



**LITIGATING
AGAINST
GUN
MANUFACTURERS**

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Pick up a newspaper any day of the week and you will find a ready supply of horrific shooting incidents. A three year old finds her parents' gun and, thinking it is a toy, playfully pulls the trigger, killing herself.¹ A 13 year old obtains a gun and uses it to murder a teacher.²

These sorts of incidents occur constantly. In 1998, over 30,000 people were killed with guns in the United States, more than one every 20 minutes.³ At least three times that many suffer nonfatal injuries from shootings.⁴ Perhaps more tragic than the number is the fact that many of these shootings could be prevented if gun makers simply exercised reasonable care in the manner in which they do business, both in how they design guns and how they sell them.

Gun manufacturers have long known ways to prevent many deaths and injuries caused by guns. They could control the distribution of their product to prevent guns from being diverted to the criminal market, and they could implement safety features to save lives of many children and adults. Gun makers, however, have simply refused to take those simple, reasonable measures. One reason they have been able to get away with these irresponsible practices is that their lobbying clout has prevented legislatures from requiring them to act responsibly, as is required of other industries.

For example, Congress carved out a unique exemption from the Consumer Product Safety Act, making guns the sole consumer product in the United States that is not compelled by the federal government to implement life-saving devices into their designs. Suspect sales that are common sources for crime guns are not prohibited. For instance, all but a handful of states allow gun dealers to sell as many guns as they wish to purchasers, even though such multiple sales are often made to gun traffickers.

Another reason the industry has not acted responsibly to prevent gun injuries and deaths is that it is not in its financial interest to do so, for it generally has faced

no financial costs when it engages in practices that cause harm. Selling guns in a manner that allows them to be easily obtained by criminals brings as much profit as sales to responsible people—more, in fact, since if sales intended for the criminal market were eliminated, overall gun sales would decrease. Also, incorporating safety features increases manufacturers' costs (though often by just a few cents). Ordinarily,

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manufacturer.**

ily, tort litigation would provide a counterweight to these socially harmful incentives, placing a cost on unreasonably dangerous activities that expose others to risks of harm, but guns remain an extremely underlitigated product.

With the recent spate of suits brought against the industry by governmental entities and private victims, that is beginning to change. Victims and courts are realizing that the industry's refusal to do what it can to prevent deaths and injuries provides ample grounds to recover against gun makers and sellers in many shooting cases. Tort litigation can encourage the industry to behave responsibly, while compensating innocent victims of the industry's irresponsibility.

Although gun makers and sellers would prefer to characterize litigation against them as novel attempts to transform or expand tort law, lawsuits against the gun

industry are based on the most fundamental tort principles. The primary principles are negligence, nuisance, and products liability. These three causes of action will be examined in turn.

Negligence

The longstanding principle of negligence imposes on all in society the duty to use reasonable care so as to minimize the risk of foreseeable injury to others. Numerous cases have found gun owners and sellers liable for criminal or unintentional shootings that result from negligently enabling an irresponsible person to obtain a gun.⁵

These same principles can be applied against gun manufacturers for their negligent distribution and marketing of guns. As a general matter, gun manufacturers are far more culpable than those dealers and gun owners who have been found liable, since gun makers control the distribution and sale of thousands of guns. They have the power and ability to greatly reduce (if not eliminate) the criminal gun market and to prevent countless criminal shootings. Yet, they intentionally choose to engage in business practices that endanger the public in order to maximize profits. These negligent distribution and marketing cases are meeting with increasing success in the courts.⁶

Negligence principles were successfully applied to hold gun manufacturers liable for criminal shootings in *Hamilton v. Accu-Tek*.⁷ Several shooting victims and their families sued several major handgun manufacturers. They claimed that the manufacturers negligently distributed handguns, thereby facilitating and maintaining the unregulated secondary market by which juveniles and others prohibited from legally possessing guns easily obtain them. The plaintiffs also claimed the manufacturers "oversupply" states that have lenient gun laws with more guns than the legitimate gun market demands, knowing that the excess will be trafficked to criminal markets in New York and other areas with tighter gun laws.

The plaintiffs proved that manufacturers have the ability to supervise and regulate the distribution of their product to

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prevent guns from being funneled into the criminal market. Expert testimony demonstrated that manufacturers could place conditions in distribution agreements that would obligate distributors and dealers to engage in responsible sales practices, but they choose to involve themselves in distribution only on issues of retail prices, rather than criminal diversion.

After a month-long trial, the jury found 15 gun manufacturers negligent, nine of which were held to have proximately caused injury as a result, and awarded \$4 million in damages to one plaintiff, slightly over \$500,000 of which was recoverable (based on the market share of the three defendants found liable for that injury). In a lengthy, well-reasoned opinion, Judge Jack B. Weinstein of the Eastern District of New York denied the defendants' motion to dismiss the verdict and render judgment for the defendants as a matter of law. The court held that the manufacturers owed a duty of care in marketing and distributing products under New York negligence law and could be liable for criminal shootings resulting from a breach of that duty. The court described the duty as requiring the manufacturers "to exercise reasonable care in marketing and distributing their products so as to guard against the risk of [their] criminal misuse."⁸

The court further explained the duty as one by "manufacturers of a uniquely hazardous product, designed to kill and wound human beings, to take reasonable steps available at the point of their sale to primary distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them."⁹

The court held that the gun manufacturers not only created a risk of foreseeable harm to the plaintiffs, but had the ability to avoid doing so by changing the manner in

which they distribute their products. The court also recognized that manufacturers' relationship with downstream distributors and retailers enable manufacturers to control the latter's conduct for the protection of prospective victims.¹⁰

A slightly different negligence theory was accepted by the court of appeal of California in *Merrill v. Navegar, Inc.*, the first (and, as of this writing, only) appellate decision holding that an assault weapon manufacturer may be liable in negligence for a criminal shooting using its product.¹¹ The court found that a gun manufacturer "owed appellants a duty to exercise reasonable care not to manufacture, market, and distribute [its assault weapons] in a manner that increases the risk of harm inherent in the presence of handguns in society."¹²

The court held that a gun maker could be found negligent for manufacturing, distributing, and marketing to the general public a high-capacity, rapid-fire, military-style assault weapon uniquely suited for mass shootings and lacking legitimate civilian uses, and could be held liable for a multiple shooting where its weapons were used. The court recognized that under California law the general rule is that each person has a duty to use ordinary care and is liable for injuries caused by his or her failure to exercise reasonable care under the circumstances.¹³ The court found no reason to exempt the makers of deadly weapons from that general duty.

The court rejected the argument often made by gun manufacturers that imposing liability on Navegar would effectively constitute a judicial ban on the manufacture and sale of a legal product. The court noted that awarding damages for the consequences of conduct is not akin to banning or enjoining that conduct. It explained, "Making an activity tortious forces the people who derive benefit from it to internalize

the costs associated with it, thereby making sure that the activity will only be undertaken if it is desired by enough people to cover its costs. It does not proscribe it altogether."¹⁴

Finally, the court held that a jury could find that Navegar's negligence was a cause of the shooting at issue.

Suits by government entities

Similar negligence theories have been asserted in suits brought by 32 cities and counties and New York state against the gun industry. While trial courts have split on the viability of these cases, several rulings have affirmed the right to recover against gun manufacturers for damages resulting from their negligence.

The U.S. District Court for the Northern District of Ohio refused to dismiss a negligent design claim brought against various gun manufacturers by the city of Cleveland. The court held that "[a] duty of care for the protection of a plaintiff against an unreasonable risk of injury is owed to all people 'to whom injury may reasonably be anticipated.'"¹⁵

A Massachusetts trial court also denied gun makers' motion to dismiss a case brought by the city of Boston, explaining that if gun makers created an illegal, secondary firearms market by failing to exercise adequate control over the distribution of their firearms, "defendants' conduct unreasonably exposed plaintiffs to a risk of harm," and they may be liable for the damage caused by their negligence.¹⁶

Other decisions and commentators have agreed that victims can recover in negligence against gun manufacturers.¹⁷ Additional support for negligent distribution claims can be found in negligence cases brought against other, less dangerous, product manufacturers.

In *Direct Sales Co. v. United States*, the U.S. Supreme Court affirmed the conspiracy conviction of a pharmaceutical distrib-

utor that had received warnings from the Bureau of Narcotics that it was the source of supply for a disproportionate number of physicians illegally dispensing morphine.¹⁸ The court in *Hunnings v. Texaco, Inc.*, held that a manufacturer of mineral spirits could be liable in negligence where its products were sold to a distributor, then to a wholesaler, then to a retailer, who sold the spirits packaged in a used milk container to the plaintiffs, whose child died after drinking from the container.¹⁹

Similarly, in *Suchomajcz v. Hummel Chemical Co.*, the court held that a chemical manufacturer could be liable for injuries caused by firecracker assembly kits using its product.²⁰

Nuisance

Another potent legal theory by which victims of gun crime can recover against gun makers is public nuisance. A public nuisance is an "unreasonable interference with a right common to the general public."²¹

Several suits against the gun industry brought by government entities and private citizens have claimed that because the existence of the thriving underground gun market (that results from gun manufacturers' negligent distribution) constitutes a public nuisance, those manufacturers may be liable for shootings resulting from that market.²²

All factors relevant to finding that an interference with a common right is unreasonable and a public nuisance weigh in favor of such a claim: (1) significant interference with public health, safety, peace, comfort, or convenience; (2) conduct contrary to a statute, ordinance, or regulation; (3) conduct in which the defendant continues to engage despite knowing, or having reason to know, of significant effect on the public's rights.²³

By enabling criminals and others who are legally prohibited from possessing guns to be armed, gun makers' distribution practices, and the underground gun

market that results, significantly interfere with the safety of the public and enable the continual circumvention of state and federal guns laws. Yet, these gun manufacturers persist in their hands-off distribution approach despite being aware that it supplies the criminal market.

In a recent Illinois suit, *Ceriale v. Smith & Wesson Corp.*, the trial court upheld the right of individual victims of underage shooters to recover against gun manufacturers under public nuisance, even though the court held that, under Illinois law, a gun manufacturer could not be liable for such injuries under a negligent distribution theory.²⁴ The court held that the public had a right to be free from the risk of danger posed by gun manufacturers' irresponsible marketing and distribution practices even if manufacturers did not owe the public a duty to use reasonable care in their distribution.

The trial court in a lawsuit brought by the city of Detroit and Wayne County,

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Michigan, agreed that gun manufacturers' distribution practices can constitute a public nuisance and that the claim is distinct and does not depend on plaintiffs' ability to maintain a negligence action.²⁵ Another trial court upheld the city of Boston's right to bring a public nuisance claim. Commentators have provided further support for these claims.²⁶

Products liability

Products liability law also provides a sound basis to recover against gun manufacturers for shootings that they could prevent by implementing feasible design changes.

Gun manufacturers may be held liable for many unintentional shootings under the risk/utility test for products liability. Under the test, a product is defective if the risk of danger inherent in the challenged design outweighs the benefits of the design.²⁷

Even "perfectly" manufactured products are defective if they are unsafe because of the absence of a safety device, or because they lack adequate warnings and instructions. Products must be made to prevent injury when foreseeably misused, even if such (mis)use was not "intended." Several courts have found that gun manufacturers may be liable for failing to include these safety features where preventable shootings result.²⁸

Plaintiffs carry their burden to prevail where, as is often the case in unintentional shootings, the user would not have fired the gun if it had been designed to alert users that a round was in the chamber or if an internal locking device had been incorporated that would have prevented unauthorized users from firing it. Gun makers will have great difficulty carrying their burden to prove that the benefits of their design choice (not including feasible, life-saving safety features) outweigh the risks.

There is no benefit to designing a gun so that it can be fired by unauthorized, irresponsible users or so that it does not alert users that it is loaded. These attrib-

utes only put users and innocent victims at grave risk of being shot, either accidentally or intentionally. As it is feasible to make a gun without these dangerous attributes, most guns are defective under the risk/utility test.

Virtually all guns fail to include numerous feasible safety measures that would prevent many unintentional shootings, including the following:

Personalized gun technology

Gun manufacturers have long known that numerous people are killed each year when people who should not be handling guns have access to them. Often a juvenile finds a parent's gun and, while playing with it, unintentionally shoots himself or herself, a friend, or a sibling.

To prevent these shootings, safety features have been invented that prevent unauthorized users from firing a gun, but gun makers have refused to implement them. Guns could easily be made with an internal lock, so that they could only be fired by someone who held the key or knew the combination. One device, "Saf-T-Lok," was patented in 1989.

A recently enacted Maryland law will require all handguns sold in Maryland to include comparable built-in locks.²⁹ More high-tech "user recognition" technology is also feasible: At least one handgun manufacturer and one long gun manufacturer have announced that they will soon be producing a gun that will fire only if it recognizes the user (e.g., by recognizing a chip embedded in a ring worn by the user or by reading the fingerprint of the user). Under the recent settlement agreement with the federal government and some cities and states, Smith & Wesson has committed to include such technology in all new models beginning in 2003.

Chamber loaded indicators

For at least a century gun makers have known that many people are killed

because users of all ages are deceived into thinking that a pistol is not loaded when the magazine (in which the bullets are loaded) is empty or removed, and then unintentionally firing the "hidden bullet" in the chamber. Feasible safety features have long existed that would prevent these tragic incidents. One device is a chamber loaded indicator, which would indicate to the user when a round is in the chamber.

Despite their efficacy, most guns do not include any chamber indicators, and those that do are grossly ineffective. For example, Beretta markets some guns by telling customers that its chamber loaded indicator will inform them that a gun is loaded. Yet the unlabeled tiny red dot that protrudes slightly on one side when the chamber is loaded makes it virtually impossible to ascertain whether the gun is loaded. Beretta has conceded that the feature was designed for highly trained law enforcement and military users, not civilians.

Magazine disconnect safeties

Many shootings caused by the hidden-bullet problem could be prevented by implementing a magazine disconnect safety, an inexpensive device (at a cost of under 25 cents). The device disables a pistol from firing when the magazine is removed.

The feature was designed in 1910 because of the dangerous scenario—common even then—that occurs when someone removes a pistol's magazine and then assumes that the gun is unloaded, unaware of the live round in the chamber. Despite the fact that magazine disconnects are inexpensive and effective, they are not included in most pistols.

Potentially strong cases

To determine whether a shooting makes a strong case against the gun manufacturer, one must closely examine all aspects of the shooting. Although this article does not suggest a blueprint for the perfect negligent gun distribution or products liability

ity case, there are a few key facts to which one should pay particular attention.

For potential negligent distribution cases, practitioners should consider: How did the shooter get the gun? They need to follow the history of the gun, from the manufacturer's initial sale to the sale to the shooter. If any of the sales were illegal or suspect (such as a sale without a background check), those facts can help support a negligent distribution claim.

If the gun was sold in the underground market (which will almost always be the case where the shooter was prohibited from buying guns), there may be a negligence and/or nuisance claim. Also, if the dealer had a history of selling guns traced to crime, that could show that the manufacturer was on special notice to exercise greater supervision, thus strengthening a case against the manufacturer or distributor.

For potential products liability cases, practitioners should consider: Was the shooter authorized to use the gun? If not, personalized gun technology could have prevented the shooting, and there may be a products liability claim. Also, did the shooter realize the gun was loaded? If not, a chamber loaded indicator or magazine disconnect safety could have prevented the shooting, and there may be a viable design claim.

Litigation tips

After overcoming the legal obstacles needed to present a case before a jury, plaintiffs face other problems that, though difficult, are surmountable. Among them, gun makers can be expected to argue that there are more culpable parties more responsible for the shooting than the manufacturer—the shooter or, in many unintentional shooting cases involving children, the parents who negligently enabled a minor to obtain a gun. Gun makers will argue that if they are found liable, the jury will be allowing these other parties to “escape responsibility.”

Plaintiff lawyers must be sure to address these issues early and forthrightly to the jury and explain that under the law many parties can be responsible for an injury and that finding a gun maker liable does not relieve others of responsibility. If anything, the fact that manufacturers

know that these lethal weapons are often used by irresponsible and criminal people should heighten their duty to do all they reasonably can to prevent injuries.

Gun cases have been a severely underlitigated area of tort law, and judges and juries are just beginning to comfortably apply common law principles to impose liability on those who negligently make and sell guns. However, these cases are well worth the struggle. They present an opportunity for plaintiff lawyers to do well by doing good and to help save lives by providing incentives that encourage the industry to behave responsibly and to become a part of the solution to the gun violence problem it has helped to create. □

Notes

1. See, e.g., *Girl, 3, Dies While Playing with Gun*, MIAMI HERALD, Mar. 24, 2000, available at <http://www.herald.com> (visited Mar. 24, 2000).
2. See, e.g., “What Was I Thinking?” Asks Teen Charged with Killing His Lake Worth Teacher, LAKE WORTH SUN-SENTINEL, June 30, 2000, available at <http://www.sun-sentinel.com/news/daily/detail/0,1136,32000000000121933,00.htm> (visited Sept. 13, 2000).
3. National Center for Health Statistics (in the United States, 30,708 were killed with guns in 1998).
4. Joseph L. Annett et al., *National Estimates of Nonfatal Firearm-Related Injuries: Beyond the Tip of the Iceberg*, 273 JAMA 1749 (1995).
5. *Kitchen v. K-Mart, Corp.*, 697 So. 2d 1200 (Fla. 1997); *Tamiami Gun Shop v. Klein*, 116 So. 2d 421 (Fla. 1959); *Sogo v. Garcia's Nat'l Gun, Inc.*, 615 So. 2d 184 (Fla. Dist. Ct. App. 1993); *Williams v. Bumpass*, 568 So. 2d 979 (Fla. Dist. Ct. App. 1990); *Foster v. Arthur*, 519 So. 2d 1092 (Fla. Dist. Ct. App. 1988); *Angell v. F. Avanzini Lumber Co.*, 363 So. 2d 571 (Fla. Dist. Ct. App. 1978); *Sixty-Six, Inc. v. Finley*, 224 So. 2d 381 (Fla. Dist. Ct. App. 1969); *Seabrook v. Taylor*, 199 So. 2d 315 (Fla. Dist. Ct. App.), cert. denied, 204 So. 2d 331 (Fla. 1967); *Pavlidis v. Niles Gun Show, Inc.*, 637 N.E.2d 404 (Ohio Ct. App. 1994); *Taylor v. Webster*, 231 N.E.2d 870 (Ohio 1967); *Long v. Turk*, 962 P.2d 1093 (Kan. 1998); *Straver v. Cline*, 924 P.2d 666 (Mont. 1996).
6. The products liability claims discussed below can also be asserted as negligent design claims. See, e.g., *White v. Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000).
7. 62 F. Supp. 2d 802 (E.D.N.Y. 1999), certified question accepted, 2000 WL 1288342 (N.Y. Sept. 12, 2000).
8. *Id.* at 824.
9. *Id.* at 821.
10. *Id.* at 820.
11. 89 Cal. Rptr. 2d 146 (Ct. App. 1999), review granted and superseded by 92 Cal. Rptr. 2d 256 (2000).
12. *Id.* at 184.
13. *Id.* at 178-79 (quoting *Rowland v. Christian*, 69 Cal. 2d 108, 112 (1968)).
14. *Id.* (quoting *McCarthy v. Olin Corp.*, 119 F.3d 148, 169-70 (2d Cir. 1997) (Calabresi, J. dissenting) (footnote omitted)).
15. *White*, 97 F. Supp. 2d 816, 828 (quoting *Gedeon v. East Ohio Gas Co.*, 190 N.E. 924, 926 (Ohio 1934)).
16. *City of Boston v. Smith & Wesson Corp.*, No. 1999-02590 (Mass., Suffolk County Super. Ct. July 13, 2000).
17. See, e.g., *Halberstam v. S.W. Daniel*, 95 Civ. 3323 (E.D.N.Y. 1998); see also *Timothy D. Lytton, Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearm Manufacturers*, 64 BROOK. L. REV. 681 (1998).
18. 319 U.S. 703 (1943).
19. 29 F.3d 1480 (11th Cir. 1994).
20. 524 F.2d 19 (3d Cir. 1975); see also *Moning v. Alfano*, 254 N.W.2d 759 (Mich. 1977).
21. RESTATEMENT (SECOND) OF TORTS §821B (1977).
22. See, e.g., Plaintiff's Complaint, *City of New York v. Arms Tech., Inc.*, No. 1:00-cv-3641 (E.D.N.Y. June 20, 2000); First Amended Complaint, *City of Boston v. Smith & Wesson Corp.*, No. 1999-02590 (Mass., Suffolk County Super. Ct. Jan. 26, 2000); Plaintiff's Complaint, *District of Columbia v. Beretta U.S.A. Corp.*, No. 00-0000428 (D.C. Super. Ct. Jan. 20, 2000); Plaintiff's Complaint, *City of St. Louis v. Cernicek*, No. 992-01209 (Mo., City of St. Louis Cir. Ct. Apr. 30, 1999); Plaintiff's Complaint, *City of Chicago v. Beretta U.S.A. Corp.*, No. 98 CH 015596 (Ill., Cook County Cir. Ct. Apr. 7, 1999); Plaintiff's Complaint, *Archer v. Arms Tech., Inc.*, No. 99-912658 (Mich., Wayne County Cir. Ct. Apr. 26, 1999).
23. RESTATEMENT (SECOND) OF TORTS §821B(2) (1977).
24. *Orders in Ceriale v. Smith & Wesson Corp.*, No. 99L5628 (Ill., Cook County Cir. Ct. Nov. 30, 1999, and May 11, 2000).
25. *Archer*, No. 99-912658.
26. See *David Kairys, The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175 (2000); Note, *Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry*, 113 HARV. L. REV. 1521 (2000).
27. See, e.g., *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978).
28. See *Hurst v. Hurst v. Glock, Inc.*, 684 A.2d 970 (N.J. Super. Ct. App. Div. 1996) (gun manufacturer may be liable for unintentional shooting with gun lacking magazine disconnect safety feature); *LeMaster v. Glock, Inc.*, 610 So. 2d 1336 (Fla. Dist. Ct. App. 1993) (a handgun may be deemed unreasonably dangerous for lack of safety device that could prevent foreseeable injuries); *Dix v. Beretta*, No. 750681-9 (Cal., Alameda County Super. Ct. June 16, 1998) (unreported) (handgun manufacturer may be liable for unintentional shooting where it failed to personalize gun or include chamber loaded indicator).
29. Responsible Gun Safety Act of 2000, 2000 Md. Laws ch. 2 (S.B. 211).