Stopping the Sale of Cigarettes

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Micah Berman, *Tobacco Litigation, E-Cigarettes, and the Cigarette Endgame*, 13 **Ne. U. L. Rev.** 219 (2021).

If tort litigation could help drive asbestos and other dangerous products from the market, might it also do so for cigarettes? For several decades, that has been the hope of scholars such as Richard Daynard and other advocates. In *Tobacco Litigation, E-Cigarettes, and the Cigarette Endgame*, Micah Berman provides a blueprint for the elimination of cigarette sales in the United States.

As Berman observes, "under general principles of tort law, if a less harmful 'reasonable alternative design' of a product is available, then the more harmful version is deemed to be defectively designed and cannot be sold without liability for the harm it causes." E-cigarettes would seem to be a less harmful, reasonable alternative design to traditional cigarettes.

To be sure, as Berman writes, tobacco litigation has failed as a strategy before, and it has done so in three distinct waves. In the first wave, which ran from the 1950s to the 1980s, cases were brought by lung cancer victims or their families. Cigarette manufacturers were able to fend off such cases through either aggressive "scorched earth" pre-trial tactics or, for the few cases that went to trial, by arguing that the connection between smoking and lung cancer had not been conclusively established. In wave two, from the 1980s to the 1990s, manufacturers had to acknowledge the connection between smoking and cancer, and they successfully argued that the risks of smoking were common knowledge and that smokers voluntarily assumed the risks to their health from smoking.

But the wall began to crumble in the early 1990s after the disclosure in second-wave litigation of internal documents revealing that manufacturers had hidden their knowledge of smoking's health risks and suppressed efforts to develop a less harmful cigarette. In some states, individual plaintiffs prevailed, costing the industry hundreds of millions of dollars in payments overall. In addition, suits brought by state attorneys general resulted in the 1998 Master Settlement Agreement (MSA) and its $200 billion in payments by industry. Still, cigarette manufacturers could shift much of their litigation costs to smokers by raising prices, and the MSA protected industry from suits by states for future-smoking-related costs.

Here is where e-cigarettes come in. As with traditional cigarettes, they serve as a delivery system for nicotine, which satisfies the smoker. But e-cigarettes supply their nicotine by using heat to vaporize a nicotine-containing liquid rather than through the burning of tobacco. Hence, the nicotine is delivered without the tar and other toxic substances that come in the smoke of a traditional cigarette. This is not to say that e-cigarettes are harmless—they are not—but even while we do not know exactly how harmful they are, they are certainly safer than traditional cigarettes. On their websites, cigarette manufacturers explicitly cite the reduced harm to smokers from e-cigarettes. This raises the question whether e-cigarettes represent a "reasonable alternative design" for traditional cigarettes and therefore expose cigarette manufacturers to serious tort liability for marketing a product that is unreasonably dangerous to the health of users.

As Berman discusses, a few obstacles exist to a theory of reasonable alternative design. For example, e-

cigarettes have only been marketed recently, and it takes decades of smoking for someone to suffer the kind of harm to health that would support a viable case. In addition, plaintiffs would have to establish that smokers would consider e-cigarettes to be "as satisfying as regular cigarettes." Relatedly, are e-cigarettes an alternative design for traditional cigarettes, or are they a different product? Are cigarettes essentially nicotine-delivery systems, in which case e-cigarettes would be a reasonable alternative, or do traditional cigarettes provide benefits beyond nicotine that e-cigarettes do not deliver?

Still, none of these obstacles are insurmountable. For example, even though e-cigarettes have not been available for purchase very long, major cigarette manufacturers had developed and patented the technologies used for e-cigarettes starting in the 1960s. The companies decided against bringing e-cigarettes to market not because of technical challenges, but because they did not want to cannibalize sales from their traditional cigarettes or undermine their public claims that nicotine was not addictive and that they were not manipulating nicotine levels in traditional cigarettes. Tort liability has the potential to doom sales of traditional cigarettes.

In addition, the effort to remove traditional cigarettes from the market can proceed on more than one front. Besides using the threat of tort liability, tobacco control advocates can encourage legislators to ban the sale of traditional cigarettes. As Berman observes, we might have finally reached a time in which the long-held goal of eliminating traditional cigarettes is an achievable goal.

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