

# CPHV Wins Landmark Victory for 101 California Street Victims in California Court of Appeal

REPORT

Legal Action

**O**n September 29, 1999, the Legal Action Project achieved a groundbreaking victory when the Court of Appeal of California ruled that the manufacturer of the infamous TEC-9 assault pistol can be held liable for a 1993 mass shooting. In that incident, a gunman wielding two TEC-9s and hundreds of rounds of ammunition shot and killed eight people and wounded six others at the 101 California Street office building in San Francisco. The decision reversed a lower court's judgment in favor of the gun company, Navegar, Inc., and cleared the way for the claims to proceed to trial. The ruling is the first appellate court decision in the nation recognizing that a gun manufacturer can be held liable for negligence leading to violence.

In a strongly-worded opinion, Judge J. Anthony Kline of the Court of Appeal explained that the manner in which Navegar manufactured and marketed the TEC-9 to the general public "created risks above and beyond those citizens may reasonably be expected to bear in a society in which firearms may legally be acquired and used and are widely available." *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 146 (Cal. App. 1999). He added, "Fundamental fairness requires that those who create and profit from commerce in a potentially dangerous instrumentality should be liable for conduct that unreasonably increases the risk of injury above and beyond that necessarily presented by their enterprise."

The court's opinion gave particularly close attention to the strong factual record developed by the Legal Action Project and its co-counsel, which contained extensive evidence of Navegar's reprehensible manufacturing and marketing practices. For example, Navegar's TEC-9 design carried the maximum amount of firepower commercially available in a pistol, with high-capacity magazines, a barrel shroud, combat sling, and other features enabling it to be spray-fired from the hip so as to kill and injure large numbers of people at close range as quickly as possible. The company's advertising also exploited the gun's bad reputation, touting the TEC-9 as being "tough as your toughest customer," "paramilitary," and even "resistant to fingerprints." (See *Legal Action Report* #14, March 1997.) In the latest chapter of its notorious history, a TEC-9 was among the weapons used in the massacre at Columbine High School in Colorado in April 1999.

The Court of Appeal agreed that the evidence showed the TEC-9 has no legitimate civilian purpose. Essentially conceding it has no genuine self-defense or sporting value, Navegar claimed the gun could be useful for civilian resistance to a Communist takeover of the United States or for "plinking" — recreational shooting at bottles and cans. The court expressed profound skepticism about those strained rationalizations.

The appellate decision overruled the trial court's determination that Navegar could not be held liable because it did



Dennis Henigan and 101 California Street Plaintiffs Stephen Sposato, Carol Kingsley, and Marilyn Merrill speak to the press after oral argument on appeal.

not violate Florida law when it manufactured and sold the TEC-9s used in the 101 California Street shootings. While the lower court suggested the only way to address gun manufacturers' dangerous practices is "through the Capitol, not the Court," the Court of Appeal concluded that "neither Congress nor the California legislature has expressed any desire to abrogate the operation of the common law as it applies to the conduct of those who manufacture and sell firearms, and the judicial responsibility to faithfully apply the common law cannot otherwise be constrained."

The decision provides strong support to current and future lawsuits seeking to hold gun manufacturers accountable. Navegar has petitioned the Supreme Court of California to review the case. ●

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**The Center to Prevent Handgun Violence** is a nonprofit, education, research, and legal advocacy organization established in 1983 to reduce the tragic toll of handgun violence in America.

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**T**he Center's Legal Action Project was founded ten years ago to advocate legal principles that, ultimately, will save lives. We have received the best possible tenth anniversary present from the California Court of Appeal: a ruling in the 101 California Street case (now called Merrill v. Navegar) that has enormous life-saving potential.

We know that gun violence is, in large measure, the result of decisions made by the gun

The recent California Court of Appeal decision turns the tables on Navegar and other gun makers. It is the first time an appeals court has ruled that gun manufacturers have a basic duty of care that must guide their conduct. As the Court put it, Navegar owed a duty "to use due care not to increase the risk beyond that inherent in the presence of firearms in our society." Although Navegar could not be liable for simply selling guns, it could be accountable for selling a gun

industry with a powerful new incentive to reevaluate every aspect of its operations with public safety in mind. To avoid liability, every gun maker must ask itself whether its decisions — from the kinds of guns it sells to the way it sells them — have increased the risk of harm to innocent persons. If such liability had been a credible threat ten years ago, our nation may never have experienced the horror of millions of assault weapons like the TEC-9 on our streets.

## **"FOR YEARS, THE GUN INDUSTRY HAS OPERATED SECURELY BEHIND A WALL OF LEGAL INVINCIBILITY. THAT WALL IS CRUMBLING."**

industry that expose people to great risks of harm. Gun maker Navegar, for example, made a decision to sell an assault pistol — the TEC-9 — with overwhelming firepower and then boasted in its advertising that the gun's finish was "resistant to fingerprints." Navegar had no fear that it would be held accountable for the havoc caused by such a gun. It was comfortable in the knowledge that gun manufacturers had virtually always prevailed in court by arguing that only the person who pulls the trigger can be held liable for gun violence. Navegar had no incentive to act responsibly. So it didn't.

literally designed for crime and then promoting it to be appealing to those with violent intentions.

The ruling in Merrill v. Navegar was the second landmark court decision this year finding that gun manufacturers could be liable for conducting their business in irresponsible ways that increase risk. In Hamilton v. Accu-Tek, a federal judge in New York earlier this year refused to upset a jury verdict against gun manufacturers for negligence in setting up a distribution system that funneled guns into the illegal market. The combined impact of these two decisions is to confront the gun

We owe a debt of gratitude to the victims who have courageously pursued the Merrill v. Navegar and Hamilton lawsuits. Although the battle continues in both cases, a threshold has been crossed. For years, the gun industry has operated securely behind a wall of legal invincibility. That wall is crumbling.

**Dennis A. Henigan**  
*Director,*  
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## CPHV Seeks Reversal of Lone Federal Court Ruling on Second Amendment

**O**n September 3, 1999, CPHV filed an *amicus* brief in support of the government in its Fifth Circuit appeal of *U.S. v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999) — the only federal court decision in the history of the U.S. to strike down a gun control law on grounds that it violated the Second Amendment. The district court in *Emerson* dismissed Timothy Joe Emerson's federal indictment for possessing a firearm while under a domestic violence restraining order as violating Mr. Emerson's alleged right to own firearms under the Second Amendment. This decision flies in the face of long-standing Supreme Court precedent holding that the Second Amendment protects only the right to bear arms as part of an organized state militia — today's National Guard. Specifically, in *U.S. v. Miller*, 307 U.S. 174 (1939), the Supreme Court said in a unanimous decision that the Amendment protects only conduct bearing "some reasonable relationship to the preservation or efficiency of a well-regulated militia." All other federal court decisions since *Miller* have confirmed that view.

Mr. Emerson was indicted by a federal grand jury on December 8, 1998, on five counts of possessing numerous firearms in violation of federal law while subject to a divorce court's order restraining him from threatening his wife and daughter. Emerson was indicted for illegally possessing not only two 9mm pistols, but a military issue, semi-automatic M1 carbine, a semi-automatic SKS assault rifle with a bayonet, and a semi-automatic M-14 assault rifle. Mr. Emerson had brandished a weapon in front of his wife and child and had confided to co-workers that he had an AK-47 at his office and he just needed bullets. After he got the necessary ammunition, he said he planned to visit the city where his estranged wife and her boyfriend lived. Appealing his indictments, Mr. Emerson claimed that the Second Amendment protected his right to own firearms despite his violation of a 1994 statute barring persons subject to domestic-violence restraining orders from possessing guns.



Federal judge Sam Cummings of the Northern District of Texas agreed with Mr. Emerson, holding that his "Second Amendment rights" trumped the federal law. In so holding, Judge Cummings relied solely on anti-gun control law review articles, some of which had been funded by the National Rifle Association, and could cite no case law in support. The court's decision not only violated the long-standing rule which requires lower courts to follow the lead of appellate courts, but also ignored strong opposing legal and historical scholarship and the language of the Second Amendment. Further, the implications of the decision, if upheld, would be staggering. Even the court noted that if citizens had a Second Amendment right to own firearms, that right could extend to possession of "bazookas, rocket launchers, and other armaments that are clearly used for modern warfare, including, of course, assault weapons."

The law firm of Wilmer, Cutler, & Pickering provided *pro bono* counsel for CPHV's brief, which was joined by ten national law enforcement groups and the Legal Community Against Violence. The brief may be accessed on our website. ●

## Constitutional Scholars and Historians Respond to Emerson Decision

**I**n addition to CPHV's *amicus* brief in *U.S. v. Emerson*, more than 50 historians and legal scholars filed an *amicus* brief in support of the government to rebut Judge Cummings' reliance on selected Second Amendment articles, some of which were funded by the NRA. Legal scholars such as Bruce Ackerman of Yale Law School, Michael Dorf of Columbia Law School, and Bruce Hay of Harvard Law School joined historians like Don Higginbotham of the University of North Carolina, Michael Zuckerman of the University of Pennsylvania, and Michael Bellesiles of Emory University in

a brief drafted by David Yassky of Brooklyn Law School. CPHV assisted in recruiting the scholars.

The historian's brief opposes the lower court's misreading of constitutional history and provides a full analysis of the historical and legal underpinnings of the Second Amendment. For example, the brief points out that the Amendment's purpose was to balance military power between the states' well-regulated militias and the newly formed federal standing army, not protect private ownership of firearms, which was extremely rare at the time. The language of the Second Amendment is also keyed

entirely to military terms — "well regulated militia," "keep and bear arms," etc. As one historian has noted, "[o]ne does not 'bear arms' against a rabbit." An early draft of the Second Amendment by James Madison, which included the phrase — "no person religiously scrupulous of bearing arms, shall be compelled to render military service in person" — also confirms that the Second Amendment was intended to protect state militia service, not personal ownership of military or civilian firearms. ●

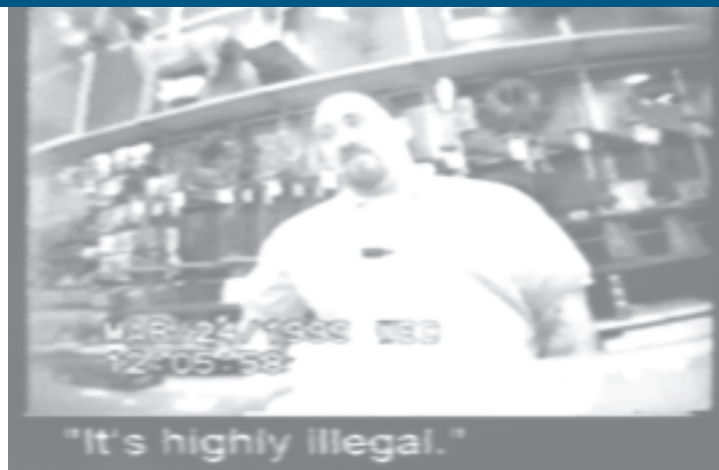
## Pressure on Gun Industry Mounts as More Local Governments Demand Reform

On October 30, 1998, CPHV represented New Orleans in filing the first public entity lawsuit in the country against gun manufacturers and sellers. One year later, the number of cities and counties pursuing claims against the gun industry has risen to 29, with more governments likely to file in the near future. (See accompanying chart.) The Legal Action Project represents two dozen of the cities and counties that have filed lawsuits so far, and is informally assisting the others. The cases have attracted a tremendous amount of interest from the media and the public, and placed increasing pressure on the gun industry to accept the reasonable reforms demanded in the lawsuits.

The lawsuits generally allege that gun companies could reduce gun violence by changing the way they design and distribute guns. (See *Legal Action Report* #18, May 1999.) Rather than exercising reasonable care to avoid injuring others, gun

companies have unfairly profited by producing guns without vital safety features that would save children's lives, and selling guns through a distribution system so lax that criminals and juveniles can easily obtain them. They have also deceptively marketed guns as necessary for home safety despite overwhelming data proving that a gun in the home is 22 times more likely to injure or kill members of the household — in a domestic assault or murder, suicide, or unintentional shooting — than to injure an intruder.

Three cities and counties — Chicago, Wayne County, Michigan, and Gary, Indiana — ran undercover sting operations prior to filing suit to prove how readily gun distributors will sell guns to straw purchasers fronting for criminal or juvenile buyers. Chicago's successful sting operation was conducted in the fall of 1998, and achieved national notoriety on *60 Minutes* and other media after Chicago filed suit in November of that year. (See *Legal Action Report* #18, May 1999.) Despite this publicity, the dealers who were stung by Wayne County and Gary undercover officers after Chicago's suit was filed were still ready and eager to make unlawful sales, confirming that the industry's negligent distribution practices are deep-seated and pervasive. In both places, buyers posing as convicted felons or juveniles were able to buy as many guns as they wanted as long as they had a person with a clean record accompanying them. One Wayne County dealer went so far as to say on videotape — "This is a



straw purchase. . . This is *highly* illegal. . . This is *highly* illegal." — yet went ahead and made the sale. Another Wayne County dealer fretted about how he could go to jail for completing the transaction, since he knew it was a straw purchase, yet could not resist the more than \$500 in cash being offered for the gun and ammunition. In Gary, one dealer told an undercover officer that buying a gun for a convicted felon would be a straw purchase and would be illegal, but advised the officer to leave the store and return in ten minutes to make the purchase. The officer did so, and the clerk sold him the gun.

These undercover stings have convinced some of the dealers in each of these jurisdictions to settle. For example, immediately after Wayne County's suit was filed, the largest gun show venue in Michigan agreed to shut down gun sales after viewing the videotaped evidence of stings on its premises. In December, an Indiana dealer agreed to stop further handgun sales and pay \$10,000 to the City of Gary. All of these dealers, plus a Chicago-area dealer who settled with that city, have also agreed to cooperate by providing documents and testimony.

The state with the largest number of public plaintiffs is California, where 12 cities and counties, including Los Angeles, San Francisco, and Sacramento have joined the litigation so far. Unlike the other suits which rely principally on common-law causes of action like negligence, the California complaints allege that defendants have engaged in unlawful and unfair practices in violation of the state's business and professions code. Defendants could be subject to a \$2500 civil penalty for each sale found to be in violation of the statute. New Jersey is another significant state in the gun litigation, where Camden County, Camden City, and Newark each filed separate lawsuits in June 1999. Boston, Massachusetts also filed suit in June. CPHV represents all of these jurisdictions, except Newark.

Most recently, the federal government indicated that more than 3,000 public housing authorities funded through the Department of Housing and Urban Development plan to file suit against the gun industry to recoup the hundreds of millions of dollars they spend annually in security and other costs because of gun violence in public housing. ●

## Gun Lobby Fails to Derail Atlanta Lawsuit

A few days after Atlanta filed suit against the gun industry on February 5, 1999, the National Rifle Association convinced the Georgia Legislature to pass a bill to bar retroactively the City of Atlanta from asserting its claims against gun companies. Terrified of having these cases heard on the merits, the NRA has pulled out all stops in lobbying state legislatures across the country to pass bills that give unprecedented immunity to the gun industry. So far, lawsuit-blocking laws have been passed in 14 states, including Pennsylvania, Texas, Louisiana, and Georgia, with other bills possible now that the Littleton tragedy has faded in certain lawmakers' minds.

### 29 Cities and Counties Tackle Gun Industry Misconduct

- New Orleans, LA (filed October 30, 1998)
- Chicago and Cook County, IL (November 12, 1998)
- Miami-Dade County, FL (January 27, 1999)
- Bridgeport, CT (January 27, 1999)
- Atlanta, GA (February 5, 1999)
- Cleveland, OH (April 8, 1999)
- Wayne County, MI (April 26, 1999)
- Detroit, MI (April 26, 1999)
- Cincinnati, OH (April 28, 1999)
- St. Louis, MO (April 30, 1999)
- San Francisco, Alameda County, Berkeley, Sacramento, and San Mateo County, CA (May 25, 1999)
- Los Angeles, Compton, and West Hollywood, CA (May 25, 1999)
- Camden County, NJ (June 2, 1999)
- Boston, MA (June 3, 1999)
- Newark, NJ (June 9, 1999)
- Camden City, NJ (June 21, 1999)
- East Palo Alto and Oakland, CA (joined SF July 16, 1999)
- Inglewood, CA (joined LA July 16, 1999)
- Los Angeles County, CA (August 6, 1999)
- Gary, IN (August 27, 1999)
- Wilmington, DE (September 29, 1999)

On October 27, 1999, however, Georgia state court judge Gino Brogdon held that Georgia's law did not protect gun manufacturers from facing Atlanta's lawsuit. Judge Brogdon denied the gun companies' motion to dismiss the lawsuit, clearing the way for the case to move forward into discovery, where the city will have the opportunity to obtain documents and depose gun industry executives. "This decision by a Georgia state judge demonstrates that Atlanta's persistence in pursuing this lawsuit is entirely justified," said Brian J. Siebel, Senior Attorney for CPHV. "Despite a state legislature that continues to take its cues from Congressman Barr and the NRA, Atlanta will now have its day in court."

The Atlanta ruling enhances the likelihood that adverse decisions in Cincinnati, Bridgeport, and Miami Dade County may be reversed on appeal. During oral argument, for example, the Cincinnati judge expressed an improper personal preference for guns without gun locks, and blindly accepted the gun companies' mischaracterizations of Ohio law. "The ruling in Atlanta is very significant and gives further support to our appeal," said Ohio attorney Stanley M. Chesley, who is co-counsel with CPHV in the Cincinnati suit. ●

## Bankruptcy Provides No Shelter From Cities' and Counties' Claims

Gun manufacturers that hoped to use bankruptcy law as a shield against public-entity lawsuits suffered a major setback on October 6th when a bankruptcy court rejected that strategy. Judge Meredith Jury, a federal bankruptcy judge in Riverside, California, concluded that the local governments are exercising "police power" to protect public health and safety through their lawsuits and therefore a gun company cannot escape the litigation by declaring bankruptcy.

Facing an increasing number of lawsuits charging them with negligently selling unsafe products, several California gun makers have filed for bankruptcy, including Davis Industries, Lorcin Engineering, and Sundance Industries. These companies specialize in making "Saturday Night Special" handguns that are inexpensive, highly concealable, and used in crime in disproportionately high numbers.

The companies made no secret of their strategy. Bruce Jennings, unofficial spokesman for the West Coast wing of the gun industry, told *Business Week* magazine that "It doesn't mean they'll be gone forever. They can file for bankruptcy, dissolve, go away until the litigation passes by, then reform and build guns to the new standard — if there is a new standard." Davis Industries filed papers seeking to have the bankruptcy court resolve all possible claims against it by all federal, state, and local government entities in a single, expedited proceeding. Many observers speculated that larger companies might follow the bankruptcy route if it proved to offer protection from the city lawsuits. Judge Jury's ruling dashes those hopes. ●

## Gun Group Launches Frivolous Counter-Attack On Mayors

On November 30, 1999, the Second Amendment Foundation, an extremist pro-gun organization based in Bellevue, Washington, filed a long-threatened lawsuit in federal court in Washington, D.C. against the U.S. Conference of Mayors and the mayors of 23 major cities who have brought suit against negligent gun manufacturers and sellers. The suit is part of the gun lobby's strategy to intimidate mayors and avoid at all costs having the merits of the city lawsuits heard.

The Foundation's lawsuit has no legal or factual basis. The suit claims that the mayors have deprived gun purchasers of their right to engage in interstate commerce, their First Amendment right to receive information about gun companies' products, their Second Amendment right to keep and bear arms, and their Ninth Amendment right to self-defense. Of course these claims are completely false, as none of the city lawsuits will ban guns or otherwise prevent law abiding citizens from obtaining firearms with adequate safeties. Ironically, the case is likely to result in one more federal court decision being added to the overwhelming body of judicial precedent rejecting the Foundation's skewed interpretation of the Second Amendment. ●

## CPHV Represents NAACP in Historic Gun Lawsuit

On July 16, 1999, the National Association for the Advancement of Colored People (NAACP) filed a lawsuit in federal court in Brooklyn, New York, against nearly 100 gun manufacturers demanding that the gun industry implement reforms that will save lives and prevent injuries. The National Spinal Cord Injury Association (NSCIA) joined as a second plaintiff when an amended complaint was filed in October. Both organizations recently filed an additional complaint against a nationwide class of gun distributors, which will likely be consolidated with the case against the manufacturers.

The lawsuits do not seek money damages, instead asking for injunctive relief that will protect their members and others from the unreasonable and unnecessary threat of harm created by the defendants' current lax distribution practices. Among other things, the complaint asks the court to order defendants to sell no more than one handgun per month to any customer, to distribute guns only to stocking dealers with bona fide retail stores, and require each manufacturer to conduct regular inspections of each of its distributors and retailers.

As the country's largest and oldest civil rights organization, the NAACP is particularly concerned about the tragic level of gun violence in African-American communities. A federal study found that a young black male is 9 times more likely to be murdered than a young white male, and that 78 percent of those homicides involve handguns.

The NSCIA and its members share a similar concern about the large and rapidly growing number of spinal cord injuries inflicted by guns. The proportion of spinal cord injuries caused by guns has more than doubled in the past two decades, from 15 to 30 percent, and each of these injuries has a devastating economic cost to society in addition to its severe physical and emotional impact on those who suffer injury and their families.

"The gun industry has refused to take even basic measures to keep criminals and prohibited persons from obtaining firearms," explained NAACP president Kweisi Mfume when he announced the lawsuit at the association's 90th annual convention. "That is why today we are putting the gun industry on notice that it will not be business as usual."

The Legal Action Project is co-counsel to both organizations, along with Denise Dunleavy of New York's Weitz & Luxenberg, Josh Horwitz of the Educational Fund to End Handgun Violence, and Elisa Barnes. Ms. Barnes was lead counsel in the landmark *Hamilton v. Accu-Tek* case, in which a federal jury in the same Brooklyn courtroom found 15 manufacturers negligent in their marketing and distribution of handguns. ●

## Massachusetts Supreme Judicial Court Upholds Handgun Regulations

Setting a strong precedent for action by state officials across the country, on June 30, 1999, the Supreme Judicial Court of Massachusetts upheld the first set of state regulations ever to apply basic consumer product safety principles to handguns. American Shooting Sports Council, Inc. v. Attorney General, 711 N.E.2d 899 (Mass. 1999). Scott Harshbarger, then Attorney General of Massachusetts, issued the regulations in October 1997 under authority given to him by the state's Unfair and Deceptive Trade Practices Act. (See *Legal Action Report* #14, March 1997.) The regulations prohibit the sale or transfer within the state of handguns that fail to satisfy certain safety and performance standards, including handguns that do not have a tamper-resistant serial numbers, lack childproofing devices, are made from inferior materials, are prone to accidental discharge, or have a barrel shorter than three inches.

Arguing that the Attorney General exceeded his rulemaking authority, a major gun industry trade group and several Massachusetts gun manufacturers sued to block the regulations from taking effect. They won the first round of the case when a state judge ruled that selling handguns not satisfying the Attorney General's standards was not an "unfair" practice covered by the statute and granted a preliminary injunction against enforcement of the regulations.

The gun industry's success in blocking the safety regulations was short-lived, however. An expedited appeal to the Supreme Judicial Court was granted, where the Court quickly reversed the trial court's ruling, upholding the regulations as a valid exercise of the Attorney General's authority to "regulate deceptive or unfair acts or practices in the sale of products which fail

fundamental requirements of safety and performance."

With *pro bono* assistance from the Boston firm of Brown, Rudnick, Freed & Gesmer, CPHV filed *amicus* briefs supporting the Attorney General at both stages of the case, joined by two law enforcement groups, seven public health organizations, and the Massachusetts gun control group Stop Handgun Violence. Many other states have statutes giving similar authority to their attorneys general, making it likely that the success in Massachusetts can be repeated elsewhere. ●

## Illinois Court Permits Public Nuisance Suit Against Gun Makers To Proceed

On November 30, 1999, Judge Jennifer Duncan-Brice of the Circuit Court of Cook County, Illinois, issued a decision giving an important legal victory to families of shooting victims suing the gun industry for creating a public nuisance by making thousands of handguns available to children in Chicago. Ceriale v. Smith & Wesson Corp., No. 99L5628 (Cook County, IL 1999). Recognizing that "the citizens of Chicago have a public right to be free from disturbance and reasonable apprehension of danger to themselves and their property," the judge denied motions by gun manufacturers, distributors, and dealers to dismiss the claims.

The case arises from three murders, each committed with a handgun by a person under 18 years of age. Andrew Young stopped his car at a traffic light and died because two gang members with a gun mistook him for a member of a rival gang. Salada Smith was several months pregnant when she became the innocent victim of a drive-by shooting. Chicago police officer Michael Ceriale died in the line of duty from a bullet fired by a 16-year old gang member. The plaintiffs, represented by lawyers from the

MacArthur Justice Center of the University of Chicago Law School, seek to make the case a class action on behalf of victims of similar tragedies.

Like the lawsuits against the gun industry brought by cities and counties, the case relies on the law of public nuisance, under which a defendant is liable for conduct that creates an unreasonable interference with the public's right to health, safety, peace, or comfort. The shooting victims' families allege, and will now have the chance to prove, that the gun companies' marketing and distribution practices are designed to appeal to criminals and juveniles, that they have caused large numbers of guns to be funneled into an underground market where they become freely available to juveniles in criminal street gangs, and that the gun makers oversupply the areas surrounding Chicago in order to circumvent that city's strict gun ordinances, where handguns have been banned since 1982.

The court distinguished these allegations as "qualitatively different" from those made in several older Illinois cases that the gun manufacturers won and have frequently cited in the cases now underway against them. "I think the legal landscape is changing almost on a daily basis," LAP's director Dennis Henigan said of the Chicago decision, "and the tide is turning against the industry." ●

## Federal Courts Unanimously Reject Emerson Court's Flawed View of Second Amendment

Earlier this year, the National Rifle Association rejoiced when a federal court in Texas in U.S. v. Emerson became the first in the nation's history to rule that the Second Amendment grants individual citizens the right to possess firearms. (See *Legal Action Report* #18, May 1999, and related

articles this issue.) The NRA no doubt thought that other courts might soon follow in reversing more than two centuries of legal precedent which holds that the Second Amendment's purpose, as it plainly states, is to protect the "security of a free State" through maintenance of a "well regulated militia." Fortunately, the NRA's hopes have been completely dashed, as every federal court to consider the issue in the last year has rejected the Emerson court's conclusions.

For example, on August 19, 1999, the U.S. District Court of the Northern District of Ohio refused a defendant's request to follow the Emerson decision and overturn his indictment for possessing a firearm while under a domestic violence restraining order, in violation of federal law. U.S. v. Visnich, 1999 U.S. Dist. Lexis 14333 (N.D. Ohio 1999). The defendant, Michael Visnich, allegedly broke into the home of a friend's ex-wife to retrieve some of his friend's possessions. When police stopped him in his vehicle, they searched the car and found at least 16 firearms and ammunition. Visnich argued that the federal law violated his Second Amendment right to bear arms, but the court rejected this notion, holding that "the Second Amendment does not confer" on a citizen "a right to bear arms in violation of a validly enacted federal law."

Other courts have similarly refused to adopt the Emerson court's flawed reasoning. On March 30, 1999, the same day Emerson was decided, a federal court in Kansas declined to "apply the Second Amendment so as to guarantee [a] right to keep an unregistered firearm which has not been shown to have any connection to the militia." U.S. v. Boyd, 52 F. Supp. 2d 1233 (D. Kan. 1999). On June 14, 1999, a federal court in West Virginia rejected a defendant's claim that the Emerson decision mandated the reversal of his indictment under the same federal statute. U.S. v. Henson, 55 F. Supp. 2d 528 (S.D.W.Va. 1999). Finding that "defendant's reliance is misplaced," the court refused to apply the

Emerson decision because the Supreme Court “has held consistently that the Second Amendment confers a collective, rather than an individual right to keep and bear arms.”

The Seventh Circuit, on July 9, 1999, refused the pleas of a police officer who argued that the federal statute preventing those under a domestic violence restraining order from possessing weapons was an infringement of his Second Amendment rights. Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999). Because the officer could not demonstrate a reasonable relationship between his own inability to carry a firearm and “the preservation or efficiency of a well-regulated militia,” the court denied Gillespie’s claims.

Others prohibited from owning firearms have tried to use the Emerson decision to their advantage. In U.S. v. Boisjore, 1999 WL 977367 (E.D. La. 1999), a hunter who violated several provisions of the Migratory Bird Act appealed his sentence. The appellant was prohibited from possessing a firearm after he bagged too many ducks and used shells and baiting techniques in violation of federal law. The Louisiana federal court refused the appellant’s request and found that Emerson did not apply. In denying the hunter’s claims, the court stated that it “would be interested in reading whatever constitution it is that gives Boisjore the ‘right to hunt.’” ●

## U.S. Supreme Court Denies Review of Second Amendment Cases

On October 12, 1999, the U.S. Supreme Court declined to review two cases raising Second Amendment challenges. In the first case, Kostmayer v. Department of Treasury, 120 S. Ct. 323 (1999), two Louisiana men who had been convicted of tax crimes posed the question: “Does the Second Amendment create a personal right in each citizen that shall not be

infringed?” The appellants argued that the Second Amendment provided them with the right to own hunting rifles. The lower courts had dismissed the case at request of the Department of Treasury. The plaintiffs pled that “the time is now ripe for this court to squarely confront the issue of whether the Second Amendment creates a personal right in favor of individual citizens.” The Supreme Court apparently disagreed with the plaintiffs. The Court also declined review of Fraternal Order of Police v. U.S., 120 S. Ct. 324 (1999), in which a national police group argued that the due process clause, coupled with the Second Amendment, barred Congress from including police officers among those prohibited from possessing firearms if they have committed domestic violence misdemeanors. ●

## Baltimore Court Rejects Child-Safety Gun Lawsuit

On October 13, 1999, a Baltimore Circuit Court judge dismissed a case brought against Sturm Ruger and a Baltimore area gun dealer for selling a firearm without a child safety device. The plaintiff in the case was the mother of a 3-year-old boy who found a gun in the basement of his family’s home, was able to load the gun, and then fatally shot himself with it. Judge Evelyn Omega Cannon recognized that had Sturm Ruger put a child-proof safety device on the gun the child would not have been killed. The judge, however, decided that the gun was not defective under Maryland product liability law. Baltimore attorney Andrew D. Freeman represented the child’s mother and plans to appeal the decision. CPHV will likely file an *amicus* brief supporting the appeal. ●

# CPHV Files Brief Defending Landmark Hamilton Verdict

On December 17, 1999, CPHV filed an *amicus* brief before the U.S. Court of Appeals for the Second Circuit defending the landmark jury verdict and subsequent court ruling in Hamilton v. Accu-Tek, which held that gun manufacturers owe a duty to the public to exercise reasonable care in distributing guns, and can be liable when their failure to do so leads to criminal violence. Eleven groups joined CPHV’s brief: Common Cause, the American Association of Suicidology, the National Spinal Cord Injury Association, the National Association of School Psychologists, the National Association of Elementary School Principals, the National Association of Elementary School Principals, the American Jewish Congress Commission on Law and Social Action, Trial Lawyers for Public Justice, the American Academy of Pediatrics, the Educational Fund to End Handgun Violence, and the Hispanic American Police Officer Association. An *amicus* brief was also filed by many cities and counties that have sued the gun industry, and by the American Trial Lawyers’ Association.

In the Hamilton case, a Brooklyn jury — the first jury in the nation to hear evidence of industry-wide misconduct — found 15 gun manufacturers guilty of negligent firearms distribution, and awarded more than \$500,000 in damages to one of the shooting victims, even though no guns involved in the case were ever recovered. The decision represented a monumental step in the effort to hold gun makers accountable for their actions and decisions. (See *From the Director*, this issue.)

On June 3, 1999, federal judge Jack Weinstein, who presided at trial, denied the manufacturers’ motion to throw out the jury’s verdict. Hamilton v. Accu-Tek, 62 F. Supp. 2d 802 (E.D.N.Y. 1999). Judge Weinstein’s lengthy opinion contains a thorough analysis of the strong grounds in both legal theory and public policy for recognizing “the duty of manufacturers of a uniquely hazardous product, designed to kill and wound human beings, to take reasonable steps available at the point of their sale to primary distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them.” Judge Weinstein found the plaintiffs presented ample evidence that gun makers knew about the diversion of large numbers of guns into the underground market but chose not to take reasonable steps to reduce the diversion and subsequent criminal use of guns. Despite the overwhelming force of Judge Weinstein’s reasoning, the manufacturers insist on appeal that they owe no duty whatsoever to the public in distributing their lethal products. ●

# CPHV Victory Helps Rid California Of Illegally Registered Assault Weapons

**M**ore than 1,600 assault weapons registered in violation of California law will be taken off the streets thanks to a ruling won last year by the Legal Action Project, (see *Legal Action Report* # 17, September 1998), and a decision by newly-elected California Attorney General Bill Lockyer not to pursue an appeal of that decision.

In 1989, California became the first state in the nation to enact an assault weapons ban, which was intended to freeze the number of assault weapons in the state. The law allowed those who already possessed assault weapons to keep them, provided they registered them with the state's Department of Justice before March 30, 1992. Ignoring the terms of the law, then Attorney General Dan Lungren allowed registration of assault weapons to continue long after the statutory deadline.

As soon as Lungren's misconduct came to light, the Legal Action Project brought suit on behalf of Handgun Control and CPHV. In addition to showing that the late registrations were illegal, the Project's lawyers provided evidence that some of the guns registered had been illegally smuggled into California after the state's Assault Weapons Control Act was enacted.

In August 1998, San Francisco Superior Court Judge Raymond Williamson ruled that the Attorney General violated the law and ordered him to stop illegally registering assault weapons. Lungren filed an appeal of the decision, but shortly after that he lost the



governor's race in an election in which the assault weapons controversy became a significant issue.

Lockyer formally announced on August 17, 1999, that he would drop the appeal and allow the Legal Action Project's victory to stand. The National Rifle Association filed a motion seeking to intervene to avoid dismissal of the appeal, but the court denied that motion. The favorable conclusion to the lawsuit has cleared the way for the state to require owners of the illegal assault weapons to turn them over to law enforcement.

The San Francisco law firm of Morrison & Foerster has assisted CPHV throughout the case. ●

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