

## E-Cigarette Litigation Is Lighting Up

Article By:

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We know it's trending when we start getting calls. Litigators out there are looking for experts in the e-cigarette industry as more and more electronic cigarette cases are piling up, ranging from product liability to patents, trademark to taxes. We believe this trend will continue, particularly as the growing e-cigarette market continues to attract the attention and support of Big Tobacco. Whether we like it or not, there's a new nicotine in town and, at IMS, we're always looking to keep you at the forefront of new litigation. Here's what's trending:

- **Big Tobacco is Getting On Board:** While electronic delivery of nicotine is not new, the e-cigarette industry has seen a rapid and valuable surge in the last decade. Not hard to believe considering the negative stigma and decline of traditionally-smoked cigarettes. A niche market that was once controlled primarily by small, independent manufacturers has caught the attention of the well-known Big Tobacco players who have started to manufacture their own brands of e-cigarettes over the last few years. R.J. Reynolds Vapor Company, a subsidiary of Reynolds America, with its popular e-cigarette VUSE, British American Tobacco (BAT, the largest tobacco company in Europe) with Vype and Altria (formerly Philip Morris) with MarkTen, to name just a few, are now dominating e-cigarette sales. According to [Newsweek](#), e-cigarette sales worldwide were \$4-5 billion in 2014. A [Forbes](#) article sets expectations of future sales growth of 20% percent year-over-year going forward.
- **Exploding Battery Suits Are Exploding:** E-cigarettes are designed to look and feel like a traditional cigarette by allowing the user to consume nicotine by inhaling, or puffing, on the e-cig. They work by heating a nicotine liquid mixture (known as "e-juice" or "vape juice") until it becomes a vapor that can be inhaled through the mouthpiece of the e-cigarette. Unfortunately, the lithium battery housed in the e-cigarette used to emulate the burning end of a cigarette when the user puffs on the device can and has exploded in many consumers' faces causing severe burns and scarring. A recent series of [reported explosions](#) of e-cigarette batteries has led to the filing of numerous e-cigarette lawsuits as well as the commiserate advertisement by law firms specializing in e-cigarette explosion cases.
- **Adolescent-Targeted Marketing:** With dozens of e-juice flavors in Bubble Gum, Cotton Candy, Cupcake, Graham Cracker, Marshmallow, and even Sour Apple, it's hard for e-cigarette manufacturers to refute this troubling allegation with a straight face. Many are predicting claims are on the way—just like their predecessors before them—that the e-cigarette manufacturers are targeting our youth. CDC director Dr. Tom Frieden said, "What's happening is widespread marketing of e-cigarettes that kids are seeing." According to

the [Centers for Disease Control and Prevention](#), use of electronic cigarettes by high school students increased from 1.5% in 2011 to 16% in 2015. If e-cigarette related diseases begin to rise in our nation's youth, you can be sure class action suits like those filed in the 90's against Big Tobacco, pointing the finger at adolescent-targeted marketing, will follow.

- **E-Cig Manufacturing Is Taxing:** Considering the lack of knowledge, research, and study on the long-term effects of the inhalation of nicotine vapor, many states are considering a tax on e-cigarettes, just as traditional cigarettes were taxed, to help cover anticipated healthcare costs related to vaping. [In Washington](#), legislators proposed to tax e-cigarettes just like tobacco products at a rate of 95% of the wholesale price. [California](#) has implemented a tax on electronic cigarettes **equivalent to** the Cigarette Distribution Tax at a rate of \$0.100 per cigarette.
- **E-Cig Manufacturers Are Battling Patent Disputes:** Each of the major players in the e-cigarette market—Reynolds, Altria, Fontem, etc.—have spent the last few years buried in patent litigation relating to various component parts of their e-cigarettes. While Fontem and Nu Mark, a subsidiary of Altria, resolved many of their claims in a [publicized settlement](#) earlier this year, Reynolds and Fontem remain steeped in litigation, [requesting \*Inter Partes Review\*](#) over several of their e-cigarette patents under 35 U.S.C. § 341(a).

As for the expert angle in the patent battles, Reynolds asserts in their briefs for *Inter Partes Review*, the Person Having Ordinary Skill in the Art, the PHOSITA, at the time of the invention would have been someone with the “equivalent of a Bachelor’s degree in electrical engineering, mechanical engineering, or biomedical engineering or related fields, along with at least 5 years of experience designing electromechanical devices, including those involving circuits, fluid mechanics, and heat transfer.”

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