

# Mounting lawsuits against Juul reminiscent of early tobacco litigation

Catherine Ho\_April 21, 2019 Updated: April 21, 2019 12:19 p.m.



Jared and Erin NesSmith of Florida are suing Juul, saying the San Francisco e-cigarette company got their daughter, identified as A.N., hooked on vaping. Photo: Karen Arango / Special to The Chronicle

The 15-year-old girl's path to nicotine addiction is familiar to many teens of the "Juul generation": Initially drawn to the vapor's sweet mango flavor, she started taking puffs from a Juul e-cigarette when she was 14, not knowing it contained nicotine, the same addictive substance found in tobacco cigarettes.

Those are among the claims the girl's parents, Erin and Jared NesSmith, made in a lawsuit filed in Florida last week against Juul. Their complaint also says the girl, identified as A.N., has had seizures after vaping — a potential side effect of nicotine poisoning if one accidentally swallows liquid nicotine. The suit also names Altria, the parent company of Philip Morris, which is seeking regulatory approval to invest \$12.8 billion for a 35 percent stake in Juul.

The NesSmiths' suit is the latest of four actions brought against Juul in Florida, New York and Pennsylvania since last year, in which parents of teenagers say their children did not know Juul products contained nicotine when they started using them, and later became addicted.

In a separate case in federal court in San Francisco, two adult vapers are seeking class-action status for similar claims against Juul, saying they were not properly warned that the e-cigarettes are addictive.

The batch of lawsuits — which is taking shape at the same time that U.S. senators and state attorneys general in Massachusetts and North Carolina are investigating many of the same marketing and sales practices named in the complaints — could mark the beginnings of a legal strategy similar to the one used by lawyers, state attorneys general and the federal government in the 1990s, when they sued the four largest U.S. cigarette manufacturers: Philip Morris, R.J. Reynolds, Brown & Williamson and Lorillard. The actions collectively won billions of dollars in settlements and verdicts for sick smokers and their families, forced the tobacco industry to scale back advertising on billboards and at sporting events, and prohibited tobacco companies from claiming their products are not addictive.

“These are generally the same kinds of theories used in the tobacco litigation before, pretty successfully,” said Stanton Glantz, director of the UCSF Center for Tobacco Control Research and Education, of the lawsuits against Juul, the largest e-cigarette maker with an estimated 70 percent market share in the United States. “This is kind of the opening shot in the litigation sphere, at least at a private level.”

A Juul spokesman said the company is reviewing the Florida lawsuit.

“Juul is intended for current adult smokers only,” said Juul spokesman Ted Kwong. “We don’t want any non-nicotine user to use our products, especially youth.”

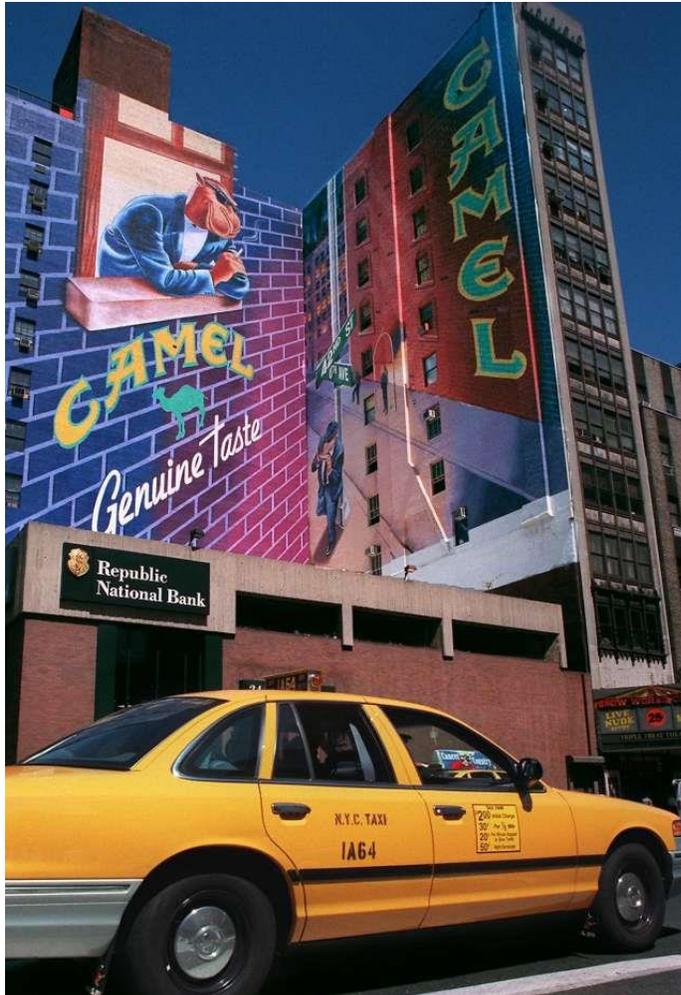
In response to the other suits, Kwong said Juul has developed an aggressive plan to combat underage use. Last year, the company pulled flavored podsoff of store shelves, though they are still available online, and imposed stricter age verification processes for online sales.

“To the extent these cases allege otherwise, they are without merit and we will defend our mission throughout this process,” he said in a statement.

Attorneys for Juul in the California case have sought to dismiss the matter, saying, among other defenses, that the claims of false advertising are not specific enough because the plaintiffs do not cite which ads they found misleading or deceptive, according to court documents. Juul is clear that its pods contain nicotine, and the label has a warning that the product contains chemicals known to cause cancer and birth defects, Juul attorneys say in motions to dismiss the lawsuit.

Many of the suits allege that Juul broke laws prohibiting companies from making false, misleading or deceptive statements. Some seek unspecified monetary damages from Juul; others want Juul to make its marketing and products less appealing to children, and make it clearer that its products are addictive.

Juul appears to have already halted much of the youth-oriented marketing practices described in the suits, which the company used when it first entered the market in 2015. Last year, amid pressure from federal regulators concerned about the rise in vaping among middle and high



school students, Juul shut down its social media accounts and shifted to promoting its products as alternatives for adult cigarette smokers.

Central to some of the Juul lawsuits is the allegation that, particularly in its early days, Juul used young, attractive models in ads and promoted its products heavily on social networks such as Instagram, knowing that they are frequented by minors.

Some see echoes of a 1991 lawsuit that San Francisco attorney Janet Mangini brought against R.J. Reynolds, claiming that the Joe Camel cartoon mascot, which appeared in the company's cigarette ads in the 1980s and '90s, violated California's unfair business practices law by appealing to minors. R.J. Reynolds paid \$10 million to settle the suit, around the same time a separate nationwide settlement resolving cases against the tobacco industry banned the use of cartoon characters in cigarette ads.

"This is definitely the template for holding the cigarette companies liable," said Mark Gottlieb, an attorney with the Public Health Advocacy Institute, a nonprofit group that researches tobacco use and advises local governments on tobacco prevention laws. "Not only has litigation against the tobacco industry resulted in tens of billions of dollars in settlements and verdicts, but it's also cast a light on the industry's practices, which may have accelerated the regulatory approach to tobacco products. I would think there would be a similar impact resulting from this increasingly widespread litigation against Juul Labs."

But there is one major difference. At the time people and attorneys general were successfully suing the tobacco industry in the '90s, there was well-established scientific evidence on the long-term health effects of smoking, such as cancer, emphysema and other diseases. That evidence has yet to emerge about Juul or any other vaping products, in large part because e-cigarettes in general are relatively new; Juul has been on the market only since 2015.

Still, if the cases can prove Juul engaged in deceptive marketing tactics under consumer protection laws, the company could be liable for paying back the purchase price, times a multiplier, for products sold in the states where the cases are pending, Gottlieb said.

"These may not be \$50 billion cases but there is an injury if there is a deceptive sales practice and advertising practice," he said. "It's likely the plaintiffs will be able to make that argument."

The law firm representing the Florida family, Schlesinger Law Offices, was one of many that sued the tobacco industry more than a decade ago in what became known as the Engle progeny cases, which won hundreds of millions of dollars in verdicts for families and smokers. They say they are not borrowing tactics of tobacco litigation for their Juul case, but rather “it’s that Juul is repeating tobacco companies’ conduct,” said attorney Jonathan Gdanski.

In side-by-side comparisons of Marlboro and Juul ads — included in some of the lawsuits and compiled by Stanford tobacco researcher Dr. Robert Jackler — the similarities are striking, with Juul products evoking many of the same colors, shapes and packaging design as Marlboro cigarettes.

“Juul has engaged in the exact kind of behavior that made the cigarette industry so vulnerable to litigation,” said Matthew Myers, president of the advocacy group Campaign for Tobacco-Free Kids.

“They use the exact kinds of images in their marketing as cigarette companies on media that disproportionately impacts youth. They engaged in practices that misled young people about the relative safety of the product ... multiple surveys demonstrate young people didn’t realize it contained nicotine, often, at all.”

The way Juul has disclosed nicotine content in its products has evolved over time, from discreet to more prominent, according to a 2019 [analysis](#) by Jackler of Stanford, whose team studied Juul marketing materials from 2015 to 2018.

A review of 171 promotional emails in 2015 and 2016 found no mention of nicotine content.

After that, emails included fine print about nicotine’s addictive properties at the bottom of the email. Juul’s Twitter feed of nearly 2,700 tweets did not include a nicotine warning until 2017. In 2017 and 2018, Juul’s Instagram posts included warnings that its products contain nicotine, an addictive chemical. In 2018, the warning text expanded and got more specific, saying nicotine can be poisonous and to avoid contact with skin and eyes.

The FDA did not require nicotine warnings on e-cigarette ads and product packaging until 2018.

“We have always followed the appropriate regulatory guidelines regarding nicotine disclosures,” Juul said in a statement. “Juul pods have always indicated that they contain nicotine and when FDA required all e-cigarette manufacturers to place additional warnings on its packaging and in its advertising, Juul Labs promptly complied with those requirements.”