

GUN INDUSTRY IMMUNITY: WHY THE GUN INDUSTRY’S “DIRTY LITTLE SECRET” DOES NOT DESERVE CONGRESSIONAL PROTECTION

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I. INTRODUCTION

Have you ever wondered how felons and gang members can get handguns so easily? They buy them—using straw buyers or other intermediaries to get around the Brady Law—from gun dealers across the United States engaging in risky business practices.¹ Astoundingly, just over one percent of the federally licensed firearms dealers (Federal Firearms Licensees or “FFLs”) in America are linked to more than fifty-seven percent of the guns recovered in crime and traced, while more than eighty-five percent of the dealers are linked to no crime guns at all.²

The gun industry has a “dirty little secret”—it knows who the “bad apple” dealers are and could force them to reform or refuse to sell them guns, but gun makers are unwilling to do so. The reason? Profits. Crime gun sales are a large percentage of the gun industry’s market. According to expert testimony in the recent federal lawsuit brought by the NAACP against gun manufacturers and

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¹ One federal report found that nearly fifty percent of all firearms in trafficking investigations—amounting to over 84,000 firearms or approximately 350 traces per dealer—were trafficked through Federal Firearm Licensees (“FFLs”). U.S. DEP’T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS 13 (2000), available at http://www.atf.gov/pub/fire-explo_pub/pdf/followingthe_gun_internet.pdf (last visited Apr. 3, 2005). Straw purchases are one of the main conduits through which Federal Firearms Licensees supply the illegal market. The same report concluded that nearly half of all firearms traced in trafficking investigations reached the illegal market through straw purchasing. *Id.* at 18.

² A “trace” is the “systematic process of tracking a recovered crime gun’s history from its source (manufacturer/importer) through the chain of distribution (wholesaler/retailer) to the individual who first purchases the firearm.” U.S. DEP’T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, YOUTH GUN CRIME INTERDICTION INITIATIVE: CRIME GUN TRACE REPORTS (2000) NATIONAL REPORT, A-4 (2002), available at <http://www.atf.gov/firearms/ycgii/2000/index.htm> (last visited Apr. 3, 2005). The Bureau of Alcohol, Tobacco and Firearms has found that a small percentage of retail dealers were linked to guns traced in criminal investigations—in 1998 11,947 of the active dealers out of a total of 83,272, or 14.3%, accounted for all traced guns. Of the total number of dealers, 1.2% were linked to ten or more traces and accounted for 57.4% of all guns traced in crime. U.S. DEP’T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, COMMERCE IN FIREARMS IN THE UNITED STATES 23 (2000), available at http://www.atf.gov/pub/fire-explo_pub/020400report.pdf (last visited Apr. 3, 2005) [hereinafter COMMERCE IN FIREARMS].

distributors, at least fifteen percent of the guns produced or imported for sale in America in 1995 were used in crime by 2000.³ Crime guns represent the third largest market segment for handgun manufacturers, ranking only behind personal protection and target shooting.⁴

To protect this critical market segment and prevent being held accountable for the crime caused by its reckless actions, the gun industry has been lobbying Congress to pass bill S. 397.⁵ The bill grants manufacturers, distributors and dealers sweeping immunity from lawsuits brought by gun violence victims who are the last stop on the industry's deadly distribution pipeline. In addition to barring lawsuits, the bill would prevent ATF from using "administrative proceeding[s]" to revoke the licenses of corrupt firearms dealers.⁶ With as many as 60 co-sponsors⁷ in the Senate and widespread support for the companion bill, H.R. 800⁸, in the House of Representatives, the bill is very likely to pass. A nearly identical bill passed through the House by a vote of 285 to 140 on April 9, 2003.⁹ Sadly, Congress is very close to giving the gun industry unprecedented immunity. President Bush has repeatedly said he would sign such legislation if it reached his desk.

According to the bill, unless a manufacturer, distributor, or dealer engages in outright criminal conduct when selling a gun (and most civil lawsuits brought to compensate injured victims are based on *negligent* conduct, not criminal wrongdoing) they would be immunized by the legislation.¹⁰ Yet a determined

³ See Expert report of Lucy P. Allen at 7, *NAACP v. Acu Sport, Inc.*, 271 F. Supp. 2d 435, 522 (E.D.N.Y. 2002) (confirmed as accurate by the court in ¶¶ 201-03 of its Findings of Facts).

⁴ *Id.*

⁵ Protection of Lawful Commerce in Arms Act, S. 397, 109th Cong. (2005).

⁶ The legislation would prohibit any "qualified civil liability action," which is defined as "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller." S. 397, § 4(5)(A). The administrative provision could "undermine" ATF's authority "to revoke the licenses of rogue gun dealers." T.R. Goldman, *Gun Bill Locked and Loaded: Pro-Industry Measure Poised to Pass Senate*, LEGAL TIMES, July 11, 2005, at 15. Former ATF Directors Steve Higgins and Rex Davis wrote in an op-ed in the Baltimore sun that the bill would tie ATF's hands, and called it "nothing short of madness." Steve Higgins & Rex Davis, *Protecting Scofflaw Gun Dealers Would Endanger Americans*, BALTIMORE SUN, June 2, 2005, at 15A. See also Anne C. Mulkern, *Firearms Makers' Immunity Bill to Get New Life: The Gun Lobby Believes it Has Enough Support This Year to Pass a Bill to Ban Most Lawsuits Against Gun Manufacturers and Dealers*, DENVER POST, Apr. 5, 2005, at A-09; Mark Benjamin, *Tough on Terror, Weak on Guns*, SALON.COM, available at <http://www.salon.com/news/feature/2005/03/28/guns/print.html>, last viewed July 29, 2005.

⁷ S. 397. The names of the cosponsors are available at: <http://thomas.loc.gov>.

⁸ Protection of Lawful Commerce in Arms Act, H.R. 800, 109th Cong. (2005). H.R. 800 currently has 257 cosponsors. The names of the cosponsors are available at: <http://thomas.loc.gov>.

⁹ H.R. 1036, 108th Cong. (2003).

¹⁰ David Boies, one of the nation's preeminent and most distinguished lawyers, issued an opinion letter in which he concluded that the bill "would accord gun dealers and manufacturers unprecedented immunity" that would insulate them "from lawsuits to which the sellers and makers of virtually every product (including toy guns) would be subject." Letter from David Boies, Attorney, Boies, Schiller & Flexner LLP, to Michael Barnes, President, The Brady Center to Prevent Gun Violence, (Feb. 17, 2004) (on file with the Brady Center). Boies also concluded that

group of Senators committed to filibustering the bill were able to force the majority to accept debate on amendments to the bill in March 2003, and once those amendments passed even the National Rifle Association (“NRA”) urged its supporters to vote against the legislation.¹¹

Nonetheless, the gun lobby is back with renewed effort this year to pass the broadest immunity protection ever received by an industry in this country. Such sweeping immunity is not justified for *any* industry in America, much less one that profits from supplying guns to criminals who cause widespread harm to society.¹² Such legislation may also be unconstitutional.¹³

the legislation would have barred action by the families of the D.C.-area sniper victims who recently won a settlement in *Johnson v. Bull's Eye Shooter Supply*, No. 03-2-03932-8, 2003 WL 21639244 (Wash. Super. June 27, 2003). *Id.* Former White House Counsel Lloyd Cutler—who was appointed by President Bush to the commission investigating U.S. intelligence-gathering in the wake of intelligence failures leading up to the war with Iraq—issued an opinion letter in which he similarly concluded that immunity legislation would have barred the D.C. sniper suit and *any* lawsuit based upon a common law negligence claim. Letter from Lloyd N. Cutler, Attorney, Wilmer, Cutler & Pickering, to Michael Barnes, President, The Brady Center to Prevent Gun Violence, (Jan. 15, 2004) (on file with the Brady Center).

¹¹ See Sheryl Gay Stolberg, *A Swing to the Middle on Gun Control*, N.Y. TIMES, Mar. 7, 2004, § 4, at 4 (reporting that an earlier version of S. 397 was killed in the Senate after the NRA withdrew support for the bill when gun control amendments were added).

¹² Gun violence is an acute public health problem in the United States. Between 1965 and the turn of the millennium gun violence in the United States took the lives of over one million people and injured three times as many. PHILLIP J. COOK & JENS LUDWIG, *GUN VIOLENCE: THE REAL COSTS* 7 (2000). According to the Center for Disease Control, between the years 2000 and 2002 guns injured 197,538 people and killed 88,478 people. See National Center for Injury Prevention and Control, *Welcome to Wisqars*, at <http://www.cdc.gov/ncipc/wisqars/>. Additionally, “[b]etween 1991 and 2000, forty Americans were murdered with guns on an average day. Gun murders account for more than two-thirds of all murders, and overall murder rate [in the U.S.] for this period was *five times higher than the average rate for other developed nations*.” DAVID HEMENWAY, *PRIVATE GUNS: PUBLIC HEALTH* 45 (2004)(emphasis added).

Taxpayers carry the burden of paying for the health and social costs that result from the high rates of firearm injuries and fatalities. See Philip J. Cook et al., *The Medical Costs of Gun Injuries in the United States*, 282 JAMA 447 (1999) (estimating that gunshot injuries in 1994 alone produced approximately \$2.3 billion in lifetime medical costs, of which \$1.1 billion will be paid for by taxpayers); Linda Gunderson, *The Financial Costs of Gun Violence*, 131 ANNALS INTERNAL MED. 483 (1999) (estimating medical costs for firearm related injuries at \$4 billion in one year, with taxpayers bearing approximately 85% of these costs); Ted R. Miller & Mark A. Cohen, *Costs of Gunshot and Cut/Stab Wounds in the United States, With Some Canadian Comparisons*, 28 ACCIDENT ANALYSIS & PREVENTION 329 (1997) (estimating total direct and indirect costs for each nonfatal firearm injury at \$249,000 for every hospitalized victim, and \$73,000 for each victim who is treated in an emergency room and then released, with total costs approaching \$126 billion per year); Bob Sipchen, *Putting a Price Tag on Violence*, L.A. TIMES, June 5, 1994, at A1 (estimating total costs—including initial response, medical care, arrest, trial and incarceration—for one shooting incident at a total of \$1,091,768).

¹³ Commentators argue that the sweeping immunity bill introduced in Congress does not pass constitutional muster. See, e.g., Elizabeth T. Crouse, *Arming the Gun Industry: A Critique of Proposed Legislation Shielding the Gun Industry from Liability*, 88 MINN. L. REV. 1346, 1373-75 (2004); Patricia Foster, *Good Guns (And Good Business Practices) Provide All the Protection They*

We have a third branch of government—the judiciary—for a reason. Courts are more than capable of deciding whether lawsuits filed by gun violence victims are meritorious, and whether such victims deserve compensation when their injuries are caused by the negligence of corporate actors. Courts also do something different from legislative bodies: they assess the factual merits of specific lawsuits and award damages based on past injuries caused by the *civil* misconduct of defendants.

In recent years, at least twenty court rulings in ten different states have held that lawsuits filed by individual gun violence victims, or the urban municipalities who suffer from concentrations of gun violence, state legitimate legal claims that should be allowed to proceed to trial.¹⁴ These suits have brought to light how the

Need: Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional, 72 U. CIN. L. REV. 1739 (2004); Jon S. Vernick & Julie Samia Mair, *State Laws Forbidding Municipalities from Suing the Firearm Industry: Will Firearm Immunity Laws Close the Courthouse Door?* 4 J. HEALTH CARE L. & POL'Y 126, 145-46 (2000).

Legal scholars have put forth two arguments as to why immunity legislation could be unconstitutional. One argument is based upon the Due Process Clause of the Fifth Amendment, which prohibits the taking of “life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The Supreme Court has held that a cause of action is “property” protected by the Due Process Clause. *Martinez v. California*, 444 U.S. 277, 281-82 (1980). In *Armstrong v. United States*, the Court held that an interest in a financial investment is a form of property that cannot be taken without proper compensation. 364 U.S. 40, 43-49 (1960). Plaintiffs who have pending suits against the gun industry have invested time and money in bringing their suits and have “staked a potential claim upon the assets of the defendant,” assets that could be deemed “compensable property.” Foster, *supra* note 12, at 1759 (comparing the claims upon the assets of the defendants to the liens deemed property in *Armstrong*). Congress’ attempt to banish civil actions filed against the gun industry from the jurisdiction of *all* courts without providing any substitute remedy deprives current and future plaintiffs of their due process property rights—both the right to set forth a claim and the right to assets that could be derived from a successful claim.

The immunity bill may also violate the Tenth Amendment by issuing a procedural order to state courts for the dismissal of all pending state cases. The Tenth Amendment provides that all powers not delegated or prohibited by the Constitution are reserved to the states. U.S. CONST. amend. X. In *Jinks v. Richland County*, the Court held that a federal provision was constitutional because it was substantive rather than procedural, drawing a distinction—as the court first did in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)—between requiring states to apply federal substantive law and federal procedural law. 538 U.S. 456 (2003). The Supreme Court held in *Printz v. United States*, that regulatory legislation was “fundamentally incompatible” with the sovereignty afforded states in the Constitution and that “[t]he Federal Government may [not] issue directives requiring the States to address particular problems.” 521 U.S. 898, 935 (1997). A federal law requiring dismissal of pending state cases may similarly infringe upon the authority of the state judiciaries. Foster, *supra* note 12, at 1760-66. Thus, the dismissal of state cases may remain within the sovereign powers of the states.

¹⁴ Appellate Victories: *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003) (appellate reversal of lower court dismissal); *Ileto v. Glock, Inc.*, 349 F.3d 1191 (9th Cir. 2003) (appellate reinstatement of case); *James v. Ray’s Sporting Goods*, 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003) (trial and appellate denials of motion to dismiss; case later voluntarily dismissed without prejudice to re-file); *Hicks v. T&M Jewelry, Inc.*, No. 97-Ci 2617 (Fayette County Circuit Ct., Lexington, Ken.), *rev’d*, No. 2002-CA-845-MR, 2003 WL 21771968 (Ky. Ct. App. 2003); *City of*

gun industry's reckless—but not technically *illegal*—distribution and sales practices supply criminals with guns. If these lawsuits are “frivolous” as industry mouthpieces continually claim, the gun industry would have won, rather than lost, dismissal of these lawsuits in court. But judges looking closely at the facts have concluded in many cases there is nothing frivolous about the gun industry's alleged wrongdoing. Each suit illustrates why the practice of selling guns to the public needs to be the most accountable of business activities, not shielded from public scrutiny and immunized from legal liability, as S. 397 would do. Accordingly, gun violence victims' legal claims deserve to be heard.

This Article argues that Congress should protect the right of gun violence victims to have their claims heard in a court of law by declining to immunize an industry that profits from supplying the criminal gun market. Section II discusses the facts of numerous recent lawsuits that provide compelling stories of gun industry wrongdoing. Section III summarizes industry documents obtained in litigation and the testimony of gun industry whistleblowers that expose the industry's decision to continue supplying a small set of high-risk gun dealers responsible for selling the majority of crime guns. Section IV explains how crime gun trace data confirms that most crime guns are sold through a

Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002) (appellate reversal of lower court dismissal; case later voluntarily dismissed without prejudice to re-file); Smith v. Bryco Arms, 33 P.3d 638 (N.M. Ct. App. 2001), *cert. denied*, 34 P.3d 610 (N.M. 2001); Morial v. Smith & Wesson Corp., 785 So.2d 1 (La. 2001), *cert. denied*, 534 U.S. 951 (2001) (dismissal based solely on state immunity law); Kitchen v. K-Mart Corp., 697 So.2d 1200 (Fla. 1997) (appellate reinstatement of jury award).

Trial Court Victories: NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435 (E.D.N.Y. 2003) (gun industry held to have created public nuisance after trial; case dismissed due to lack of organizational standing); People v. Arcadia Machine & Tool, Inc., No. 4095, 2003 WL 21184117 (Cal. Super. Ct. Apr. 10, 2003) (denying summary judgment to gun dealers and distributors, each of whom settled before trial) (case brought by 12 cities and counties); Lemongello v. Will Co., Inc., No. CIV.A.02-C-2952, 2003 WL 21488208 (Cir. Ct. W.Va. June 19, 2003) (denying motions to dismiss gun dealer and manufacturer; settlement for \$1,000,000); Johnson v. Bulls Eye Shooter Supply, No. 03-2-03932-8, 2003 WL 21639244 (Wash. Super. June 27, 2003), *reconsideration denied, interlocutory appeal denied* (commissioner ruling) (denying motions to dismiss gun dealer and gun manufacturer; settlement for \$2,565,000); White v. Smith & Wesson, 97 F. Supp. 2d 816 (N.D. Ohio 2000) (motion to dismiss denied); Maxfield v. Bryco Arms, et al, No. 841636-4 (Super. Ct. Cal., Alameda County 2003) (jury verdict—trial victory); Hernandez v. Kahr Arms, Inc., Civil No. WOCV2002-01747 (Mass. Super. Ct. Apr. 4, 2003) (denying motion to dismiss gun manufacturer); Anderson v. Bryco Arms Corp., No. 00-L-007476 (Circuit Ct., Cook County, Ill., April, 10, 2002) (denial of motion to dismiss); Jefferson v. Rossi, No. 01-CV-2536, 2002 WL 3215428 (E.D. Pa. Jan. 22, 2002) (denying motions to dismiss gun dealer and distributor; settlement for \$850,000); Isaac v. Southern Ohio Guns International, Inc., C.A. No. 98-4618 (Mass. Super. Ct.) (denial of motion for summary judgment; confidential settlement); Boston Pub. Health Comm'n v. Smith & Wesson Corp., No. 199902590, 2000 WL 1473568 (Mass. Super. July 13, 2000) (motion to dismiss denied; settled in 2001 defendant agreeing to assist in addressing Boston's continuing gun violence problem). Mathieu v. Fabrica D'Armi Pietro Beretta SPA & Beretta U.S.A., No. 97-CV-12818-NG (D. Mass.) (motion to dismiss denied, case settled in 2000); McNamara v. Arms Tech., Inc., 71 F. Supp. 2d 720 (E.D. Mich. 1999) (dismissal based solely on state immunity law).

concentrated set of high-risk gun dealers. Section V notes that the gun industry, far from choosing to be responsible, has rebuffed repeated requests from the United States Department of Justice (“USDOJ”) and Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) to “build sounder and safer businesses”¹⁵ by “identify[ing] and refus[ing] to supply dealers and distributors that have a pattern of selling guns to criminals and straw purchasers.”¹⁶ Section VI suggests that an industry code of conduct is the best way to relieve the gun industry from liability, saving lives in the process. Proposed Congressional immunity, on the other hand, would cost society and individual victims dearly.

II. GUN VIOLENCE VICTIM LAWSUITS PROVIDE COMPELLING STORIES OF INDUSTRY WRONGDOING

Lawsuits by gun violence victims are exposing the gun industry’s dirty little secret, which is exactly why the industry is so desperate to pass an immunity bill to shut them down. The following cases illustrate how the negligence of the gun industry has directly supported criminals with the tools of crime. For this negligence the gun industry should bear some responsibility.

A. *Williams v. Beemiller, Inc. d/b/a Hi-Point*

The eagerness of several Ohio gun companies to sell as many as 250 *handguns* to a gun trafficker who openly used several women accomplices as straw purchasers and then resold the guns in Buffalo, New York is at the heart of *Williams v. Beemiller, Inc. d/b/a Hi-Point*.¹⁷ Williams is a New York State case brought by Daniel Williams, who was only sixteen when he was shot with one of the trafficked guns while innocently shooting baskets near his home in Buffalo.¹⁸ Williams was a good student preparing for his junior year at McKinley High School where he appeared to be on the verge of stardom as a basketball player. His coach said that Williams “could have been one of the best point guards in Western New York.”²⁰ On August 18, 2003, a juvenile gang member named

¹⁵ U.S. DEP’T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, CRIME GUN TRACE REPORTS (1999), NATIONAL REPORT 1 (2000), *available at* <http://www.atf.gov/firearms/ycgii/1999/index.htm> (asking firearms manufacturers to utilize ATF trace data to effectively monitor their distribution chains).

¹⁶ U.S. DEP’T OF JUSTICE, GUN VIOLENCE REDUCTION: NATIONAL INTEGRATED FIREARMS VIOLENCE REDUCTION STRATEGY, PART V (2001), *available at* http://www.usdoj.gov/archive/opd/gun_violence.htm [hereinafter “GUN VIOLENCE REDUCTION”].

¹⁷ *Williams v. Beemiller, Inc. d/b/a Hi-Point*, No. I2005 – 0070506, N.Y. Sup. Ct. (July 28, 2005) (date of filing).

¹⁸ Susan Schulman, Lou Michael & Dan Herbeck, *The Damage Done*, BUFFALO NEWS, June 12, 2005, at A6

¹⁹ *Id.*

Cornell Caldwell shot at Williams from a car, apparently believing he was a member of a rival gang. On the floor of the car officers found a 9mm Hi-Point handgun.²¹ Williams survived the shooting but his recovery took months.²²

The gun Caldwell used to shoot Williams was one of hundreds of handguns trafficked into Buffalo by James Nigel Bostic, who traveled to Ohio gun shows where he found two gun dealers that were all too happy to sell him as many guns as he wanted.²³ During a six-month span in 2000, Bostic purchased about 250 guns from the two dealers using three women as straw purchasers.²⁴ Bostic then resold the guns on the streets of Buffalo, where nearly *eighty* of his guns have already turned up in crimes.²⁵ Bostic's guns have been used in an incredible

²¹ *Id.*

²² *Id.*

²³ *Id.* at A1, A6-A7. See also Dan Herbeck, Lou Michel & Susan Schulman, *The Damage Done: The Double Standard*, BUFFALO NEWS, June 14, 2005, at A1, A4-A5. The other dealers willing to sell Bostic dozens of guns were Sandra and Jim Cyrus of Gallipolis Gun & Archery in Gallipolis, Ohio. *Id.* at A4-A5. Bostic's female accomplices said the Cyrus's were well aware that the sales were straw purchases, yet they made them anyway. *Id.* at A4.

²⁴ *The Damage Done: The Double Standard*, *supra* note 24, at A1.

²⁵ See Susan Schulman, Lou Michel & Dan Herbeck, *The Damage Done: Gun By Gun*, BUFFALO NEWS, June 12, 2005, A8-A9. The carnage caused by the Ohio gun companies' willingness to supply cheap handguns to James Nigel Bostic is astounding. Here is a synopsis of the crime wave that resulted from their negligence: **Aug. 11, 2000:** woman robbed on the street; **Sep. 18, 2000:** criminal fleeing police drops a 9mm Hi-Point gun with a magazine clip; **Sep. 25, 2000:** 18-year-old is shot twice in the head while walking home from his cousin's house; **Oct. 13, 2000:** 9mm Hi-Point gun is recovered in Englewood, California; **Oct. 21, 2000:** 9mm Hi-Point gun is recovered in an abandoned house in Buffalo; **Oct. 28, 2000:** Gunfire shatters windows in a Buffalo home, two are arrested and a 9mm Hi-Point gun is recovered; **Nov. 3, 2000:** another 9mm Hi-Point gun is recovered in Buffalo; **Dec. 2, 2000:** police find a 9mm Hi-Point gun when searching an apartment; **Dec. 10, 2000:** Man shoots at four officers with a 9mm Hi-Point gun. When police detain him they find the gun and 14 bags of cocaine; **Dec. 11, 2000:** Three individuals are arrested after shots are fired at police who came to search a crack house. At the house, police find crack, drug paraphernalia and two guns that had been purchased by Bostic – a 9mm Hi-Point and a 9mm Intratec; **Dec. 29, 2000:** 9mm Hi-point gun is found in an apartment in Buffalo; **Jan. 1, 2001:** Police find drugs and a loaded .45 caliber Hi-Point gun during a traffic stop; **Jan. 12, 2001:** Man tries to bury a Hi-Point 9mm gun in the snow while fleeing police after a fight; **Jan. 15, 2001:** An 18-year-old suspected robber drops a 9mm Intratec while attempting to escape the police; **Jan. 20, 2001:** Perpetrator attempts a robbery with a 9mm Hi-Point gun; **Jan. 23, 2001:** Police find another 9mm Hi-Point gun during a traffic stop; **Jan. 23, 2001:** police find a 9mm Hi-Point gun connected to a previous shooting in an impounded car; **Jan. 30, 2001:** A man is abducted at gun point. The gun used is a .45 caliber Hi-Point gun; **Feb. 4, 2001:** A man pulls up to a car with three women in it and opens fire with a 9mm Hi-Point Gun; **Feb. 4, 2001:** Police find drugs and a 9mm Hi-Point gun when searching a vehicle; **Feb. 16, 2001:** A man attempts to escape the police while carrying a .38 caliber Hi-Point gun; **Feb. 16, 2001:** A man who allegedly beat his girlfriend is found with a loaded 9mm Hi-Point gun and seven rounds of ammunition; **Feb. 28, 2001:** A 9mm Intratec gun is

found; **Mar. 19, 2001:** Police find a loaded, 9mm Hi-Point gun in easy reach of four children in a Buffalo apartment; **Apr. 10, 2001:** Shots are fired and police find a 9mm Hi-Point at the scene; **May 7, 2001:** A 9mm Hi-Point gun connected to an Apr. 30 shooting is found; **May 15, 2001:** Narcotics officers seize a 9mm Hi-Point gun while searching a Buffalo house; **May 16, 2001:** A man shoots himself to death with a 9mm Hi-Point gun; **May 18, 2001:** Police find a 9mm Hi-Point gun on the street; **May 21, 2001:** Police find a .40-caliber Hi-Point gun and drug paraphernalia when searching an apartment; **May 22, 2001:** Police recover a 9mm Hi-Point when arresting five people on gun charges; **May 30, 2001:** A 9mm Hi-Point gun is found on a Buffalo street; **July 5, 2001:** Police find a 9mm Hi-Point underneath a car and arrest a man on weapons charges; **July 14, 2001:** During a fight outside of a bar a bystander is shot with a gun police suspect was a Hi-Point trafficked by Bostic; **Aug. 9, 2000:** A juvenile uses a 9mm Hi-Point handgun to return fire at a 15-year-old firing across the street; **Aug. 16, 2001:** Police find a 9mm Hi-Point at an address in Buffalo; **Aug. 26, 2001:** Police recover a loaded 9mm Hi-Point gun on a Buffalo street; **Sep. 8, 2001:** A juvenile runs from police with a 9mm Hi-Point gun; **Nov. 1, 2001:** Police find a Hi-Point gun in the bedroom of a drive-by shooting victim; **Nov. 23, 2001:** Police find a 9mm Hi-Point and drugs at a Buffalo home; **Dec. 23, 2001:** Man fires a 9mm Hi-point gun. The bullet enters the apartment of a woman and her three-year-old child. **Jan. 2, 2002:** Police find a 9mm Hi-Point gun and cocaine during a traffic stop; **Jan. 23, 2002:** Shots are fired and police see a man drop a 9mm Hi-Point gun as he flees the scene; **Feb. 8, 2002:** Two men break into a woman's apartment, fire two shots with a 9mm Hi-Point gun and take money from the woman; **Feb. 27, 2002:** Police find a 9mm Hi-Point gun on a man who police had seen pick up the gun in an abandoned lot; **Apr. 6, 2002:** Two men break into an apartment and put a .45 caliber Hi-Point gun to the head of a seventeen-year-old girl, attempt to tie her up with duct tape and then demand money. **Apr. 24, 2002:** Police find a loaded 9mm Hi-Point gun and drugs while executing a search warrant; **June 9, 2002:** Police confiscate a loaded 9mm Hi-Point gun on a man they apprehended for an open container violation; **July 24, 2002:** A man shoots holes through a car with a 9mm Hi-Point gun. Police find 20 bags of marijuana on the man when he is taken into police custody; **Oct. 17, 2002:** Two men are arrested on burglary charges and police find a .45 caliber Hi-Point gun in their possession; **Nov. 9, 2002:** A man pulls out a 9mm Hi-Point gun when he is stopped by police for speeding; **Jan. 17, 2003:** Two men in a ski mask and camouflage are refused entry to a bar. Angry, one of the men fires shots at the door with a 9mm Hi-Point handgun; **Jan. 26, 2003:** Police are called to an apartment to investigate an altercation and find a loaded 9mm Intratec handgun in the apartment; **Feb. 18, 2003:** A man pulls out a .45 caliber Hi-Point gun when officers attempt to question him about a murder and stabbing. He is later convicted of the stabbing and a robbery during which two people lost their lives; **Mar. 15, 2003:** Police stop a car for speeding. The driver is wearing a bulletproof vest and police find a loaded .40 caliber Hi-Point gun in the car; **Mar. 19, 2003:** A 9mm Hi-Point handgun is used in a drive-by shooting; **Mar. 31, 2003:** A clean-up crew finds a 9mm Hi-Point gun on a New York highway. The gun is later determined to be the gun used in a shooting that wounded two people; **Apr. 5, 2003:** A motorist is robbed by a man brandishing a 9mm Intratec gun with seven rounds of ammunition; **May 11, 2003:** Police apprehend a young man suspected of firing shots. The young man has a 9mm Hi-Point gun; **June 12, 2003:** A woman calls alleging drug dealers have overtaken her apartment. Police find a loaded 9mm Hi-Point handgun, 44 grams of crack cocaine and drug paraphernalia at the scene; **July 19, 2003:** A teenager attempting to escape police throws a 9mm Hi-Point on the ground. The weapon is identified as the gun used in two previous shooting incidents; **Aug. 10, 2003:** Police find a 9mm Hi-Point gun and crack cocaine stuffed in a heating duct in a Buffalo apartment; **Aug. 16, 2003:** *Star athlete Daniel Williams is shot and seriously wounded with a 9mm Hi-Point gun;* **Sep. 14, 2003:** Police apprehend a man with a 9mm Hi-Point gun. Tests reveal the same weapon was used in an Aug. 17, 2003 shooting that wounded a man; **Oct. 2, 2003:** Police find a 9mm Hi-Point in a vehicle during a traffic stop; **Oct. 21, 2003:** A man is arrested after he throws a loaded 9mm Hi-Point gun under a parked car; **Nov. 12, 2003:** Shots are fired. Police arrest a man carrying a 9mm Hi-Point gun; **Jan. 15, 2004:** A man is arrested in New York city for possession of a 9mm Hi-Point gun and some marijuana; **Jan. 27, 2004:** A man fleeing police is apprehended with a 9mm

number of shooting incidents in Buffalo and elsewhere in New York.²⁶ It is likely that dozens more may have been used in crimes but not recovered by police.

Bostic found a willing participant for his gun trafficking scheme in Charlie Brown, the sole owner and president of MKS Supply, an Ohio gun distributor that sells all guns carrying the Hi-Point name. Brown sold Bostic about 190 Hi-Point handguns between May and October of 2000 at Bill Goodman's North America Gun and Knife Show at Hara Arena in Dayton, Ohio. In one of those sales, Bostic *bought eighty-seven pistols at one time*, using his girlfriend Kimberly Upshaw to fill out the paperwork.²⁷ Bostic accompanied Upshaw to the gun show booth, handed over the cash, and carried out the guns himself.²⁸ One of the guns in the eighty-seven-gun sale was the Hi-Point pistol used to shoot Daniel Williams.²⁹ Bostic and his straw purchasers repeatedly visited Brown to buy more guns with cash, yet Brown never turned him away.³⁰ Bostic's female accomplices say it was obvious their purchases were not legitimate.³¹

Hi-Point gun; **Apr. 9, 2004:** Police find a 9mm Hi-Point gun during a traffic stop; **Apr. 18, 2004:** A woman is critically shot in Manhattan with a 9mm Hi-Point gun; **June 14, 2004:** Police execute a search warrant and recover a 9mm Intratec gun. Police also find several malnourished dogs, including one that likely starved to death; **June 14, 2004:** A 9mm Hi-Point is found on a Buffalo street; **Jan. 23, 2005:** Four other men beat a Niagara Falls man with a gun and rob him. The gun recovered on the perpetrators was a 9mm Intratec gun. **Apr. 17, 2005:** Police chase a man suspected of selling drugs and possibly guns to an abandoned apartment where they find five guns. One of the found guns is a 9mm Hi-Point; **May 3, 2005:** A .45 caliber Hi-Point gun is found in an attic in a Buffalo home. *Id.*

²⁶ *Id.*

²⁷ *The Damage Done: The Double Standard*, *supra* note 24, at A4. Initially, Bostic filled out the paperwork on some gun purchases himself, but when a Brady background check came back with a hold, he started using women accomplices to fill out the federal gun purchase forms. *Id.* In addition to the volume of guns he was buying, this should have raised an immediate red flag for any gun dealer and caused them to deny the sale.

²⁸ *The Damage Done: The Double Standard*, *supra* note 24, at A1, A4.

²⁹ *The Damage Done*, *supra*, note 21 at A6; *The Damage Done: Gun By Gun*, *supra*, note 26 at A9; *The Damage Done: The Double Standard*, *supra* note 24, at A4.

³⁰ *Id.*

³¹ *Id.* Brown apparently said to prosecutors that he believed Bostic's pretext for the sales—that Bostic was going to open a gun shop. *Id.* Any responsible gun dealer would have seen through this thin ruse immediately. If Bostic was going to open the shop, why did he need female accomplices to fill out the federal gun purchase forms? Moreover, why didn't Bostic just get his federal firearms license and order Hi-Point pistols through the mail? Bostic's criminal record prevented him from doing either of those things. *See id.* Brown and the other gun show dealer should have recognized that. Tammi Lee Songer tried a similar ruse when straw purchasing a dozen guns from a West Virginia dealer. *See infra* § II(D).

Charlie Brown, the owner and president of MKS Supply, is the sole distributor of Hi-Point firearms. Hi-Point firearms are known as Saturday Night Specials: cheap, low-quality, small and therefore easily concealable, handguns gun disproportionately used in crime and having no collector value or interest.³² In addition to the guns he sold to Bostic, Hi-Point guns sold by Brown and MKS Supply are repeatedly recovered in connection with crime—about 630 Hi-Point guns were seized in New York City alone over the last four years.³³ MKS Supply was also the source of a Hi-Point semi-automatic rifle used in the Columbine killings.³⁴

Williams has sued Charlie Brown and MKS Supply for negligence and helping to create a public nuisance by directly supplying the criminal gun market.³⁵ Williams also sued Beemiller, the manufacturer of the Hi-Point gun,³⁶ for negligence in continuing to supply Brown and MKS. Brown and the maker of Hi-Point firearms, Tom Deeb, have an unusually close business relationship—talking almost every day—yet they do not discuss, nor implement, any policies to help prevent multiple sales or other suspicious high-risk sales.³⁷ Although Beemiller exercises strict control over Brown as its sole distributor, it chooses not to monitor, train, or prevent its sole distributor and its dealers from engaging in straw sales.

If the immunity bill were to pass Congress, it would protect the reckless conduct of the Ohio gun companies—MKS Supply, Beemiller, and Gallipolis Gun & Archery—that profited from James Nigel Bostic's gun trafficking scheme. Congress should be more concerned about protecting the rights of innocent gun violence victims, like Daniel Williams, that are severely injured through the negligence of others.

B. *Oliver v. Phoenix Arms*

³² See GAREN J. WINTEMUTE, VIOLENCE PREVENTION RESEARCH PROGRAM, RING OF FIRE: THE HANDGUN MAKERS OF SOUTHERN CALIFORNIA (1994); CRIME GUN TRACE REPORTS, *supra* note 2.

³³ *The Damage Done: The Double Standard*, *supra* note 24, at A1.

³⁴ *Id.*

³⁵ Complaint, *Williams v. Beemiller, Inc. d/b/a Hi-Point*, No. I2005 – 0070506, N.Y. Sup. Ct. (July 28, 2005).

³⁶ Beemiller, Inc. is the corporate name for the company that made the Hi-Point 9mm pistol used to injure Daniel Williams.

³⁷ Deposition of Charles Brown, *City of New York v. Beretta U.S.A. Corp.*, No. 00 CV 3641, E.D.N.Y. (Apr. 12, 2005).

A gun seller's negligence in supplying a straw purchaser is the basis for *Oliver v. Phoenix Arms*.³⁸ Oliver was brought by the parents of a fourteen-year-old Philadelphia boy who was unintentionally slain by a thirteen-year-old friend against the gun dealer and manufacturer of the gun used in the shooting for their negligence. On July 23, 2004, Anthony Oliver was playing video games with his friend Quamere Durham when Quamere retrieved a .25 caliber Phoenix Arms handgun that he told police he bought on the streets.³⁹ Quamere pulled the trigger, mistakenly thinking the safety was on, and fatally shot Anthony in the stomach. The children unsuccessfully tried to staunch Anthony's bleeding with paper towels and toilet paper. Anthony died that night.⁴⁰

Press reports indicate that the original buyer of the handgun was a straw purchaser who bought the gun and at least six others at Lou's Loan of Upper Darby, Pennsylvania.⁴¹ Lou's Loans allegedly has a history of selling guns to illegal gun traffickers in circumstances strongly indicating that the purchasers were supplying them to persons prohibited by law from buying them.⁴² Lou's has consistently been ranked as one of the nation's most prolific sellers of crime guns, ranking first for numbers of crime gun traces out of all dealers in Pennsylvania between 1996 and 2000.⁴³ It is a well-known destination for gun traffickers in Pennsylvania and New Jersey.⁴⁴

Despite public knowledge of Lou's Loans' record of supplying guns under suspicious circumstances, manufacturer Phoenix Arms chose to continue supplying it with cheap handguns, including the gun that shot Anthony. Phoenix Arms refuses to monitor, train or prevent its distributors and dealers from

³⁸ *Oliver v. Phoenix Arms*, No. 1836, Pa. Ct. Common Pleas (filed July 20, 2005).

³⁹ Barbara Laker, *Role of Guns Spreads Ugly Net*, PHILADELPHIA DAILY NEWS, Sep. 15, 2004, at 7.

⁴⁰ *Id.* See also Complaint ¶¶ 9-11, *Oliver v. Phoenix Arms*, No. 1836, Pa. Ct. Common Pleas (filed July 20, 2005).

⁴¹ *Role of Guns Spreads Ugly Net*, *supra* note 37. See also Complaint ¶¶ 19-27, *Oliver v. Phoenix Arms*.

⁴² *Id.* at ¶¶ 32-35.

⁴³ AMERICANS FOR GUN SAFETY FOUNDATION, *SELLING CRIME: HIGH CRIME GUN STORES FUEL CRIMINALS*, (Jan. 2004). [hereinafter "SELLING CRIME"]. Lou's ranked forty-fourth in the nation during this time period. *Id.*

⁴⁴ See Myung Kim & Barbara Laker, *Who Sells Them: Four Philadelphia-area Gun Shops are Consistently Identified as the Original Sellers of Hundreds of Crime Guns Every Year*, PHILADELPHIA DAILY NEWS, June 24, 2005, at 10.

engaging in straw sales, or the high-volume sales used by gun traffickers.⁴⁵ Anthony's family has sued Lou's Loan for negligence, and Phoenix Arms and Phoenix Arms' distributor for failing to exercise reasonable care in their distribution and sale of the handgun.⁴⁶

Certainly, Congress should not immunize these defendants from liability for negligence and bar the courthouse door to the Oliver family. Pennsylvania courts are more than capable of determining whether the Olivers have a claim that they can prove at trial.

C. *Johnson v. Bull's Eye Shooters Supply*

*Johnson v. Bull's Eye Shooters Supply*⁴⁷ was brought by nine of the sixteen victims⁴⁸ who were shot in 2002 in and around Washington, D.C. by two snipers armed with a Bushmaster XM-15 assault rifle—a weapon one of the snipers allegedly shoplifted from a Tacoma, Washington gun store. Each of the victims was randomly gunned down by a single shot while going about simple activities of daily life, like closing up a store after work,⁴⁹ filling a car with gas at a service station,⁵⁰ mowing a lawn,⁵¹ or loading a car in a mall parking lot.⁵² The case was filed in Washington state on January 16, 2003, against the two snipers, Bull's Eye Shooter Supply, the gun store that failed to secure the three-foot-long \$1,600 rifle from being shoplifted by a minor, and Bushmaster Firearms, Inc., which continued to distribute its product through a gun dealer with a history of “lost”

⁴⁵ Complaint ¶¶ 42-59, *Oliver v. Phoenix Arms*.

⁴⁶ *Id.* at ¶¶ 13-18.

⁴⁷ No. 03-2-03032-8, 2003 WL 21639244 (Wash. Super. Jun. 27, 2003).

⁴⁸ The nine victims who brought the suit were: Conrad Johnson; James L. “Sonny” Buchanan, Jr.; Rupinder “Benny” Oberoi; Hong Im Ballinger; Premkumar A. Walekar; Linda Franklin; Sara Ramos; Lori Lewis-Rivera; and Iran Brown; descendants of the remaining seven victims were not a part of the suit.

⁴⁹ Twenty-two-year-old Rupinder “Benny” Oberoi was shot in the lower back outside his place of work in Silver Spring, Maryland on September 14, 2002. Fifty-two-year-old liquor store manager Claudine Parker was shot and killed as she and a coworker closed the store in Montgomery, Alabama. Forty-five-year-old beauty supply store manager named Hong Im Ballinger was shot and killed outside a store she managed in Baton Rouge, Louisiana on September 23, 2002.

⁵⁰ Premkumar A. Walekar of Olney, Maryland, a fifty-four-year-old male cabdriver, was shot and killed with the Bushmaster assault rifle at a Mobil gas station in Aspen Hill, Maryland on October 3, 2002.

⁵¹ James L. “Sonny” Buchanan, Jr. of Abingdon, Va., a thirty-nine-year-old landscaper, was shot and killed with the Bushmaster assault rifle while mowing grass at a car dealership in White Flint, Maryland on October 3, 2002.

⁵² Linda Franklin, a forty-seven-year-old FBI employee was shot and killed with the Bushmaster assault rifle while loading packages with her husband in the parking garage of a Home Depot in Seven Corners Shopping Center in Fairfax County, Virginia on October 14, 2002.

guns and crime gun traces that ranked it among the worst gun dealers in America.

John Muhammed, a convicted felon, and his juvenile cohort Lee Boyd Malvo acquired the \$1,600 rifle from Bull's Eye Shooter's Supply under suspicious circumstances. When the ATF traced the murder weapon back to the store, Bull's Eye had no record of having sold the gun to anyone.⁵³ Bull's Eye received the assault rifle on July 2, 2002 and by September it had "disappeared" from the store.⁵⁴ The 35-inch weapon was not easily concealable on the body of 17-year-old Malvo.⁵⁵ Although a juvenile and therefore ineligible to buy guns, Malvo nevertheless told authorities that he was able to walk out of the store with the three-foot-long gun.⁵⁶

According to ATF audits, this episode was not the first time a firearm "disappeared" from Bull's Eye's inventory.⁵⁷ In 1998, ATF conducted compliance audits of eighty-seven problem dealers reporting high numbers of lost or stolen firearms.⁵⁸ Bull's Eye was the only Washington dealer to be audited. Between 1997 and 2001, law enforcement authorities also traced guns involved in fifty-two crimes to Bull's Eye. These numbers place Bull's Eye in the top one percent of all dealers nationwide in sales of crime guns.⁵⁹ These numbers also prompted a second audit in 2000, in which ATF found 421 guns unaccounted for.⁶⁰

Bushmaster sold the assault rifle used in the sniper attacks directly to Bull's Eye even after ATF audits revealed Bull's Eye's propensity to "lose" guns. Bushmaster sells its assault weapons through approximately sixty dealers, including Bull's Eye that it selects as Bushmaster dealers. The federal government has continually warned gun manufacturers, including Bushmaster, to be alert for gun dealers with corrupt business practices. Bushmaster consistently ignored these warnings, however, stating even after it learned from the sniper victims' lawsuit of Bull's Eye's negligence in securing the sniper rifle, that it still regarded Bull's Eye as a "good customer."⁶¹

⁵³ Complaint ¶¶ 7, 9, *Johnson v. Bull's Eye Shooters Supply*, No. 03-7-03032-8, 2003 WL 21639244 (Wash. Super. June 27, 2003).

⁵⁴ *Id.* at ¶ 46.

⁵⁵ Maureen O'Hagan, *Gun-Shop Owner in D.C. Sniper Case Faces Tax Charges*, SEATTLE TIMES, Oct. 15, 2004, at B1, available at http://seattletimes.nwsourc.com/html/localnews/2002063934_bullsoyol5m.html (last visited Apr. 3, 2005).

⁵⁶ Laura Sullivan, *Gun Maker Settles Suit on Snipers: Manufacturer, Dealer to Pay Victims' Families Total of \$2.5 Million*, BALTIMORE SUN, Sep. 10, 2004, at 4A.

⁵⁷ Amended Complaint, *Johnson v. Bull's Eye Shooters Supply*, No. 03-7-03032-8, 2003 WL 21639244 (Wash. Super. June 27, 2003).

⁵⁸ *Id.* at ¶ 66.

⁵⁹ COMMERCE IN FIREARMS, *supra* note 2, at 23.

⁶⁰ Amended Complaint, *supra* note 57, at ¶ 67.

⁶¹ Mark Shanahan, *Lawsuit Targets Windham Manufacturer of Snipers' Weapon*, PORTLAND PRESS HERALD, January 17, 2003, at 1A.

On September 14, 2002, the Bushmaster rifle was used in the first D.C.-area sniper attack.⁶² Bull's Eye failed to report the missing firearm to the authorities until the ATF made an inquiry in early November 2002 into the whereabouts of the gun used in the sniper shootings.⁶³

Following the sniper shootings, ATF investigated Bull's Eye's business practices more thoroughly. Bull's Eye could not account for the Bushmaster rifle used in the shootings and claimed that it had been stolen from the store. In addition to the Bushmaster assault rifle, seventy-seven other firearms were also missing with no record of sale.⁶⁴

Was Bull's Eye guilty of inexcusably lax security? Or was it guilty of off-the-books sales to convicted felons and dangerous juveniles? Either way, the evidence indicates that Bull's Eye is the kind of reckless gun dealer that directly supplies the criminal market with illegal guns. A state court judge ruled twice that the suit against both companies should proceed to trial.⁶⁵ If Congress had passed the gun industry immunity bill supported by the gun industry in March 2003 when it first came to vote in the U.S. Senate, Bull's Eye and Bushmaster would have been immunized despite their complicity in directly arming two dangerous criminals.

Fortunately, once the immunity bill in Congress failed, the sniper victims were able to secure a \$2 million settlement from Bull's Eye. Bushmaster Firearms, Inc. also agreed to pay the victims \$568,000 to settle the case. This was the first time a gun manufacturer in the United States compensated victims for negligently distributing its weapons through a high-risk gun dealer, and the highest settlement against a gun dealer for supplying criminals with a firearm.⁶⁶

D. *Lemongello v. Will Jewelry and Loan*

The widespread practice of using straw purchasers to obtain guns from complicit dealers is well illustrated by a case filed in West Virginia state court—*Lemongello v. Will Jewelry and Loan*⁶⁷—brought by two New Jersey police officers shot and injured on the job by a gun trafficked from a West Virginia dealer. The officers' injuries forced both to retire from active police work. A three-time felon who used the trafficked gun in a shootout with the officers was killed.

The Ruger pistol used to shoot the officers Kenneth McGuire and Dave Lemongello during an aborted gas station robbery was obtained by a three-time felon gun trafficker named James Gray, who traveled to West Virginia to buy

⁶² Amended Complaint, *supra* note 57, at ¶ 99.

⁶³ *Id.* at 46.

⁶⁴ *Id.* at 9.

⁶⁵ See Order Denying Defendant's Motion to Dismiss, *Johnson v. Bull's Eye Shooter Supply*, No. 03-2-03932-8, 2003 WL 21639244 (Wash. Super. 2003).

⁶⁶ See Matt Bennett, *Bull's Eye Settlement Hits the Target for Public Safety*, NEWS TRIBUNE, Tacoma, Wash., Sept. 13, 2004, at B5.

⁶⁷ *Lemongello v. Will Co., Inc.*, No. CIV.A.02-C-2952, 2003 WL 21488208 (W.Va. Cir. Ct. June 19, 2003).

guns for resale on the black market.⁶⁸ New Jersey's tough gun laws necessitated this interstate gun trafficking scheme.⁶⁹ Gray enlisted cab driver Tammi Songer to straw purchase the first of many guns from Will Jewelry and Loan in South Charleston on July 3, 2000. Ms. Songer bought the gun for Gray, a felon who would have failed a background check, in exchange for \$100, cocaine, and marijuana.⁷⁰

A few weeks later, Ms. Songer returned to Will Jewelry and Loan accompanied by Gray. After Gray identified the guns that were to be purchased, the clerk pulled out a dozen handguns and Ms. Songer filled out the purchase forms required by the ATF. When the clerk asked her why she was buying \$4,000 worth of pistols, Songer laughed and told him she was opening a shooting range even though it was clear that Songer knew nothing about the guns that Gray had selected.⁷¹ Clearly Songer was serving as a straw buyer for Gray and therefore the dealer should have refused the sale. Instead, when the background check on Songer came up clean, the clerk proceeded with the sale in cash. Gray carried the guns out of the store. After profiting from the sale, the store eventually called ATF to report a suspicious sale. By then, however, the damage had been done. The gun that shot officers McGuire and Lemongello was already in the underground market on its way to New Jersey.⁷²

Like the plaintiffs in *Bull's Eye*, a West Virginia judge ruled that the case against Will Jewelry and Loan should proceed to trial.⁷³ Officers McGuire and Lemongello would have been left without legal recourse had the immunity bill passed Congress in March 2003. The immunity bill would have protected a reckless gun dealer instead of the lives of two police officers. Fortunately, after the bill failed, officers Lemongello and McGuire reached a \$1 million settlement with Will Jewelry and Loan for the dealer's negligence in selling a dozen

⁶⁸ Toby Coleman, *The Trading Game*, CHARLESTON DAILY MAIL, Feb. 26, 2004, at 11A.

⁶⁹ The vast majority of crime guns recovered in New Jersey—where one of the guns bought by Gray was recovered—have been sold by out-of-state gun dealers and trafficked into the state in order to circumvent New Jersey's strict gun laws. See DEP'T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, CRIME GUN TRACE REPORTS (2000) NATIONAL REPORT 48 (2002), available at <http://www.atf.gov/firearms/ycgii/2000/index.htm> (figures show over 75% of all crime guns traced originated outside of New Jersey); DEP'T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, YOUTH CRIME GUN INTERDICTION INITIATIVE, THE ILLEGAL YOUTH FIREARMS MARKETS IN 27 COMMUNITIES 13 (1999), available at <http://www.atf.gov/firearms/ycgii/index.htm> (table shows that 86% of all crime guns recovered in New Jersey were originally sold outside of New Jersey and that 77.7% of the guns were originally sold in the top-ten source states for illegal firearms).

⁷⁰ Toby Coleman, *The Trading Game*, CHARLESTON DAILY MAIL, Feb. 26, 2004, at 1A.

⁷¹ *Id.*

⁷² The guns purchased by Songer were quickly trafficked out of West Virginia. Less than six months later, a three-time felon named Shuntez Everett used one of the guns in the near fatal shooting of officers McGuire and Lemongello in Orange, New Jersey. Amended Complaint, *Lemongello v. Will Co., Inc.*, No. CIV.A.02-C-2952, 2003 WL21488208 (W.Va. Cir. Ct. June 19, 2003).

⁷³ *Lemongello v. Will*, *supra*, note 67.

handguns to Songer. The settlement also led Will Jewelry and Loan to implement a policy of selling only one handgun a month per customer. Other West Virginia dealers have adopted similar policies.⁷⁴ These policy changes would likely not have taken place had Congress granted gun dealers immunity from civil suits.

E. *Jefferson v. Rossi*

A Pennsylvania gun dealer's willingness to supply a gun trafficker was the basis for *Jefferson v. Rossi*,⁷⁵ in which a grieving mother brought suit against a reckless gun dealer for the violent shooting death of her seven-year-old son. On April 19, 1999, Tennille Jefferson's son, Nafis, was playing with his friends in their South Philadelphia neighborhood when another seven-year-old boy found a loaded .44 caliber revolver under an abandoned car. The boy, thinking the gun was unloaded, pointed the gun at Nafis' head and pulled the trigger. Nafis passed away six hours later.⁷⁶

The handgun that killed Nafis Jefferson was one of many that gun dealer Sauers Trading had sold to gun trafficker Perry Bruce.⁷⁷ Perry Bruce was an addict and user of illegal drugs, including crack cocaine and marijuana. Sauers Trading is a licensed dealer in South Williamsport, Pennsylvania that repeatedly sold handguns to Bruce despite obvious indicators that he was trafficking them. For instance, Bruce showed a welfare I.D. card for identification, yet paid thousands of dollars in cash for eleven guns. Bruce testified in a pre-trial deposition that he was high on marijuana each time he purchased guns from Sauers Trading and that Jon Sauers, the owner of Sauers Trading, "had to know" what Bruce was doing.⁷⁸ In addition, on at least one occasion, Sauers asked Bruce to wait until other customers left the premises before completing a sale to Bruce.⁷⁹ Sauers was also aware that a prior firearm Sauers had sold to Bruce was involved in a crime, yet continued to sell him more handguns.⁸⁰ When asked why he never questioned Bruce about why he was purchasing so many guns, Sauers stated that he didn't think it was any of his business.⁸¹

Of the eleven handguns Sauers sold to Bruce, nine were easily concealable semi-automatic handguns. Twelve guns Bruce purchased from Sauers or

⁷⁴ Fox Butterfield, *Gun Dealer Settles Case Over Sale to Straw Buyer*, N.Y. TIMES, June 23, 2004 at A14.

⁷⁵ *Jefferson v. Rossi*, No. 01-CV-2536, 2002 WL 32154285 (E.D. Pa. Jan. 22, 2002).

⁷⁶ Complaint, ¶15-19, *Jefferson v. Rossi*, 2002 WL 32153906 (Pa. Com. Pl. 2002) (No. 2218) [hereinafter "Jefferson Complaint"].

⁷⁷ *Id.* at ¶4.

⁷⁸ Deposition of Perry Bruce at 31, 37 & 46, *Jefferson v. Rossi*, 2002 WL 32153906 (Pa. Com. Pl. 2002) (No. 2218).

⁷⁹ *Id.*

⁸⁰ *Jefferson Complaint*, *supra* note 76, at ¶ 47-48.

⁸¹ L. Stuart Ditzen, *Dealer Settles Suit Over Gunplay*, PHILADELPHIA INQUIRER, Aug. 24, 2004, available at <http://www.philly.com/mld/inquirer/9477679.htm?1c>.

elsewhere have been recovered from crime scenes.⁸² Bruce was not Sauers' only gun trafficking client. Sauers sold at least forty-one guns to six different gun traffickers between 1993 and 1999.⁸³

Despite supplying guns to an appalling number of gun traffickers like Perry Bruce, Sauers Trading would have been immunized from liability had Congress passed the immunity bill. A Pennsylvania court rejected Sauers' attempt to dismiss the claim, ruling that it had merit and should proceed to trial.⁸⁴ After the immunity bill failed, Sauers agreed to settle with Ms. Jefferson for a reported \$850,000 weeks before the trial was to begin.⁸⁵

F. *Anderson v. Bryco Arms Corp.*

A reckless firearms dealer supplying a gun trafficker was also at the heart of *Anderson v. Bryco Arms Inc.*⁸⁶ Several victims of hate-crime shooter Benjamin Nathaniel Smith brought suit against the gun dealer and manufacturer who sold the gun Smith used in a well-publicized shooting spree in Illinois and Indiana in July 1999. Ricky Byrdson, a former Northwestern University basketball coach,⁸⁷ Steven Kuo, a student at the University of Illinois,⁸⁸ Reverend Stephen Anderson, of Decatur, Illinois,⁸⁹ and Won Joon Yoon, a graduate student at Indiana University in Bloomington, Indiana,⁹⁰ were among those targeted by Smith because they were African-American, Asian-American, or Jewish. In all, Smith's hatred led him to kill two people and wound nine others over three days.⁹¹

Smith acquired the .380 caliber Bryco handgun used in these shootings from a gun trafficker named Donald Fiessinger who was steadily supplied with Bryco guns by the Old Prairie Trading Post in Pekin, Illinois.⁹² Smith had previously attempted to acquire a gun in June 1999; but a gun dealer in Peoria Heights, Illinois turned Smith away after a background check revealed a domestic violence restraining order prohibiting Smith from purchasing a gun.⁹³

⁸² Jefferson Complaint, *supra* note 76, at ¶¶ 43, 46.

⁸³ Expert report of Gerald Nunziato & Joseph J., Table IV, *Jefferson v. Rossi*, 2002 WL 32153906 (Pa. Com. Pl. 2002) (No. 2218).

⁸⁴ Jefferson Complaint, *supra* note 76.

⁸⁵ Ditzen, *supra* note 81.

⁸⁶ *Anderson v. Bryco Arms*, No. 00-L-7476 (Circuit Ct., Cook County, Ill., April, 10, 2002).

⁸⁷ Amended Complaint, ¶ 39, *Anderson v. Bryco Arms*, No. 00-L-7476 (Circuit Ct., Cook County, Ill., April, 10, 2002) [hereinafter "Anderson Amended Complaint"].

⁸⁸ *Id.* ¶¶ 32-3.

⁸⁹ *Id.* ¶ 28.

⁹⁰ *Id.* ¶ 36.

⁹¹ See Russell Working, *Rampage Left Lasting Wounds*, CHI. TRIB., July 4, 2004, at C10.

⁹² Plaintiff's Memorandum in Opposition to Defendant Old Prairie Trading Post's Motion to Dismiss 1, *Anderson v. Bryco Arms*, No. 00-L-7476 (Circuit Ct., Cook County, Ill., April, 10, 2002).

⁹³ Anderson Amended Complaint, *supra* note 87, at ¶ 151.

Smith next searched the classified ads in the *Peoria Journal Star* and found Fiessinger advertising guns for sale, even though he did not have a federal license.⁹⁴

Fiessinger routinely purchased the same make and model of Bryco handguns from the Old Prairie Trading Post, reselling them for a substantial profit.⁹⁵ In all, Old Prairie supplied Fiessinger with seventy-two such guns over a two-year period, never questioning whether these weapons were bound for the underground market. Not only did Old Prairie fail to inquire into Fiessinger's activities, the gun dealer affirmatively assisted Fiessinger in avoiding federal firearms laws by spacing out multiple gun purchases to avoid filing mandatory reports to federal authorities.⁹⁶ In return, Fiessinger's purchases accounted for a large share of Old Prairie's sales of Bryco handguns.

Old Prairie certainly should have known that Feissinger was trafficking the Bryco pistols he was buying, but they never shut down those sales. Bryco, as well, could have required Old Prairie to adhere to certain responsible practices as a prerequisite to receiving Bryco guns for resale. Instead, due to a gun seller's irresponsible practices, two people were left dead and nine others injured. Despite the strong case against Old Prairie and Bryco, which a judge held should proceed toward trial,⁹⁷ the case has been stalled because both the owner of Old Prairie and Bryco filed for bankruptcy protection.⁹⁸

⁹⁴ See *id.* at ¶¶ 53-58. Federal law provides that no person shall import, manufacture or deal in firearms without a license, 18 U.S.C. §§ 922(a), 923(a) (2005). A person who has acquired a firearms license is called a Federal Firearms Licensee ("FFL"). Federal law also allows private individuals who are collectors to sell firearms without becoming an FFL. 18 U.S.C. § 923(b). However, if they are "engaged in the business" of selling firearms for profit, they must obtain an FFL. 18 U.S.C. §§ 922(a)(5), (x). The Brady Act mandates that all FFLs conduct background checks before they sell a firearm. 18 U.S.C. § 922(t). The Brady Act applies only to FFLs. Collectors and private individuals are allowed to sell firearms without conducting a federal background check and ATF cannot police all firearms sellers to determine if they are "engaged in the business." This loophole feeds the thousands of gun shows that occur every year in this country where massive amounts of firearms are sold without background checks. Federal law does not regulate gun shows and as a result they "provide a large market where criminals can shop for firearms anonymously." DEP'T OF TREASURY, BUREAU OF ALCOHOL TOBACCO & FIREARMS, GUN SHOWS: BRADY CHECKS AND CRIME GUN TRACES 26 (1999), available at http://www.atf.treas.gov/pub/treas_pub/gun_show.pdf (last visited Mar. 28, 2005). The ATF has stated that gun shows provide the mechanism for traffickers to "freely transfer firearms;" firearms that will later be used in crime. *Id.* at 6, 14, & Table 4.

⁹⁵ Plaintiff's Memorandum, 5-7, *Anderson v. Bryco Arms*, No. 00-L-7476 (Circuit Ct., Cook County, Ill., April, 10, 2002).

⁹⁶ *Id.* at 8-11. During a six-month stretch in 1998, Fiessinger received one gun from Old Prairie every Monday for twenty-five consecutive weeks. *Id.* at 13.

⁹⁷ *Anderson v. Bryco Arms*, No. 00-L-7476 (Circuit Ct., Cook County, Ill., April, 10, 2002).

⁹⁸ The Illinois Supreme Court recently held that individuals victimized by gun traffickers in Chicago did not state a claim for public nuisance under Illinois law. See *Young v. Bryco Arms*, 821 N.E.2d 1078 (Ill. 2004). However, this ruling would not necessarily foreclose the *Anderson* plaintiffs from proceeding under negligence if not for the bankruptcies that halted their case.

G. NAACP v. Acusport, Inc.

A lawsuit brought by the NAACP in the Eastern District of New York further illustrates how widespread reckless gun selling has become in this country.⁹⁹ In 2003, the NAACP brought suit seeking injunctive relief¹⁰⁰ against the primary manufacturers, importers, and distributors of handguns in the United States for negligently and intentionally making large numbers of handguns available to criminals, juveniles, and other people prohibited from possessing and using handguns in New York State.¹⁰¹ The foundation for plaintiff's case was expert testimony and gun crime trace data illustrating how specific manufacturers, distributors, and dealers are systematically engaging in business practices that afford prohibited individuals the opportunity to procure guns.¹⁰²

Expert testimony offered by the NAACP revealed that a small proportion of gun dealers sell a large proportion of the guns recovered in crime,¹⁰³ and that particular characteristics of dealers are significantly correlated to the percentage of their guns that wind up in criminals' hands.¹⁰⁴ The experts also testified that certain manufacturers and distributors appear to disproportionately sell to problem dealer groups.¹⁰⁵

After a lengthy trial, the court found that defendants were responsible for creating a public nuisance in New York, holding that “[c]areless practices and

⁹⁹ A prior decision of the New York Court of Appeals in *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001), that rejected a lawsuit brought by individual gun violence victims who could never identify the guns used to cause their injuries, nevertheless suggested that a case for liability against the gun industry could be predicated on a showing that particular dealers supplied by gun manufacturers were responsible for a disproportionate share of crime guns. The court held that,

[negligence] might well support the extension of a duty to manufacturers to avoid selling to certain distributors in circumstances where the manufacturer knows or has reason to know those distributors are engaging in substantial sales of guns into the gun-trafficking market on a consistent basis. . . . Without a showing that specific groups of dealers play a disproportionate role in supplying the illegal gun market, the sweep of plaintiffs' duty theory is far wider than the danger it seeks to avert.

Id. at 1064. The court went on to state, “[b]ecause of BATF's continued pursuit in identifying how handguns enter the illegal market, it may well be that a core group of corrupt FFLs will emerge at some future time. This might alter the duty equation.” *Id.* at 1064 n.5.

¹⁰⁰ *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003). The NAACP sought injunctive relief in the form of more responsible and practicable business practices. The reforms would include: limiting multiple retail sales of guns to the same person; requiring retailers to maintain properly stocked, protected, and run establishments; requiring retailers to train sellers to block straw purchases; and cutting off sales of new guns to retailers that sell a disproportionate amount of handguns that ATF traces to criminal activity. *Id.* at 524-25.

¹⁰¹ *Id.* at 446-47.

¹⁰² *Id.* at 519-23.

¹⁰³ *Id.* at 522.

¹⁰⁴ *NAACP*, 271 F. Supp. 2d at 522.

¹⁰⁵ *Id.* at 503.

lack of appropriate precautions on the part of some retailers lead to the diversion of [a] large number of handguns from the legal primary market into a substantial illegal secondary market.”¹⁰⁶ The court added that “[t]he flow of guns into criminal hands in New York would substantially decrease if manufacturers and distributors insisted that retail dealers who sell their guns be responsible.”¹⁰⁷ Ultimately, however, the NAACP was held to have lacked standing to bring a public nuisance suit.¹⁰⁸ The court did hold, however, that New York City would have standing to make this claim and indeed such a suit is scheduled for trial in 2005.¹⁰⁹

H. *Johnson v. Bryco*

Trafficked guns were also used in a horrific multiple slaying – “The Wendy’s Massacre” – on May 25, 2000 in Flushing, New York.¹¹⁰ John Taylor and Craig Godineaux during a robbery ordered seven employees of a Wendy’s restaurant to the walk-in cooler in the basement, their heads covered with plastic bags and duct tape, and shot, execution style. Five employees, including Anita Smith, were killed. Two, including JaQuione Johnson, survived.¹¹¹ John Taylor had worked at Wendy’s until a few months before the shootings when he was fired on suspicion that he had stolen from the restaurant.¹¹² Taylor and Godineaux have since been tried and convicted of the shootings.

JaQuione Johnson and the family of Anita Smith brought suit against Bryco Arms, the maker of the gun used in the shootings, its owners, distributor, and the dealer that sold the gun. Taylor and Godineaux apparently obtained the Bryco semiautomatic pistol used in the shootings from gun traffickers. These traffickers purchased the gun from Atlantic Gun & Tackle, a dealer in Bedford Heights, Ohio and then traveled to New York City to sell it at a profit.¹¹³ The suits allege that even though Atlantic Gun knew that the purchase was a straw sale, the dealer completed the sale, sending the gun into the illegal market. Atlantic Gun has been identified as one of the ten worst gun dealers in the

¹⁰⁶ *Id.* at 450.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 455 (holding that the NAACP lacked standing because its members were not harmed in any way different from the general public by the existence and threat of gun violence in New York). The NAACP chose not to appeal this ruling.

¹⁰⁹ *NAACP*, 271 F. Supp. 2d at 449; *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256 (2004) (denying defendant’s motion to dismiss).

¹¹⁰ See Amended Complaint, *Smith v. Bryco Arms*, 1:02-cv-3029-JBW, 2002 WL 32153892 (E.D.N.Y. May 21, 2002); Amended Complaint, *Johnson v. Bryco Arms*, 1:03-cv-0066-JBW (E.D.N.Y.) [hereinafter “Johnson and Smith Amended Complaints”].

¹¹¹ *Id.* See also Patrice O’Shaughnessy, *Mother Takes Aim At Top Gunmaker*, N.Y. DAILY NEWS, June 11, 2002.

¹¹² See Sean Gardiner, *Gun Traced to Ohio Buy*, NEWSDAY, June 1, 2000.

¹¹³ See Johnson and Smith Amended Complaints, *supra* note 110; Gardiner, *supra* note 112.

country, having sold more than 900 guns traced to crime between 1996 and 2000.¹¹⁴ A federal judge ruled the case should proceed to trial.¹¹⁵

Although Bryco Arms and its owners and distributor were also sued for continuing to supply Atlantic Gun, they have filed for bankruptcy protection, thereby preventing the lawsuits from continuing against them.¹¹⁶ Had the immunity bill passed Congress in 2003, these victims would have been denied any compensation for their grievous losses. Instead, the plaintiffs have received compensation from the defendants in an undisclosed amount.

III. GUN INDUSTRY INSIDERS AND DOCUMENTS CONFIRM THAT GUN MANUFACTURERS ENGAGE IN HIGH-RISK SALES PRACTICES

The problem of gun manufacturers supplying high-risk gun dealers willing to make straw sales and directly supply the illegal market is not new. In the mid-1970's, Congress held a series of nationwide hearings on legislation to close loopholes in the 1968 Gun Control Act.¹¹⁷ The hearings identified the problem of large volume multiple sales fueling the illegal market from dealers in Ohio¹¹⁸ and South Carolina.¹¹⁹ A 1976 House Judiciary Committee report zeroed in on the problem of unscrupulous dealers:

While conscientious dealers make individual attempts to assure that their purchasers are State residents and not prohibited persons, the opportunity remains for lax or unscrupulous dealers to do nothing and rely on the fact that, because of lack of frequent inspection of their records, they will escape detection and avoid prosecution.¹²⁰

Unfortunately, Congress failed to pass legislation to address weaknesses in the 1968 Gun Control Act and the problem of "lax or unscrupulous" dealers continued to grow.

By the early 1990s, even voices within the gun industry began to recognize and accept that there was a serious problem with "unscrupulous" gun dealers diverting huge numbers of guns into the illegal market. In 1993, Douglas Painter, a marketing director for the National Shooting Sports Foundation ("NSSF"), the largest gun industry trade association that claims most gun manufacturers as members, wrote a memo to Robert Delfay, NSSF Executive

¹¹⁴ SELLING CRIME, *supra* note 43.

¹¹⁵ *Johnson v. Bryco*, 304 F.Supp. 2d (E.D.N.Y. 2003).

¹¹⁶ See Hebert Lowe, *Verdict is Death, Jury Decides Killer's Fate in Wendy's Massacre*, NEWSDAY, Nov. 27, 2002, at A5.

¹¹⁷ *Firearms Legislation: Hearings Before the Subcomm. on Crime, House Comm. on the Judiciary*, 94th Cong. 389 (1975).

¹¹⁸ *Id.* at 1032.

¹¹⁹ *Id.* at 2600. See also DEP'T OF TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, PROJECT IDENTIFICATION: A STUDY OF HANDGUNS USED IN CRIME (1976).

¹²⁰ H.R. REP. NO. 94-1103, at 28 (1976).

Director, discussing an important ATF report entitled “Operation Snapshot.” Painter offered a scathing critique of gun manufacturers’ distribution systems and strongly called for a “*proactive industry strategy*” to (1) address the serious “potential for illegal firearms transactions through ostensibly ‘legal’ FFL channels,” and (2) “minimiz[e] the possibility of illegal transactions through *unscrupulous* FFL holders.”¹²¹ Painter also strenuously warned that “[t]here are literally tens of thousands of FFL holders throughout the country whose firearms transactions are not subject to regular inspection or proper oversight” because the ATF lacks the resources to oversee them. Painter noted that thirty-four percent of FFLs who were inspected by the ATF had Gun Control Act violations.¹²²

What was the response to this alarming memo that echoed what Congress had identified as a huge problem seventeen years earlier? Robert Delfay’s response on behalf of the industry was to pen a handwritten note to Painter’s memo: “Doug – You may want to file for future reference. Arlen not keen on doing anything right now, 10/1/93.”¹²³ The “Arlen” referred to is Arlen Chaney, Chairman of the Board of Governors of NSSF. Nothing further was done in reference to Painter’s memo or this important ATF report. Indeed, Painter never read another ATF report again.¹²⁴ Delfay did not even read *Operation Snapshot* or any of the dozens of subsequent ATF reports that expanded upon the serious problems described in *Operation Snapshot*.¹²⁵

This pattern of the gun industry ignoring or suppressing internal voices of reform played out throughout the 1990s and continues today. In 1993 and 1994, the National Alliance of Stocking Gun Dealers (“NASGD”), headed by Bill Bridgewater, a North Carolina gun dealer, published a series of alarms about the corrupt firearms dealers within the industry in its newsletter the “Alliance Voice,”¹²⁶ which is sent to all major gun manufacturers. These were only a few of the alarms Mr. Bridgewater and other dealer members of the NASGD raised in this time period. The NASGD submitted a prepared statement during 1993

¹²¹ Memorandum from Doug Painter, NSSF Marketing Director, to Robert Delfay, NSSF Executive Director (Jul. 13, 1993) (on file with the Brady Center) (emphasis in original and added).

¹²² *Id.* at 1.

¹²³ Note from Robert Delfay, NSSF Executive Director, to Doug Painter, NSSF Marketing Director (Oct. 1, 1993) (on file with the Brady Center).

¹²⁴ Painter is now Executive Director of the NSSF and the Sporting Arms and Ammunition Manufacturers’ Institute. Robert Delfay previously held both posts.

¹²⁵ Deposition of Robert Delfay, *People v. Arcadia Machine & Tool* (June 18, 2002) [hereinafter Delfay Deposition].

¹²⁶ See Bill Bridgewater, *Executive Director’s Comment*, ALLIANCE VOICE (July 1993); B.R. Bridgewater, *Guest Editorial*, ALLIANCE VOICE (Feb. 1994) (arguing the diversion of firearms is a major responsibility and concern of the industry); Carole Bridgewater, *The Editor’s Desk*, ALLIANCE VOICE (Sep. 1993) (writing that the industry needs to clean up its act); Tim Darrah & David Herzog, *Guns Out of Control*, ALLIANCE VOICE (Aug. 1994) (warning that the gun industry is dangerously unregulated); William H. Hartsing, *Letter to Mr. Bridgewater*, ALLIANCE VOICE (Feb. 1993) (writing that the gun industry is a “big non-professional mess” and is critical of the lack of federal regulation of FFLs); *Interview with Richard Feldman*, ALLIANCE VOICE (Nov. 1993).

Congressional hearings about the widespread problem of corrupt dealers supplied by the industry.¹²⁷

Later, Carole Bridgewater, wife of Bill Bridgewater and Secretary of the NASGD, stated in a sworn declaration that the manufacturers' "willingness to sell guns to anyone with a Federal Firearms License feeds the black market for guns" and that situation "makes it extremely difficult for legitimate dealers who obey the rules to compete and survive."¹²⁸ In apparent retaliation for raising these alarms, Bridgewater was forced off the board of another gun industry trade association.¹²⁹

Sturm Ruger received similar warnings from its dealers in a 1993 survey asking them what it could do to increase their sales.¹³⁰ Many dealers responded that legitimate dealers were tired of the manufacturers and distributors tolerating and continuing to supply guns to dealers who engaged in illegal and irresponsible sales practices and asked Sturm Ruger to exercise greater control over its distribution system. Dealers also suggested establishing an "authorized dealer" program where dealers had to meet strict requirements and operate legitimate, responsible businesses. Sturm Ruger's marketing manager informed William Ruger Sr. about what the dealers had said but was told to drop "the whole thing."¹³¹

In February 1995, after debating whether the industry should do something about high-risk dealers, NSSF and the Sporting Arms and Ammunition Manufacturers' Institute ("SAAMI") drafted a "Responsible Firearms Retailer Code of Practice" that called for dealers to go "beyond" federal regulations to block straw purchases.¹³² The code was never implemented.¹³³ At around the same time, SAAMI published a brochure claiming that its members "pledge to sell our products to *only legitimate retail firearms dealers*," adding, "we feel such action would result in fewer of our products ending up in the hands of

¹²⁷ *Federal Firearms Licensing: Hearings Before the Subcomm. on Crime and Criminal Justice, House Comm. Of Judiciary*, 103d Cong. 86-100 (1993).

¹²⁸ Declaration of Carole Bridgewater ¶ 5, *People v. Arcadia Machine & Tool, Inc.*, No. 4095 [hereinafter "Bridgewater Declaration"].

¹²⁹ Declaration of Robert Ricker In Support of Plaintiff's Opposition to Defendant Manufacturers' Motion for Summary Judgment ¶¶ 11-12, *People v. Arcadia Machine & Tool, Inc.*, No. 4095 [hereinafter "Ricker Declaration"].

¹³⁰ Deposition of Sylvan C. Wiley at 26, *People v. Arcadia Machine & Tool, Inc.*, no. 4095 (Aug. 7, 2002).

¹³¹ *Id.*

¹³² *Id.*

¹³³ Sporting Arms and Ammunition Manufacturers' Institute & National Shooting Sports Foundation, *Responsible Firearms Retailer Code of Practice* (Feb. 1995) (unpublished) (on file with the Brady Center). *See also*, Delfay Deposition, *supra* note 125.

unethical dealers.”¹³⁴ But this pledge was never implemented and was dropped from subsequent editions of the brochure.¹³⁵

About this time, industry leaders also began to meet quarterly with ATF, which continually urged the industry to address the crime gun diversion problem, to no avail. One of the first meetings was in December 1995. Robert Scott, then Smith & Wesson’s Marketing Vice President, took notes of the meeting, highlighting a litany of matters identified by ATF that remain critical today: “straw man purchasing is a major emphasis;” “trafficking is a critical area for attention;” “commerce of guns (dangerous commodity) [is] very unregulated [in comparison to] pharmaceuticals for example;” “juveniles buy through the black market;” and “theft from FFLs [is a concern].”¹³⁶ Smith & Wesson and other gun manufacturers continued supplying guns to high-risk dealers without addressing any of these problems. In August 1999, NSSF finally pledged to ATF officials to “look for ways to help identify problem dealers,” but NSSF never did so.¹³⁷

The gun industry did more than renege on agreements with the ATF to take action against high-risk gun dealers. Between 1992 and 1997, according to whistleblower Robert Ricker,¹³⁸ lawyers and key executives for the gun industry and trade associations, including inside and outside counsel, held “informal” meetings to discuss various legal, legislative, and policy issues facing the industry.¹³⁹ While Ricker and Richard Feldman, Executive Director of the American Shooting Sports Council (“ASSC”), suggested at these meetings that the industry would be better served by dealing with the problems of firearm diversion from dealers, the prevailing view was that action by the industry would be an admission of responsibility for the problem. Ultimately, the meetings themselves were considered “dangerous” and after 1997 were stopped.¹⁴⁰

In his declaration, Ricker states that “[t]he firearms industry, including the defendants in this action, has long known that the diversion of firearms from legal channels of commerce to the illegal black market in California and elsewhere, occurs principally at the distributor/dealer level” as “firearms pass quickly from licensed dealers to juveniles and criminals through such avenues as

¹³⁴ THE SPORTING ARMS AND AMMUNITION MANUFACTURERS INSTITUTE, A RESPONSIBLE APPROACH TO PUBLIC FIREARMS OWNERSHIP AND USE, 2D EDITION (1994).

¹³⁵ See THE SPORTING ARMS AND AMMUNITION MANUFACTURERS INSTITUTE, “...WE URGE THAT YOU NOT PURCHASE A FIREARM.” (1996).

¹³⁶ Smith & Wesson Notes, Areas of Discussion With ATF (Dec. 12, 1995) (on file with the Brady Center).

¹³⁷ Fax from James E. Chambers, Executive Director, Sporting Arms and Ammunition Manufacturers Institute, to Bob Delfay, President, NSSF, BATF/Industry Meeting Notes (Aug. 15, 1999) (on file with the Brady Center).

¹³⁸ Ricker spent nearly twenty years of his life representing the gun industry as a NRA lawyer, gun lobbyist, and finally, as Director of the American Shooting Sports Council, the primary industry trade group dedicated to lobbying. In 2003, Ricker submitted a declaration in support of the lawsuits filed by twelve California cities and counties against the gun industry. See Ricker Declaration, *supra* note 129.

¹³⁹ Ricker Declaration, *supra* note 129, at ¶ 15.

¹⁴⁰ *Id.* at ¶ 16.

straw sales, large-volume sales to gun traffickers and various other channels by corrupt dealers or distributors who go to great lengths to avoid detection by law enforcement authorities.”¹⁴¹ He also noted “straw purchases, often of large volumes of guns, were a primary avenue by which a relatively small number of federally licensed firearms dealers supplied the criminal market.”¹⁴² Although these diversions could be stopped through proper oversight and training, Ricker said that it has been a common practice of gun manufacturers and distributors to adopt a “see-no-evil, hear-no-evil, speak-no-evil” approach regarding those who sell their guns that “encourages a culture of evasion of firearms laws and regulations.”¹⁴³ Rather than cutting off sales to dealers that sell guns into the illegal market, Ricker said manufacturers and distributors “hide behind the fiction” that they have no responsibility as long as their gun seller holds an FFL.¹⁴⁴ To underscore that defendants can identify these dealers, Ricker added that “[f]irearm manufacturers have long been aware that the number of ATF crime gun traces associated with a particular dealer can be an important indicator that illegal gun trafficking is occurring.”¹⁴⁵

The reform advocacy of Ricker and Feldman only led to retaliation by powerful members of the gun industry.¹⁴⁶ In October 1997, Feldman and Ricker enlisted member companies to join an accord with President Clinton to provide child safety locks with new firearms.¹⁴⁷ Robert Delfay, head of NSSF, immediately dismissed the initiative and tried to torpedo the agreement.¹⁴⁸ Feldman and Ricker were summoned to a key trade association meeting and raked over the coals by industry members for stepping out of line.¹⁴⁹ Nevertheless, Feldman and Ricker began to support measures to keep guns out of criminals’ hands, including a proposal they made to NSSF to develop training videos for firearms dealers along with a “dealer certification” program.¹⁵⁰ Delfay ordered in a memo to industry executives: “Someone in a position of authority at ASSC needs to direct Mr. Ricker to become silent.”¹⁵¹ Ray Oeltjen, Vice-Chairman of ASSC said a “lynch mob mentality” by members of NSSF was going to destroy ASSC.¹⁵² Oeltjen was proven right: NSSF leaders thereafter

¹⁴¹ *Id.* at ¶ 8.

¹⁴² *Id.* at ¶ 9.

¹⁴³ *Id.* at ¶ 9.

¹⁴⁴ Ricker Declaration, *supra* note 129, at ¶ 12.

¹⁴⁵ *Id.* at ¶¶ 1-5, 8 & 9.

¹⁴⁶ *Id.* at ¶ 21.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at ¶ 19.

¹⁴⁹ *Id.* at ¶¶ 18 & 19.

¹⁵⁰ *Id.* at ¶ 19.

¹⁵¹ Memo from Robert Delfay, NSSF Executive Director, to Georgia Nichols, Jay Hansen, Paul Jannuzzo and Ray Oeltjen, re: Reining in Ricker (June 4, 1999) (on file with the Brady Center).

¹⁵² Email from Ray Oeltjen, Vice-Chairman, American Shooting Sports Council, to Georgia Nichols (on file with author).

engineered the firing of Feldman, the ouster of Ricker, and the dissolution of ASSC.¹⁵³

The “see no evil, hear no evil, speak no evil” attitude described by Ricker is similarly described by Robert Hass, a former Smith & Wesson Executive. Hass worked for Smith & Wesson for eleven years and submitted a sworn statement, admitting that:

[Smith & Wesson] and the industry are . . . aware that the black market in firearms is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal firearms licensees. In spite of their knowledge, however, the industry's position has consistently been to take no independent action to insure responsible distribution practices.¹⁵⁴

In his deposition, Hass confirmed that others in the gun industry, including defendants in the suits highlighted in this article, “[s]hould have, could have, would have” known that manufacturers sold through high-risk dealers and that the industry could be more active in “analyzing the tracing of its guns” and “pinpointing those dealers who are involved in a significantly higher percentage of traces than the average.”¹⁵⁵

Robert Lockett, owner of a Kansas gun store and former winner of NASGD’s “Dealer of the Year” award, is another industry insider who suffered retaliation after calling for reform.¹⁵⁶ In 1999, he wrote an article for *Shooting Sports Retailer* that called on manufacturers and distributors to “wake-up” and control their distribution systems to curb widespread diversion, including requiring that distributors and dealers “adhere to some strict guidelines.”¹⁵⁷ In a deposition, Lockett admitted that the industry essentially does nothing to oversee distribution: “Once you receive a Federal Firearms License from the Federal Government, the industry has generally said, okay, that's good enough for us, you are good to go.”¹⁵⁸ For speaking out, Lockett suffered retaliation from several distributors who refused to continue supplying him.¹⁵⁹

Perhaps the most dramatic illustration of the gun industry’s determination to undermine reform efforts and maintain its irresponsible but profitable relationships with high-risk gun dealers is Smith & Wesson’s short-lived attempt

¹⁵³ Ricker Declaration, *supra* note 129, at ¶ 21.

¹⁵⁴ Affidavit of Robert Hass, ¶ 20, *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (1999).

¹⁵⁵ Deposition of Robert Hass, *Boston v. Smith & Wesson*, No. 99-2590 (Sup. Ct. Div., Suffolk County, Mass.) (Feb. 26, 2002) [hereinafter “Hass Deposition”].

¹⁵⁶ See, e.g., Paul M. Barrett, *Loaded Words: A Dealer Breaks Rank, Blaming Gun Makers*, WALL ST. J., June 22, 1999, at A1; Robert Lockett, *The Implications of New York City*, SHOOTING SPORTS RETAILER (July/Aug. 1999).

¹⁵⁷ *The Implications of New York City*, *supra* note 156.

¹⁵⁸ Deposition of Robert Lockett, at 23, *California v. Arcadia Machine & Tool*, Super. Ct. San Francisco City and County, 1999, No. 303753; Super. Ct. Los Angeles County, 1999, No. BC214794 (Aug. 9, 2002) [hereinafter “Lockett Deposition”].

¹⁵⁹ *Id.*

to require its dealers to adhere to a code of conduct as part of a settlement with various government agencies considering lawsuits. Smith & Wesson broke ranks with its fellow gun makers on March 17, 2000, and agreed to widespread reforms in the way it distributed its handguns.¹⁶⁰ On the same day, Robert Delfay, as head of NSSF, stated to the press that he was “deeply disturbed” by Smith & Wesson’s action.¹⁶¹ He added: “*We are confident that no other major manufacturers will desert.*”¹⁶² Delfay also told the press: “I talked to the majority of [the manufacturers], and the unanimous response was, ‘No way.’”¹⁶³ In May 2000, Don Gobel, then head of NSSF’s board and a Browning Arms executive, drafted a memo of NSSF “Action Items” he sent to Delfay summarizing gun manufacturers’ positions on key issues, including the Smith & Wesson agreement.¹⁶⁴ One of the action items was: “Why We Stand United Not to Sign the S&W Agreement.”¹⁶⁵

Pressure on multiple fronts¹⁶⁶ was successful in suppressing Smith & Wesson’s handgun sales, and the parent company then sold Smith & Wesson to a group of investors, including former company executive Robert Scott.¹⁶⁷ Under Scott’s leadership, Smith & Wesson renounced the settlement agreement.¹⁶⁸

In August 2002, Scott admitted that as a consequence of signing an agreement to reform its distribution practices, Smith & Wesson was forced to withdraw from some of the industry “community groups,” including NSSF.¹⁶⁹ He also said that after scuttling the agreement, Smith & Wesson was readmitted to membership within the firearms industry:

“The firearms industry is a family. We need to be part of that family. We can’t be separate from that family. We want to fully, 100 percent,

¹⁶⁰ Under the agreement, Smith & Wesson would have required that all distributors and dealers selling Smith & Wesson guns be authorized, thereby submitting themselves to a code of conduct critical to curbing the diversion of firearms into the underground market. GUN VIOLENCE REDUCTION, *supra* note 16, at App. D. Smith & Wesson also signed a slightly modified agreement in December 2000 with Boston. *Id.*

¹⁶¹ David Ho, *Officials Praise Smith & Wesson*, ASSOCIATED PRESS, Mar. 17, 2000.

¹⁶² *Id.* (emphasis added).

¹⁶³ *Id.*

¹⁶⁴ Letter from Don Gobel, Chairman of NSSF, to Robert Delfay, NSSF Executive Director (June 8, 2000) (on file with the Brady Center).

¹⁶⁵ *Id.*

¹⁶⁶ Certain companies, including Taurus, apparently threatened to pull advertising from both *Shooting Times* and Peterson Publishing (publisher of *Handguns* and *Guns & Ammo* magazines) if the magazines continued accepting Smith & Wesson ads. Taurus also threatened to drop its sponsorship of the Sportsman Team Challenge if Smith & Wesson was allowed to remain a sponsor. Deposition of Paul J. Pluff, at 79, *People v. Arcadia Machine & Tool* (Aug. 6, 2002).

¹⁶⁷ Dick Metcalf, *Smith & Wesson’s New President Speaks Out*, SHOOTING TIMES, Aug. 2002, at 58.

¹⁶⁸ *Id.* at 58.

¹⁶⁹ *Id.* at 59.

participate in that family. We want to be part of family decision-making.”¹⁷⁰

He added: “I would like to think that the new Smith & Wesson will just be the ‘good-old’ Smith & Wesson.”¹⁷¹ At the same time, Scott received the “Man of the Year” award from NSSF, which he perceived as “speak[ing] volumes about Smith & Wesson’s reclaimed place in the firearms community today.”¹⁷²

Overall, the insider testimony and documentation described above reflects the gun industry’s complicity in illegal sales of guns and its total unwillingness to reform itself. Such an industry—one that perpetuates illegal activity with impunity—should not enjoy immunity from civil prosecution.

IV. CRIME GUN TRACE DATA SHOWS HOW GUN MAKERS SUPPLY A CONTINUOUS STREAM OF GUNS TO THE UNDERGROUND MARKET THROUGH HIGH-RISK DEALERS

ATF data that traces the source of crime guns also demonstrates the problem created when gun manufacturers supply guns to high-risk dealers.¹⁷³ Since the early 1990’s, ATF has traced more and more guns recovered in crime throughout the United States.¹⁷⁴ Under a program called the Youth Crime Gun Interdiction Initiative (“YCGII”), seventeen major cities began tracing all crime guns recovered in their jurisdictions.¹⁷⁵ In just a few years, the number of major cities that are part of the program has grown to more than fifty-five.¹⁷⁶ In all, ATF now traces more than 200,000 crime guns each year, year after year.¹⁷⁷

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ ATF, *Firearms Statistics*, available at <http://atf.treas.gov/firearms/stats/index.htm> (last visited Mar. 20, 2005).

¹⁷⁴ *Id.*

¹⁷⁵ DEP’T OF TREASURY, BUREAU OF ALCOHOL TOBACCO & FIREARMS, CRIME GUN TRACE ANALYSIS REPORTS: YOUTH CRIME GUN INTERDICTION INITIATIVE, THE ILLEGAL YOUTH FIREARMS MARKETS IN 17 COMMUNITIES (July 1997), available at http://www.atf.treas.gov/pub/fire-explo_pub/ycgii97.

¹⁷⁶ DEP’T OF TREASURY, BUREAU OF ALCOHOL TOBACCO & FIREARMS, CRIME GUN TRACE REPORTS (2000) NATIONAL REPORT (July 2002) [hereinafter CRIME GUN TRACE REPORTS], *supra* note 3.

¹⁷⁷ *See, supra* note 2. Unbelievably, at the prodding of the gun lobby, Congress has sought to conceal this data from the public even though doing so only protects the high-risk dealers who are profiting from diverting guns into the illegal market. Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, § 644, 117 Stat. 11 (2003). The City of Chicago, supported by an amicus brief by the Brady Center, battled ATF in court to obtain this data under a Freedom of Information Act request and won a court victory in the Seventh Circuit recently. *City of Chicago v. United States Dep’t of the Treasury*, 384 F.3d 429 (7th Cir. 2004). Congress responded to this decision by passing another amendment to an appropriations bill designed to keep this information secret. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004). By protecting the identities of high-risk gun dealers, this ill-advised Congressional action will allow crime gun diversion to continue unabated. Moreover, Congress has now also cut funding for Project Safe

The purpose of gun tracing is to identify the sources of crime guns.¹⁷⁸ Moreover, because traces start with the gun manufacturer, they provide those companies with constant notice that particular guns they have sold have been recovered in crime. Indeed, “gun manufactures receive thousands of ATF trace requests each year.”¹⁷⁹ With that knowledge, gun makers can easily identify the dealers within their distribution systems that have sold each crime gun.¹⁸⁰ Federal law enforcement officials have stated that “[f]irearms tracing provides invaluable information about the sources of illegally supplied crime guns.”¹⁸¹

Crime gun traces indicate that most crime guns have been sold by a tiny fraction of the gun dealers in the United States,¹⁸² a fact first brought to light in a 1995 report requested by ATF¹⁸³ and later confirmed by numerous other reports and studies.¹⁸⁴ *Commerce in Firearms in the United States* is perhaps the best-known study confirming that a small proportion of dealers supply a significant number of guns recovered in crime.¹⁸⁵ It was published by ATF in February 2000. Table 13 of *Commerce in Firearms* plotted the “[d]istribution of traces among current dealers” for the year 1998.¹⁸⁶ It found that 85.7% of the dealers had no crime gun traces at all, while only 1.2% of dealers were responsible for 57.4% of the crime gun traces.¹⁸⁷ Even fewer of the dealers—132 out of 83,272—were responsible for more than a quarter of all traces (27.2%).¹⁸⁸

In January 2004, the Americans for Gun Safety Foundation released a report identifying many of these high-risk dealers.¹⁸⁹ The report was based on

Neighborhoods, a federal program designed to target gun criminals and get them off the streets. Eric Lichtblau, *Key Antigun Program Loses Direct Financing*, N.Y. TIMES, Dec. 2, 2004, at A32.

¹⁷⁸ ATF only traces crime guns, which are defined as firearms that are “illegally possessed, used in a crime, or suspected of use in a crime.” CRIME GUN TRACE REPORTS, *supra* note 151, at A-3.

¹⁷⁹ Declaration of Joseph J. Vince, Jr. ¶ 38, *People v. Arcadia Machine & Tool, Inc.*, No. A103211 (Mar. 7, 2003) [hereinafter “Vince Declaration”].

¹⁸⁰ *Id.* at ¶ 36.

¹⁸¹ GUN VIOLENCE REDUCTION, *supra* note 16.

¹⁸² *Id.*

¹⁸³ GLENN L. PIERCE ET AL., THE IDENTIFICATION OF PATTERNS IN FIREARMS TRAFFICKING: IMPLICATIONS FOR FOCUSED ENFORCEMENT STRATEGIES, A REPORT TO THE UNITED STATES DEP’T OF TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS OFFICE OF ENFORCEMENT 12-13 (1995).

¹⁸⁴ See e.g. Sen. Charles E. Schumer, A Few Bad Apples: Small Number of Gun Dealers the Source of Thousands of Crimes (June 1999) (finding that 137 of the worst dealers accounted for 34,000 of crime guns over three years); Sen. Charles E. Shumer, Nearly All Crime Guns Sold by High Crime Gun Dealers Quickly Change Hands and Are Rarely Used by Original Buyer of the Gun (Dec. 1999) (adding data and confirming findings in June report); Glenn L. Pierce et al., *Characteristics and Dynamics of Illegal Firearms Markets: Implications for a Supply-Side Enforcement Strategy*, 21 JUST. Q. 391 (Jun. 2004); Anthony A. Braga et al., *The Illegal Supply of Firearms*, 29 CRIME & JUST. 319 (2002); Philip J. Cook & Anthony Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 ARIZ. L. REV. 277 (2001).

¹⁸⁵ COMMERCE IN FIREARMS, *supra* note 2.

¹⁸⁶ *Id.*, at 23.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ SELLING CRIME, *supra* note 43, at 114.

crime gun trace data released to the NAACP and used in the *NAACP v. AcuSport*, trail in New York City.¹⁹⁰ The report also published the names of 120 high-risk gun dealers across twenty-two states included in ATF trace data.¹⁹¹ Each of these dealers had sold more than two hundred crime guns between 1996 and 2000.¹⁹² Two dealers—Chuck’s Guns in Riverdale, Illinois and Don’s Guns & Galleries in Indianapolis, Indiana—had sold more than 2,000 crime guns that were subsequently recovered and traced during this period. Thousands more guns sold by these stores to gun traffickers may have been used in crimes where the gun has not been recovered.¹⁹³

In addition to exposing the concentration of crime gun sales among certain high-risk dealers, the study also examined whether ATF has been able to crack down on these dealers.¹⁹⁴ The evidence is that ATF has not been able to do so, in large part because of lack of resources and loopholes in the law that permit dealers to remain in business and escape criminal prosecution despite overwhelming evidence of their continued diversion of guns into the illegal market.¹⁹⁵ The sad fact is that most high crime gun stores remain open and are rarely inspected. Of the 120 dealers identified in the AGS report, 96 remain in business today and only twenty-four were inspected between January 1, 2000 and May 31, 2003. Moreover, under the current Justice Department, the number of federal cases brought against corrupt gun dealers has declined by 25%, from thirty-six cases brought in fiscal year 2000 to only twenty-seven in fiscal year 2002.¹⁹⁶

Given the limited oversight and minimal threat of criminal prosecution, the report concludes that there is “little incentive” for gun dealers to act responsibly.¹⁹⁷ Civil litigation successes in negligence suits brought by entities like the Brady Center, in contrast, have acted as catalysts to industry reform as shown in the *Lemongello* case.¹⁹⁸ Passage of a bill immunizing gun

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ SELLING CRIME, *supra* note 43, at 9.

¹⁹⁵ See GUN VIOLENCE REDUCTION, *supra* note 16; SELLING CRIME, *supra* note 43; COMMERCE IN FIREARMS, *supra* note 2.

¹⁹⁶ SELLING CRIME, *supra* note 43, at 16. The Inspector General’s Office recently identified other problems with ATF’s oversight of gun dealers. See also U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., EVALUATION AND INSPECTIONS DIV., INSPECTIONS OF FIREARMS DEALERS BY THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, REPORT NUMBER I-2004-005 (2004) (finding that in FY 2002 the ATF initiated only 30 revocation actions out of 1,934 inspections and in FY 2003 initiated only 54 revocation actions out of 1,812 inspections. Each revocation action was simply initiated, and is not an indicator of the number of licenses actually revoked. The report found “the ATF acts infrequently to revoke...licenses, and the process is not timely.” *Id.* at vi. Additionally, the Inspector General found that new restrictions on the NICS would prevent the ATF from adequately monitoring the background checks conducted by FFLs. *Id.* at x.)

¹⁹⁷ SELLING CRIME, *supra* note 43, at 19.

¹⁹⁸ *Lemongello v. N.J.*, 389 U.S. 858 (1967).

manufacturers, distributors, and dealers from civil liability would prohibit this proven method of holding gun dealers accountable for their dangerous business practices.

V. GUN MAKERS HAVE IGNORED REPEATED GOVERNMENT REQUESTS FOR HELP

The Department of Justice and ATF have repeatedly urged defendant manufacturers to “self-police” their distribution chains, stating that they “could substantially reduce the illegal supply of guns” by ensuring that downstream sellers are responsible.¹⁹⁹ The government agencies identified specific steps that gun manufacturers should take, including:

identify[ing] and refus[ing] to supply dealers and distributors that have a pattern of selling guns to criminals and straw purchasers...and develop[ing] a code of conduct for dealers and distributors, requiring them to implement inventory, store security, policy and record keeping measures to keep guns out of the wrong hands.²⁰⁰

Further, ATF has said it would encourage and assist the gun industry in this effort by providing tracing information to each manufacturer “to build sounder and safer businesses”²⁰¹ and take “affirmative steps to track weapons and encourage proper operation of Federal Firearms Licensees to ensure compliance with all applicable laws.”²⁰² ATF has also said that it would “provid[e] the firearms manufacturers, upon request, a list by serial number of the firearms they sold that were traced as crime guns during the previous year. This will enable the manufacturers and importers to police the distribution of the firearms they sell.”²⁰³ Even a former ATF agent hired by the gun manufacturers to be an expert witness in litigation in California stated in correspondence with gun makers Taurus and Sturm Ruger that they could use ATF trace data to determine if “there is an unusually high number of [their] firearms being traced to certain Federal

¹⁹⁹ See GUN VIOLENCE REDUCTION, *supra* note 16, at 34.

²⁰⁰ *Id.*

²⁰¹ Letter from Forest G. Webb, ATF Special Agent in Charge at the National Tracing Center to Stephen L. Sanetti (Mar. 3, 2000) (on file with the Brady Center) [hereinafter Webb Letter]; Vince Declaration, *supra* note 180, at ¶ 84.

²⁰² U.S. DEP’T OF TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, ATF STRATEGIC PLAN FY2000-2005 11 (2000), *available at* http://www.atf.gov/pub/gen_pub/strategicplan/stratplan2000/stratplan.pdf (last visited Mar. 20, 2005).

²⁰³ GUN VIOLENCE REDUCTION, *supra* note 16, at Part IV. See also Press Release, U.S. Dep’t of Treasury, Treasury, ATF Release Firearms Report, Gun Trafficking Actions (Feb. 4, 2000), *available at* <http://www.atf.gov/press/fy00press/020400firearmsreport.htm> (last visited Mar. 20, 2005).

Firearms Licensees” and if so, “look at their business practices more carefully.”²⁰⁴

Gun makers, however, have adamantly refused to follow federal law enforcement’s suggested practices.²⁰⁵ Instead, they have run to their friends in Congress to obtain blanket immunity that would permit them to continue supplying the criminal gun market without fear of liability.

VI. A SIMPLE CODE OF CONDUCT WOULD MARKEDLY REDUCE THE SUPPLY OF GUNS TO THE ILLEGAL MARKET

The logical choice for an industry that sells products desired by violent criminals would be to set up a distribution system to maximize safeguards and accountability. Gun manufacturers could do this easily by requiring those who sell their guns to abide by a Code of Responsible Conduct along the lines of the one Smith & Wesson once agreed to implement.²⁰⁶ They could choose the distributors and dealers to which they sell guns, use written agreements to set the terms of their sales, and refuse to sell guns to a distributor or dealer that does not meet their requirements or does not agree to abide by their terms and conditions.²⁰⁷

For example, gun makers could:

- Collect and use crime gun tracing and multiple sale data to identify high-risk dealers;
- Sell only through authorized and approved dealers;
- Provide training to distributors and dealers about how to block straw purchases;
- Limit the number of guns that dealers sell to a customer at one time or on multiple occasions or require dealers to take special precautions in doing so, including asking questions about why the customer is making multiple purchases; And
- Impose strong sanctions on distributors or dealers who fail to comply with requirements imposed by the manufacturer or who continue to have significant indicators of trafficking or diversion of guns to the criminal market.²⁰⁸

²⁰⁴ The evidence is incontrovertible that ATF has offered such information to the defendant gun makers, see Webb Letter, *supra* note 202.

²⁰⁵ Vince Declaration, *supra* note 180.

²⁰⁶ See *supra* note 161 and accompanying text.

²⁰⁷ *Id.*

²⁰⁸ Vince Declaration, *supra* note 180.

In practice, however, gun manufacturers only exercise this sort of control over their distribution partners when their *financial* interests are at stake. For example, they:

- Screen, investigate, and monitor distributors and dealers regarding their creditworthiness and financial viability;
- Provide training through their sales representatives to dealers about the marketable features of their products and how to promote sales;
- Use written distribution agreements to impose a range of terms and conditions that protect their financial interests, such as requirements that distributors and dealers maintain minimum inventory levels, observe specified price terms, and allow the manufacturer to inspect sales premises and records at any time; or
- Terminate sales to distributors and dealers when it is in their financial interests to do so.²⁰⁹

To protect its foreign sales representatives, Beretta's standard distributor agreement requires the distributor to actively discourage retail dealers from selling Beretta guns to anyone outside the United States.²¹⁰ Beretta regards any such sales that "our distributors know or should have known are occurring" as violations of the agreement.²¹¹ In a letter to a distributor, Beretta listed factors that would indicate the distributor should have known or suspected a dealer was making unauthorized international sales, such as "the size of the order, past history of the particular dealer, the size and nature of the order relative to normal buying practices of the dealer, etc."²¹² According to Beretta's national sales manager, this was done in order to "control the distribution process," to force

²⁰⁹ See, e.g., Deposition of David Brazeau, *Hamilton v. Accu-Tek*, No. 95 CV 0049 (Apr. 8, 1999); Deposition of Robert Bonaventure, *People v. Arcadia Machine & Tool*, No. A103211, and *Boston v. Smith & Wesson*, 1999-02390-C (Dec. 14, 2001); Deposition of Thomas Frane, *People v. Arcadia Machine & Tool*, No. A103211; Gregory T. Gundlach Declaration, ¶¶ 21-23, *People v. Arcadia Machine & Tool*, No. A103211 (Mar. 7, 2003) [hereinafter "Gundlach Declaration"]; Hass Deposition, *supra* note 129; Deposition of Christopher Killoy, *People v. Arcadia Machine & Tool*, No. A103211 (June 26, 2002); Deposition of Chris August Larsen, *People v. Arcadia Machine & Tool*, No. A103211 (Aug. 2, 2001); Deposition of John T. Meyer, *People v. Arcadia Machine & Tool*, No. A103211 (Jan. 9, 2002); Deposition of Robert Morrison, *Boston v. Smith & Wesson*, 1999-02390-C (Aug. 21, 2001).

²¹⁰ Deposition of Donald H. Campbell, *People v. Arcadia Machine & Tool & Boston v. Smith & Wesson* (Jan. 15, 2002) [hereinafter "Campbell Deposition"].

²¹¹ Letter from Don Campbell, National Sales Manager, Beretta U.S.A. to Michael Saporito, Senior Vice President, RSR Wholesale Guns (Feb. 25, 1997) (on file with the Brady Center).

²¹² *Id.*

distributors to keep an eye on dealers' activities, and to prevent distributors from just looking the other way in circumstances suggesting a dealer was making international sales.²¹³ Beretta could require distributors to exercise the same vigilance to spot dealers that they should know are supplying the illegal market within the United States, but has not done so. Likewise, when Sturm Ruger became concerned about the potential for rebate fraud by dishonest dealers generating fake documentation to claim rebates for guns they did not sell, Sturm Ruger implemented rules and procedures to scrutinize dealer conduct and to prevent that fraud from occurring.²¹⁴

In some instances, those who sell guns have not hesitated to adopt responsible policies that go beyond minimum legal requirements to curb crime gun diversion. For example, Wal-Mart instituted a nationwide policy requiring its stores to refrain from selling a gun prior to the completion of a background check—even when legally permitted to do so—because of problems that arise when a check cannot be completed in the allotted time.²¹⁵ Felons and other prohibited purchasers have been able to obtain guns via this “delayed denial” problem.²¹⁶ However, no gun manufacturer has required such a policy for dealers selling its guns, however.

In litigation in California, Professor Gregory Gundlach, the former John W. Berry, Sr., Professor of Business at the University of Notre Dame, examined the distribution methods employed by the defendants and compared the gun industry's actions to those of other industries selling dangerous items such as tobacco, alcohol, chemicals, pyrotechnics, and all-terrain vehicles.²¹⁷ Gundlach concluded that gun manufacturers have established distribution systems in which all the incentives favor selling guns to traffickers or others who funnel guns into the criminal market because of the profits to be made by doing so.²¹⁸

Based on his knowledge and study of other industries, Gundlach stated that a responsible corporation can and will implement safety measures that go beyond the bare minimum legal requirements.²¹⁹ Gundlach concluded that there are many changes that each gun manufacturer could and should implement that would reduce the supply of its guns to the criminal market.²²⁰ By implementing such safeguards, each gun manufacturer could reverse the incentives in its distribution system, using those incentives to favor safe and responsible conduct.²²¹

If the industry were to voluntarily enforce such a Code of Conduct—as it could have years ago when Bob Ricker said a code was debated and shot

²¹³ Campbell Deposition, *supra* note 211.

²¹⁴ Memorandum from S.K. Vogel to W.B. Ruger (Jan. 26, 1990) (on file with the Brady Center).

²¹⁵ Deposition of Ramon Crow, *People v. Arcadia Machine & Tool, Inc.*, No. A103211 (Aug. 8, 2002).

²¹⁶ Vince Declaration, *supra* note 180, at ¶ 11.

²¹⁷ Gundlach Declaration, *supra* note 210, at ¶¶ 9-67, 89-96.

²¹⁸ *Id.* at ¶¶ 97-99. *See also* Vince Declaration, *supra* note 180, at ¶15.

²¹⁹ Gundlach Declaration, *supra* note 210, at ¶¶ 85-88.

²²⁰ *Id.* at ¶¶ 68-84.

²²¹ *Id.* at ¶¶ 68-84, 97-99.

down—gun manufacturers could end the reckless distribution practices that underlie most current lawsuits against it. The fertilizer industry implemented such voluntary safeguards after just two cases—in Oklahoma City and the basement of the World Trade Centers—when criminals acquired its products to make bombs.²²² Moreover, none of these steps would prevent law-abiding citizens from buying guns. However, they would almost certainly have the effect of reducing the diversion of guns into the illegal underground market.

VIII. CONCLUSION

The United States Department of Justice and ATF have repeatedly called on gun makers to help law enforcement keep guns out of criminals' hands by, among other things, "identify[ing] and refus[ing] to supply dealers and distributors that have a pattern of selling guns to criminals and straw purchasers."²²³ Who could possibly oppose that?

Unfortunately, the gun industry adamantly opposes such common sense measures because it profits so much from supplying the crime gun market. Indeed, as one author has argued, by keeping the criminal market so well supplied, the gun industry also fuels an even larger self-protection market designed to counteract widespread criminal gun possession in a kind of mini-arms race.²²⁴

The reckless practices of this industry should not be forever protected behind a wall of federal immunity.

²²² GUN VIOLENCE REDUCTION, *supra* note 16, at part IV.

²²³ *See id.* at part V.

²²⁴ TOM DIAZ, MAKING A KILLING: THE BUSINESS OF GUNS IN AMERICA (1999).