

E-CIGARETTE LITIGATION: A REPEAT PERFORMANCE?

by: Maggie R. Chappell and Graham L. Newman

“THERE WILL NEVER BE ANOTHER TOBACCO.”

Such was the declaration following the landmark 1998 multi-hundred billion dollar Tobacco Master Settlement Agreement that became the stuff of legends. But just a few years later, nicotine and technology met in a West Coast laboratory and the e-cigarette was born. And with the October 2019 establishment of the In Re: JUUL Labs, Inc. multidistrict litigation, one wonders if we haven't seen this movie before.

What is JUUL?

JUUL is the dominant market shareholder in the burgeoning electronic cigarette industry, accounting for approximately 80% of e-cigarette sales. The device looks nothing like a cigarette, more closely resembling a thumb drive used to store data. The product is quite new, having been introduced to the market in June of 2015. Its meteoric rise to the top of the industry caught the attention of major investors, and in December of 2018 JUUL Labs, Inc. sold a 35% share of its stock for \$12.8 billion. The purchaser was Altria Group, Inc., better known as the parent company of tobacco giant Philip Morris.

The JUUL device is composed of three parts: the JUULpod mouthpiece, the JUUL device, and the USB charging dock. It is slender, sleek, and the current model is 3.5 inches long – it easily fits in the palm of a hand. The USB charging dock allows the device

to plug into any USB port, like on a computer or the transformer of a cell phone charger. The JUUL device makes up the body of the device that houses the electronic components including sensors, coils, etc. The essence of the JUUL devices, however, is found in the JUULpod mouthpiece.

The JUULpod mouthpiece is sold separately from the device and contains the vaping liquid. The vaping liquid is comprised of propylene glycol, glycerine, benzoic acid, nicotine and flavor. Current flavors on the market include Virginia tobacco, mango, mint, classic tobacco, menthol, crème, fruit, and cucumber.

The device delivers nicotine to its user by utilizing the energy stored in its charging dock to heat the liquid within the pod mouthpiece. The liquid vaporizes once heated so that it can be inhaled, thereby creating the “high” associated with nicotine use.

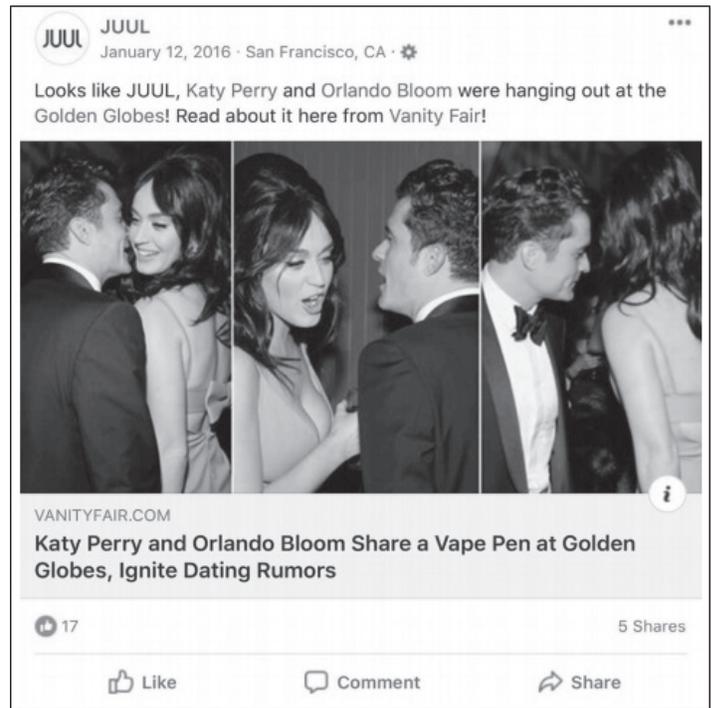
According to JUUL's website, the JUULpods are available in 3% or 5% nicotine strengths depending upon the flavor chosen by the user. ¹ However, upon further review, JUUL's label represents 3% or 5% strength in weight, meaning each 5% JUULpod contains 59 mg of nicotine per milliliter of fluid. ² This is the equivalent of approximately 20 combustible cigarettes. ³ Prior to JUUL's popularity, similar products contained only 1-3% nicotine by volume. ⁴

The nicotine in JUULpods not only differs in strength, but also in molecular composition. The JUULpods utilize nicotine salts. This patented technology differs from the freebase nicotine found in other e-cigarettes. While freebase nicotine may cause coughing and throat irritation, JUUL's nicotine salts help reduce those complications. ⁵ The increased strength of nicotine in JUUL paired with the ease of smoking nicotine salts and the attractive flavors available makes marketing JUUL an easy proposition. And the company has marketed aggressively.

What Was JUUL's Targeted Market?

Today JUUL's marketing employs the tag line "designed for smokers, by smokers." It holds itself out to be a healthy alternative to the traditional cigarette in that it delivers the desired high without the cancer-causing tar. A quick look at the company's website reveals the stories of middle-aged smokers who have successfully made the transition to the JUUL product from traditional cigarettes. But that wasn't always the case.

When JUUL was first released in 2015, the advertisements looked much different. Instead of middle-aged actors, muted tones, and tales of repeated attempts to stop smoking traditional combustible cigarettes, JUUL's original advertisements had bright colors, young actors in stylish clothing, and hashtags to be used on social media such as "#smokingevolved." JUUL featured launch parties with celebrities and social media influencers and widely distributed free sample products around the country. In doing so, JUUL was not originally marketed as a way for habitual smokers to stop smoking deadly combustible cigarettes, but rather as a way for a much younger audience to be "cool." Sounds familiar, right: the juxtaposition of smoking and popularity? It is familiar. JUUL's original advertising looked like a 21st century version of Joe Camel or the Marlboro Man.



JUUL's advertising campaign worked. The flashy marketing combined with the high doses of nicotine and the smooth puff has led to an increase in teen users across the US and around the globe. In 2018, over 3.6 million youth between middle school and high school reported using e-cigarettes. The use of e-cigarettes by at least 25% of youth users is not considered "vaping" but is instead referred to as "JUULing." ⁶ One high school-aged user described the culture surrounding JUUL as follows:

Between classes the big bathroom in my school averages 20-25 kids, and 5-10 JUULs. Kids usually will give you a dollar for a JUUL rip if you don't know them, if you want to buy a pod for \$5 you just head into the bathroom after lunch. We call the kids in there between every class begging for rips "JUUL fiends." Pod boys are the freshman that say "can I put my pod in ur juul?" and are in there every block. I myself spent about \$180 on mango pods and bought out a store, and sold these pods for \$10 a pod, making myself an absolutely massive profit in literally 9 days. Given because I'm 18 with a car and that's the tobacco age around here, I always get offers to get pod runs or juuls for kids. people even understand the best system to get a head rush in your 2 minutes between classes, is all the juuls at once. So someone yells "GIVE ME ALL THE JUULS" and 3-7 are passed around, two hits each. This saves us all juice, and gives you a massive head rush. Kids also scratch logos and words onto their juuls to make it their own, every day you can find the pod covers

in my student parking lot. I know this sounds exaggerated, but with a school with 1400 kids near the city and JUULs being perceived as popular, it's truly fascinating what can happen. ⁷

But then the health problems began to appear.

The Federal Government Steps In

As e-cigarette use began to skyrocket, reports of injuries related to these devices began to circulate. By early 2018, medical journals were suggesting protocols for training pediatric personnel on the identification and treatment of Acute Nicotine Toxicity in children caused by the use of e-cigarettes. ⁸ In December of 2018, the Surgeon General issued an advisory noting that e-cigarette use among children had reached "epidemic" proportions and specifically identified JUUL as a product uniquely attractive to youth. ⁹ Then, on April 3, 2019, the FDA revealed that it had received 35 voluntary reports of seizures potentially related to e-cigarette use over the last decade. ¹⁰ The announcement noted, however, that the voluntary nature of this reporting likely indicated that the true scale of such instances was much larger.

On July 24, 2019, in a Congressional hearing before the House Committee on Oversight and Reform, parents and their high school-aged children testified that JUUL representatives had visited schools under the guise of anti-addiction campaigns. Representatives told the students that the JUUL product was "much safer than cigarettes" and "totally safe" and suggested that those addicted to cigarettes should consider JUUL as an alternative. ¹¹

This testimony resulted in a warning letter from the FDA to JUUL in which the agency found these reports to

be "particularly concerning because these statements were made directly to children in school." ¹²

The CDC now refers to the instance of lung damage related to e-cigarette use as an "outbreak." By October 8, 2019, 1,299 lung injury cases associated with e-cigarette use had been reported to CDC, including 26 deaths. The median age of these victims was 24 years old with 15% being under the age of 18. ¹³ As data continues to be collected, the number of victims of e-cigarettes continues to rise.

The State of Litigation

The first JUUL litigation began on April 26, 2018, as a putative class action seeking relief for both personal injury and deceptive marketing practices. By the summer of 2019, at least nine other suits had been filed in five federal districts and JUUL petitioned the Judicial Panel on Multidistrict Litigation for the formation of an MDL. On October 2, 2019, the Judicial Panel on Multidistrict Litigation created MDL No. 2913, In Re: JUUL Labs Inc., Marketing, Sales Practices, and Products Liability Litigation. The court placed the MDL in the Northern District of California (the home of JUUL headquarters) before Judge William Orrick, who has been presiding over the first-filed JUUL litigation. As of October 17, 2019, 105 individual suits have been filed and the pace at which the MDL expands appears to be quickening.

JUUL's initial MDL filings give us a glimpse of what public relations strategy the company may be intending to pursue as the number of lawsuits continues to mount. Remarkably, in its August 2, 2019 petition to form the MDL, the company proclaims that its mission "is to improve the lives of the world's one billion adult smokers by eliminating

cigarettes." MDL 2913, Doc. 1-1 at 8. This stands in stark contrast to the 2019 Form 10K of Altria Group, its 35% shareholder, which boasts that it owns "the largest cigarette company in the United States" (Philip Morris) and "the largest-selling cigarette brand in the United States" (Marlboro). But perhaps this "mission" wasn't run by JUUL's Board of Directors, because on September 25, 2019, the board fired CEO Kevin Burns and replaced him with K.C. Crosthwaite, a top official of Altria. ¹⁴ Whether Crosthwaite's ascendance will change JUUL's litigation or public relations strategies is yet to be seen.

As the MDL litigation begins in earnest, the focus appears to be on two types of potential plaintiffs: lung injury victims and minors and young adults who have become addicted to nicotine because of the JUUL product. The number of lung injury victims is still quite unknown. But as noted above, in just six months the number of known instances of e-cigarette injury cases has expanded from just a handful to 1,299 with recent trends showing reported new hospitalization rates at over 100 per week. ¹⁵

Addiction cases, though they may sound less serious, should not be discounted. "Tobacco Use Disorder" is a medical injury specifically recognized by the Diagnostic and Statistical Manual of Mental Disorders (DSM-V 305.1) and, as anyone who has tried to quit smoking knows, it doesn't tend to go away. "Although more than 80% of individuals who smoke express a desire to stop smoking and 35% try to stop each year, less than 5% are successful in unaided attempts to quit." DSM-IV at 265. Furthermore, the Surgeon General warns that those under the age of 25 are particularly susceptible to nicotine addiction. ¹⁶ Despite this fact (or perhaps because of it), there

is powerful evidence that JUUL intentionally targeted young people in their advertising campaigns. As such, those who became addicted to nicotine through the JUUL products before the age of 25 may have strong claims.

Though the proceedings against JUUL are quite new, developments are occurring rapidly. Even as this article was being finalized, JUUL announced that it was suspending the sale of its Mango, Creme, Fruit, and Cucumber flavors.¹⁷ But of

course, the horse is already out of the barn: millions of minors have been exposed to nicotine through the JUUL product and many (if not most) became addicted to the drug. Furthermore, even if JUUL is successful in stemming the epidemic of e-cigarette use among American youth, it still has the problem of identifying the cause of lung damage hospitalizations related to its product.

The good news is that, unlike the 20th Century saga of Big Tobacco, the government appears to be moving

rapidly to counter a serious public health threat. In that sense, at least, the story of e-cigarettes promises to be different. But the speed with which we returned to massive personal injury litigation surrounding tobacco-based products is something to behold. Perhaps this time we'll learn?

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1. <https://www.juul.com/learn/pods>
2. https://www.nejm.org/doi/full/10.1056/NEJMp1805758?query=featured_home
3. https://www.nejm.org/doi/full/10.1056/NEJMp1805758?query=featured_home
4. <https://www.cnet.com/news/juul-what-is-it-how-does-it-work-and-is-it-safe/>
5. <https://www.cnet.com/news/juul-what-is-it-how-does-it-work-and-is-it-safe/>
6. <https://dev-craft.tobaccofreekids.org/assets/factsheets/0394.pdf>
7. In RE: JUUL Labs, Inc. Product Litigation, 3:18-cv-2499 (N.D.Ca.), Doc. 81 at ¶ 266.
8. "Pediatric Toxidrome Simulation Curriculum: Liquid Nicotine Overdose," <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6342440/>.
9. <https://www.hhs.gov/about/news/2018/12/18/surgeon-general-releases-advisory-e-cigarette-epidemic-among-youth.html>
10. <https://www.fda.gov/tobacco-products/ctp-newsroom/some-e-cigarette-users-are-having-seizures-most-reports-involving-youth-and-young-adults>
11. <https://www.youtube.com/watch?v=m3iEMrAd83o&feature=youtu.be>
12. https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/juul-labs-inc-590950-09092019#_ftn3
13. https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html#latest-outbreak-information
14. <https://www.nytimes.com/2019/09/25/health/juul-vaping.html>
15. https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html
16. <https://e-cigarettes.surgeongeneral.gov/knowtherisks.html>
17. <https://newsroom.juul.com/juul-labs-suspends-sale-of-non-tobacco-non-menthol-based-flavors-in-the-u-s/>