

The products-completed operations hazard exclusion: How exploding vape pens could ignite a firestorm of uncovered claims

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The popularity of e-cigarettes and vaping has expanded rapidly over the last several years. According to a recent study, sales of e-cigarettes nearly doubled between 2013 and 2017, from about 63 million units sold in 2013 to over 120 million units in 2017.¹

The number of users has also increased exponentially. According to a recent market research study, the number of adults who vape grew from 7 million globally in 2011 to 41 million in 2018, and is estimated to reach 55 million by 2021.² The global market for vape and e-cigarette products is estimated to be worth \$19.3 billion, up from \$6.9 billion just five years ago.³

Unfortunately, as sales of vape pens and e-cigarettes continue to proliferate, so has the number of vape and e-cigarette related injuries. It has been widely reported that outbreaks of deadly lung diseases have been linked to vaping, and more than 2,000 cases were confirmed by health officials by November 2019.⁴

Less discussed, but just as serious, is the risk of vape pens or e-cigarettes exploding and causing serious injuries. One study estimated that there were 2,035 e-cigarette explosion and burn injuries resulting in visits to emergency rooms between 2015 and 2017.⁵

Generally, e-cigarette and vape pen explosions occur when the battery inside the product overheats. According to a report from the U.S. Fire Administration, the shape and construction of e-cigarettes make them more likely to behave like “flaming rockets” when a battery fails.⁶

In one tragic case, a man died after a vape pen exploded in his mouth, sending shards of metal into his face and neck.⁷ The family of that man, William Brown, filed a lawsuit against the store in Texas where Brown had purchased the product.⁸

In another case, a 17-year-old in Nevada was injured when an e-cigarette exploded in his mouth, knocking out several teeth and shattering his jaw.⁹ As these cases show, the injuries caused by exploding vape pens can be serious, and the exposures faced by those in the stream of vape pen commerce can be significant.

Given the risk, it is critical that businesses operating in the vape pen and e-cigarette space obtain adequate insurance coverage

to protect against the bodily injuries and damage to property that these products can cause. An obvious source of insurance coverage for exploding vape pen claims is commercial general liability insurance policies.

CGL policies generally insure against, among other things, liability for bodily injury and property damage caused by negligence, arising out of the insured’s premises or business operations.¹⁰ In addition, the standard CGL form also provides coverage for claims falling within the definition of the products-completed operations hazard.

According to a study published in the journal *Tobacco Control*, an estimated 2,035 e-cigarette explosion and burn injuries resulted in visits to emergency rooms between 2015 and 2017.

Generally, the products-completed operations hazard covers claims based on bodily injury or property damage that occurs after a product has entered the stream of commerce or is otherwise “completed,” such as product liability claims.

As one insurance treatise has explained, “products completed operations losses arise out of products that the insured manufactures, distributes or sells; or operations such as contract and building operations that have already been completed.”¹¹ In essence, the products-completed operations hazard affords coverage for product liability claims, among others.

Some insurers have relied upon the products-completed operations hazard exclusion in CGL policies to deny coverage for losses arising from exploding vape pens. This exclusion is a standard form endorsement that was created by the Insurance Services Office, and some courts have construed it to bar coverage for exploding vape pen claims.

A typical products-completed operations hazard exclusion endorsement reads, “This insurance does not apply to ‘bodily

injury’ or ‘property damage’ included within the ‘products-completed operations hazard’ as defined in the main policy form.¹²

The exclusion’s incorporation of the definition of products-completed operations hazard raises the question of whether exploding vape pen and e-cigarette claims are within the CGL policy’s definition of products-completed operations hazard.

While there are exceptions to the applicability of the exclusion, courts have repeatedly held that it is applicable to claims involving exploding e-cigarettes or vape pens — leaving vape pen retailers, distributors and manufacturers without CGL insurance for such claims.

In *United Specialty Insurance Co. v. E-Cig Vapor Emporium LLC*,¹³ the insurer sought a declaration that it did not owe insurance coverage to its insured, E-Cig, for an underlying personal injury lawsuit. E-Cig, a retailer of vape pens and related accessories, was sued by a customer who bought an e-cigarette from it.

The underlying lawsuit alleged that the customer suffered bodily injuries when the e-cigarette caught on fire in his pants pocket, burning his leg, hand and clothes. The suit asserted causes of action for strict product liability, negligence and breach of warranty. E-Cig sought coverage from USIC for defense and indemnity in connection with the suit.

The CGL policy that USIC issued to E-Cig contained a products-completed operations hazard exclusion. USIC argued that the exclusion barred coverage for the underlying lawsuit because it arose from E-Cig’s completed products.

The court agreed, holding that product liability claims arising from events that occurred off E-Cig’s premises were excluded from coverage unless an exception to the definition of the products-completed operations hazard applied.

E-Cig argued that an exception to the exclusion for bodily injury arising out of the transportation of the product applied and therefore there was coverage for the underlying lawsuit. As E-Cig explained, at the time that the customer’s e-cigarette caught fire, he was transporting the e-cigarette from his home to his office where it caught fire.

The court disagreed, saying that E-Cig’s proffered interpretation of the transportation exception was not reasonable. It noted that under E-Cig’s reasoning even moving the e-cigarette from “restroom to desk ... or indeed from pocket to mouth” would constitute “transportation.” This interpretation would cause the exception to consume the exclusion, the court said.

The court concluded that the “more natural and reasonable reading” of the transportation exception is that it applies to transportation undertaken by the insured, not by its customers. Accordingly, the court ruled in favor of USIC and held that there was no coverage for the underlying lawsuit.

A similar result was reached in *Atain Specialty Insurance Co. v. Todd*.¹⁴ In that case, the insureds were two individuals who design, sell, manufacture, market and distribute e-cigarettes. The insurer, Atain, had issued the insureds a CGL policy that contained a products-completed operations hazard exclusion.

The insureds were sued after an e-cigarette that they manufactured exploded in a customer’s pocket. It was undisputed in the underlying action that while the insureds manufactured the e-cigarette, the battery in the device was manufactured by a different company, JOCOR. The injured customer sued the insureds and JOCOR for product liability, breach of warranty and negligence.

The insureds sought coverage under their policy with Atain, and Atain in turn commenced a declaratory judgment action arguing that the products-completed operations hazard exclusion barred coverage.

Some insurers have relied upon the products-completed operations hazard exclusion in CGL policies to deny coverage for losses arising from exploding vape pens.

The insureds maintained that the exclusion did not apply because the products-completed operations hazard only applied to bodily injury arising from “your product.” They argued that the battery was not their product under the policy, noting that it was manufactured by JOCOR.

The court disagreed, explaining that there were two possible outcomes at trial in the underlying action. First, a jury could find that the insureds were liable for the explosion because the e-cigarette at least partially caused it, in which case the products-completed operations hazard exclusion would apply.

Second, the jury could find that the insureds were not liable for the explosion because the battery caused it. In that case, Atain’s duty to indemnify would not be triggered because JOCOR was not an insured under Atain’s policy.

Since there was no scenario in which Atain would owe coverage, the court ruled that Atain had no duty to defend or indemnify the insureds in the underlying action.

The court also rejected the insureds’ argument that the transportation exception applied, agreeing with the decision in *United Specialty* that applying the exception in this instance would cause the exception to swallow the exclusion.

Two additional cases from Washington state have also followed the trend of applying the products-completed operations hazard exclusion to exploding vape pen and e-cigarette claims.

In *Atlantic Casualty Insurance Co. v. Bellinger*,¹⁵ the court held that the exclusion barred coverage for a lawsuit that arose after an e-cigarette that a woman was smoking while at home exploded, causing injuries to her mouth and face.

The insured argued that the exclusion did not apply to claims in the underlying lawsuit for breach of warranty and failure to warn. In doing so, it tried to draw a distinction between the injuries caused by the malfunctioning product and alleged insufficiency of the warranties and warnings that accompany that product.

The court rejected this argument, reasoning that the definition of “your product” expressly included warranties or representations with respect to the fitness, durability, quality or performance of “your product.”

In *Atlantic Casualty Insurance Co. v. Ohana Enterprises*,¹⁶ the court again rejected the insured’s argument that exploding batteries did not fall within the policy’s definition of “your product.” It noted that “your product” included any goods or products “sold by” the insured, and in that case the insured had sold the batteries that caused the injury.

Courts have repeatedly held that the products-completed operations hazard exclusion applies to claims involving exploding e-cigarettes or vape pens — leaving vape pen retailers, distributors and manufacturers without CGL insurance for such claims.

Thus, the products-completed operations hazard exclusion was deemed applicable to claims made against the retailer of the e-cigarette batteries.

A pending case in a North Carolina federal court will provide another opportunity for judicial review of the applicability of the products-completed operations hazard exclusion to an exploding vape pen claim.

In *Evanston Insurance Co. v. C9SS Inc.*, Evanston is seeking a declaratory judgment that it does not owe coverage to C9SS for an underlying lawsuit involving an exploding vape device.¹⁷

In the complaint, which was filed Nov. 5, Evanston asserts that the exclusion applies. More specifically, it alleges that the allegedly defective batteries fall within the definition of “your product” because they were sold, handled or distributed by C9SS.

As of the date this article was written, C9SS had not yet filed its answer in the declaratory judgment action. However, based upon the cases discussed above, the weight of legal authority appears to be on Evanston’s side.

As the foregoing shows, the products-completed operations hazard exclusion provides insurers with a strong tool to exclude coverage for injuries arising from exploding devices, while still providing CGL coverage to those involved with the manufacture, distribution and sale of vape pens and e-cigarettes.

The exclusion allows insurers to operate in the vape pen and e-cigarette space without assuming the additional liabilities unique to these devices and the batteries that power them.

However, uninformed vape pen and e-cigarette companies might end up purchasing insurance that does not cover exposures that they wanted to be protected against.

Manufacturers, distributors and retailers of vape products and e-cigarettes should consult with insurance industry professionals and counsel to assess their coverage needs and to guard against the liabilities that may arise from the injuries caused by exploding vape devices.

Most critically, the vape and e-cigarette industry must be aware that simply obtaining a CGL policy may not be enough if the policy contains a products-completed operations hazard exclusion.

Rather, to guard against the product liability claims that they are most likely to face if a device fails, they will need to ensure that they have adequate product liability coverage in place.

Moreover, those underwriting vape pen and e-cigarette risk must be aware of the potential product liability claims their insureds may face — and price their coverage accordingly.

Notes

¹ King, Gammon, and Rogers, *Electronic Cigarette Sales in the United States, 2013-2017*. *Journal of the American Medical Association*, 2018.

² Jones, Lora, *Vaping: How popular are e-cigarettes*, *BBC News*, September 15, 2019, available at: <https://bbc.in/37HJ1K4>.

³ *Id.*

⁴ Abbott, Brianna, *What We Know About Vaping-Related Lung Illness*, *The Wall Street Journal*, November 10, 2019, available at: <https://on.wsj.com/2QTfoid>.

⁵ Rossheim, Livingston, Soule, Zeraye and Thombs, *Electronic Cigarette Explosion and Burn Injuries, U.S. Emergency Departments 2015-2017*, *Tobacco Control*, 2019.

⁶ U.S. Fire Administration, *Electronic Cigarette Fires and Explosions in the United States, 2009 – 2016*, July 2017, available at: <https://bit.ly/39P1hmP>.

⁷ Horton, Alex, *Vape Pen Kills Man After Exploding in His Mouth*, *The Washington Post*, February 5, 2019, available at: <https://wapo.st/2T2lpfh>.

⁸ Manna, Nichole, *Family of Man Who Died in E-Cig Explosion Files Lawsuit against Shop Where it Happened*, *Fort Worth Star-Telegram*, April 1, 2019, available at: <https://bit.ly/2s3BOoB>.

⁹ Edwards, Erika, *Vape Pen Explodes, Shattering Teen’s Jaw Amid Rising Concerns Over Batteries*, *NBC News*, June 22, 2019, available at: <https://nbcnews.to/36vWtRe>.

¹⁰ Commercial General Liability Insurance, Insurance Information Institute, available at: <https://bit.ly/39P2HxF>.

¹¹ 3 Law of Liability Insurance § 16.02, New Appleman Law of Liability Insurance.

¹² <https://bit.ly/2tz2P3z>

¹³ 2018 WL 5098859 (C.D. Cal. Oct. 15, 2018).

¹⁴ 2019 WL 2030329 (E.D. Wash. Jan. 24, 2019).

¹⁵ 2017 WL 3996408 (E.D. Wash. Sept. 8, 2017).

¹⁶ 2017 WL 5569857 (W.D. Wash. Nov. 20, 2017).

¹⁷ 2019 WL 5799706 (E.D.N.C. Nov. 5, 2019).

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