the new coronavirus SARS-CoV-2 pandemic, Javelle, E, *Arch Toxicol*. 2020 Apr 18 [Epub ahead of print].

6 Public health concerns and unsubstantiated claims at the intersection of vaping and COVID-19, *supra*.

7 See, e.g., Do smoking and vaping increase susceptibility to COVID-19? The Johns Hopkins News Letter, April 4, 2020, available at <https://www.jhunewsletter.com/article/2020/04/do-smoking-and-vaping-increase-susceptibility-to-covid-19>

8 See, e.g., Can Vaping Increase Your Coronavirus Risk? SHAPE.COM, April 27, 2020, available at <https://www.shape.com/lifestyle/mind-and-body/vaping-coronavirus-risk>.

9 Epidemiological and clinical features of the 2019 novel coronavirus outbreak in China. Yang, Y., et al., preprint posted on *medRxiv*, withdrawn on February 21, 2020. Cited in Do smoking and vaping increase susceptibility to COVID-19? *Supra*, first hyper-linked study.

10 Can Vaping Increase Your Coronavirus Risk? *Supra*.

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12 Can Vaping Increase Your Coronavirus Risk? *Supra*.

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14 FDA and federal government statements on smoking, vaping and COVID-19. Miller, Thomas J., et al., Iowa Department of Justice Office of Attorney General, March 31, 2020, available at [https://www.iowaattorneygeneral.gov/media/cms/vaping\\_Letter\\_re\\_FDA\\_Bloomberg\\_COVI\\_D889DF13CDB63.pdf](https://www.iowaattorneygeneral.gov/media/cms/vaping_Letter_re_FDA_Bloomberg_COVI_D889DF13CDB63.pdf).

15 *Id*.

16 FDA Shifts Its COVID-19 Stance on Vaping, Smoking Impact, Bloomberg, April 15, 2020, available at <https://www.bloomberg.com/news/articles/2020-04-16/fda-shifts-its-covid-19-stance-on-vaping-smoking-impact>.

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18 *Id.*

19 *Id.*

20 *Id.*

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