

# Toxic Tort Claims Relating to Diesel Exhaust Exposure

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# What Is Diesel Exhaust?



# Where Does it Come From?

- Ships
- Trains
- Trucks
- Construction equipment
- Heavy machinery



# How Is Diesel Exhaust Created?

- Diesel fuel
- Combusted within engine
- Filtering systems
- “Regeneration”/cleaning systems



# What is Actually Emitted Depends On:

- Type of fuel
- Engine specifications
- Method of use/duty load
- Emissions treatment
- Maintenance and upkeep
- Efficiency of combustion

# Four Key Points:

1. The type and amount of emissions differ for **each vehicle**.  
Not just between makes and models, but between individual vehicles.
2. Diesel engines, exhaust systems, and **emissions treatment** are continually evolving.
3. Studies are **outdated**, and not relevant in any event unless they relate to your vehicle.
4. **This is generally not understood** or appreciated.

# NIOSH, 1988



National Institute of Occupational Safety  
and Health Report on Diesel Exhaust:

"Diesel exhaust" is a potential occupational carcinogen.

# IARC, 1988

International Agency for Research on Cancer



International Agency for Research on Cancer  
(part of the World Health Organization) classified  
"diesel exhaust" as *probably* carcinogenic to humans.

# IARC, 2012

"Diesel exhaust" *is* carcinogenic to humans.





"Diesel exhaust" classified as likely to be carcinogenic to humans by inhalation.

“Long-term exposure to diesel exhaust is likely to pose a lung cancer hazard.”

. . . and can cause “heart and lung disease and a range of other health effects.”

# California



The State of California identified diesel exhaust as a "chemical" known to cause cancer in conjunction with Proposition 65.

## CARB



California Air Resources Board identified diesel particulate matter as a toxic air contaminant, noting relationships with lung cancer, chronic bronchitis & reduced pulmonary function.

# US Department of Health & Human Services National Toxicology Program

December 21, 2021:

- Exposure to “diesel exhaust **particulates** is reasonably anticipated to be a human carcinogen.”

# Can DE Constituents Cause Harm?

Dose-response factors:

1. What are you exposed to?
2. In what quantities?
3. For how long?
4. How frequently?



# Who are potential plaintiffs?

National Cancer Institute:

12M American workers are exposed to diesel exhaust in the workplace.

- Could become another asbestos docket.

# Typical Allegations:

- Cognitive
- Respiratory
- Cardiac
- Cancer
- Vision loss
- Hearing loss

# What Actually Could be Caused Is A Question For Experts—Specific Causation

1. *Difficult* to sort out.

Plaintiffs associate *everything* with DE.  
Medical Hx is critical to understanding true cause.  
You need the right subject-matter expert.

## 2. *Expensive* to sort out—Med Hx; IME; etc.

- a) Cognitive—baseline tests rarely exist
- b) Respiratory—same
- c) Must isolate DE from environmental factors

Other sources produce many of the same constituents

- Smoking
- Industrial exposure
- BBQ grill
- Toaster
- List is long...



# Plaintiffs' Claims:

FELA/Locomotive Inspection Act

Jones Act

RCRA

- Negligence
- Strict products liability

# Plaintiffs' Claims are Simple:

- Defendant's product emits DE  
(directly *or by virtue of* after-treatment)
- DE is bad
- Plaintiff was exposed to DE
- Plaintiff is sick

# Defense Case Is More Complicated

## 1. Engine emits DE?

- a) Necessary feature of the engine
- b) EPA certified
- c) Claims are preempted under the Clean Air Act
- d) Not problematic/harmful
- e) Not a latent hazard → Not defective
- f) Open and obvious
- g) Plaintiff is a "sophisticated user"

# Defense Case Is More Complicated

## 2. DE is bad?

- a) How is this known?
- b) Based on general studies or vehicle tests?
- c) Studies of old or new diesel technology?
- d) What is impact of after-treatment/DPF technology?
- e) What is really being emitted?
  - Complete combustion/vehicle factors



# Defense Case Is More Complicated

## 3. Plaintiff exposed to DE?

- a) What constituents of DE were you exposed to?
- b) What was the route of exposure?
- c) **Inspect vehicles**—maintenance, repairs, changes from certified condition at date of sale?
- d) **Site air quality testing** also necessary
- e) What other sources of exposure to the same constituents?

# Defense Case Is More Complicated

## 4. Plaintiff is sick?

- a) Link to exposure to constituents is key
- b) Similar exposures from other sources?
- c) Dose-response analysis
- d) Medical history is critical
- e) Independent medical exams required
- f) **Must fight on causation**

# These Are Not Simple Cases

Finding the truth requires:

- Extensive discovery
- Very specialized experts
- Great science
- Lengthy explanation to show how plaintiffs' claims might not be accurate

# Two Things Could Make These Claims Lucrative for Plaintiffs' Counsel:

1. Aggregating claims into a mass tort.
2. Allowing them to profit through settlement of individual claims, leading to more filings.

Don't let this happen.

All defendants need to stick together.



# Suggested Best Practices:

1. Record tests of emissions and other design criteria **at time of manufacture**
2. Memorialize your and your vendors' compliance and certification evidence for preemption and state of the art defenses
3. Instruct vehicle purchasers regarding recommended fuel and how and when they must inspect, maintain, and repair the vehicle

# Suggested Best Practices:

4. Modify contracts and T&C to require **customers** to accept responsibility for not properly maintaining the vehicle
5. Warn/advise **operators** and **unions** of potential hazards to make them “sophisticated users” and to make the hazard open and obvious
6. Maintain chronology and supporting evidence of evolution and state of the art of your products
7. Promptly investigate any claims of DE injury

# Suggested Best Practices:

8. Maintain library of publicly available materials discussing potential hazards of DE
9. Utilize *Lone Pine* procedures to require plaintiffs to satisfy both general and specific causation given the variability between the constituents found in DE
10. Even in mass torts, it is critical to test the veracity and severity of plaintiffs' claims through depositions and/or independent medical exams
11. Check your insurance coverage for pollution exclusions, etc.

# Thank You!

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