

# SMOKESHOP

THE INDUSTRY AUTHORITY ON TOBACCO RETAILING

Official Publication of the International Premium Cigar & Pipe Retailers Association (IPCPR)

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## China: The Next Big Name in Premium Cigars?

- > **Alex Goldman:** Orchestrating Royal Gold's Debut in Premium Cigars
- > **Drafting Federal OTP Regulations:** The Nine Time-Consuming Steps
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## E-Cigarette Marketing: Misleading or Puffery?

*The honeymoon might be over as plaintiffs' lawyers fault e-cigarette marketing even in advance of FDA regulation of the segment.*

>BY BRYAN M. HAYNES AND MICHAEL LACY

In what could possibly become a trend, a consumer in California has filed a class action lawsuit against Njoy, Inc. and its former parent, Sottera, Inc., claiming that Njoy's advertisements misled him into purchasing Njoy e-cigarettes. The consumer's complaint takes issue with Njoy's marketing slogan "everything you like about smoking without the things you

methods of competition and unfair or deceptive acts or practices, as well as California's Unfair Competition Law, which prohibits unfair or fraudulent business practices. The consumer also claims that Njoy's e-cigarettes breach their warranty by omitting information regarding potential health risks in their advertising materials. The complaint demands that Njoy disgorge all of the

> Class action complaints, like the one filed against Njoy, are being used more and more by attorneys who claim that their clients have been the victim of improper business practices.

don't." While the slogan is susceptible to many different interpretations, the consumer asserts that it is meant to mislead consumers into thinking that e-cigarettes do not pose the health risks that cigarettes do. According to the consumer, Njoy's e-cigarettes contain known carcinogens and toxic chemicals, and it is still unknown whether Njoy's e-cigarettes cause long-term health problems. The consumer also claims that Njoy's tagline, "Resolution Solution," misleads consumers by implying that its e-cigarettes are smoking cessation devices.

The consumer's lawsuit, which is pending in federal court in California, seeks to assert claims on behalf of all consumers who purchased Njoy e-cigarettes in or from California. The complaint tries to take advantage of California's expansive consumer protection laws, including its Legal Remedies Act, which targets unfair

profits it has made as a result of the allegedly improper conduct, and it seeks to require Njoy to disclose information regarding the alleged health risks of its e-cigarettes.

Class action complaints like the one filed against Njoy are being used more and more by attorneys who claim that their clients have been the victim of improper business practices. Unlike typical lawsuits in which the defendant is dealing with a single plaintiff, class action lawsuits can be used to assert claims on behalf of hundreds of thousands of consumers who have allegedly suffered the same injury. In some instances, the mere possibility of being exposed to the claims of so many consumers causes the matter to be resolved quickly. In the Njoy case, it is uncertain whether the plaintiff's attempt to assert claims on behalf of all consumers who purchased Njoy e-cigarettes in or from California will be

successful. Class actions may only proceed if all of the members of the class have the same claim, which in the case of Njoy, means that each consumer has to have been misled by the purportedly deceiving advertisements. But even if the consumer who has sued Njoy must go at it alone, he may still force Njoy to change its marketing materials if he is successful.

These class action consumer claims often follow—or prompt—state and federal regulators to take action against those accused of wrongdoing. Depending on the nature of the alleged claims, one or more state attorneys general will investigate the claims and possibly try to force the company to pay substantial fines and change its business practices. Njoy is such an example. In 2010, Sottera and the Attorney General of California entered into a consent judgment, which required Sottera to include certain warnings on its packaging, including warnings relating to the inclusion of nicotine in its e-cigarettes and its e-cigarettes being used as smoking cessation devices.

As sales and competition in the e-cigarette market increase, so too could

>E-cigarettes are classified as tobacco products and are not regulated by the FDA, but may not make any health-related claims. Some marketing campaigns come very close, say some marketing analysts, while traditional anti-smoking groups are simply enraged that e-cig marketing is "normalizing" public impressions of smoking.

the types of lawsuits like the one filed against Njoy. But it's not just consumers who may bring them. Businesses can utilize the same consumer protection

currently available evidence indicates that electronic cigarettes are by far a less harmful alternative to smoking and significant health benefits are expected

ported trace levels of tobacco-specific nitrosamines ("TSNAs," the cancer-causing agents in cigarettes) in certain e-liquid, those levels apparently were comparable to those found in FDA-approved smoking cessation products and TSNAs were not found in the vapor. The FDA also reported the presence of diethylene glycol, an ingredient found in antifreeze, although this was apparently a nontoxic amount and also not found in the vapor.

Nevertheless, as e-cigarettes become an increasingly potent force in the marketplace, they will be subject to increased legal scrutiny, not only from plaintiffs' attorneys, but also from state and federal regulators, as well as state legislatures. **S**

> While taxation of electronic cigarettes exists in one state and is being considered by several others, it is not expanding at the pace of laws governing youth access and public use restrictions.

statutes against their competitors. To avoid these lawsuits, e-cigarette companies should ask themselves, "are our marketing materials misleading or just puffery?"

In any event, the claim that e-cigarette ads are misleading is belied by all available evidence. There are no studies showing that the harms of tobacco cigarettes are present in electronic cigarettes. In fact, a recent peer reviewed study states that "[c]ur-

in smokers who switch from tobacco to electronic cigarettes." Another study by Professor Igor Burstyn of Drexel University found that chemicals in e-cigarettes pose no health issues for users or bystanders. Dr. Burstyn concluded that the levels of e-cigarette contaminants are insignificant, and far below any levels that would pose a health risk.

Even the studies cited in the plaintiffs' complaint fall flat after careful scrutiny. Although the FDA has re-

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