

LAWSUITS AGAINST GUN MANUFACTURERS

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Background

Under tort law, someone sustaining personal injury or damage to his or her property due to the proper use of an unsafe or defective product may seek compensation from the persons who designed, manufactured, sold, or furnished that product. Most product liability cases arise because a product does not function as intended, such as when brakes fail or toys contain harmful parts. In November 1998, the attorneys general of 46 states entered into a settlement with five tobacco companies promising up to \$206 billion over the next 26 years in compensation for costs associated with smoking-related diseases. The tobacco cases were unusual, if not unique, because they involved liability for products that *did* function as intended, but with damaging outcomes. On a similar notion, some cities and counties recently have filed lawsuits against gun manufacturers to recover public costs associated with gun violence. In addition to product liability, these suits are based on theories of negligence, nuisance, and unfair and deceptive trade practices.

The Centers for Disease Control and Prevention report that in 1996, 34,000 people in the United States were killed by gunfire (including more than 14,300 homicides, 18,100 suicides, and more than 1,100 unintentional shooting deaths), making firearms second only to motor vehicles as the most frequent cause of injury-related deaths in the country. With the experience of the states' multibillion dollar settlement with the tobacco companies in mind, the municipalities suing the gun manufacturers may believe that they do not actually have to win a lawsuit, but rather bring enough suits to induce the gun manufacturers to take responsibility for negotiation, reform, and control.

Gun Lawsuits Filed

On October 30, 1998, the City of New Orleans filed the first lawsuit on behalf of a city or other governmental unit against the firearms industry (including dealers, distributors, and manufacturers). Since then, approximately 30 cities and counties, including Alameda County (CA), Atlanta, Boston, Bridgeport (CT), Camden City (NJ), Camden County (NJ), Chicago, Cincinnati, Cleveland, Detroit, Gary (IN), Los Angeles (including Compton, West Hollywood, and Inglewood), Los Angeles County, Miami/Dade County, Newark (NJ), Philadelphia, St. Louis, San Francisco (including Berkeley, Sacramento, San Mateo County, Oakland, and East Palo Alto), Washington D.C., Wayne County (MI), and Wilmington (DE), have filed lawsuits against gun manufacturers seeking compensation for the public costs associated with gun violence. (Judges in Cincinnati, Bridgeport, and Miami-Dade County have dismissed the lawsuits brought by those governmental entities.)

According to the lawsuits, the public costs associated with gun-related violence, unintentional shootings, and teen suicide include factors such as medical care, police investigation, emergency personnel, public health resources, courts, and prisons. According to an article in the *Detroit Free Press* (3-9-99), the Urban Institute found that rapes, robberies, assaults, and murders committed with guns in 1997 cost Detroit taxpayers an estimated \$850 million. The *Journal of the American Medical Association* estimates that nationwide, the yearly financial costs of gun violence are \$1.4 billion to \$4 billion and another \$19 billion in indirect costs, such as loss of productivity.

Legal Theories

Product Liability. New Orleans, Miami, and St. Louis are just a few of the cities that have filed a lawsuit focusing on the design of the firearms. The suits' primary allegation is that the guns are unreasonably dangerous in design under relevant state laws. The lawsuits contend that the gun industry's sale of guns fails to incorporate feasible safety devices into firearms to prevent their use by young children and other unauthorized users. The plaintiffs suggest that gun manufacturers should do more to ensure that the weapons cannot be misused by criminals or children, by including trigger locks and smart gun technologies that permit only the owner to fire

them. Allegedly, safety devices would prevent thousands of unintentional shootings by children, adolescent suicides, intentional shootings by violent teenagers, and criminal violence with stolen guns. Just as car manufacturers have been held liable for failing to install seat belts and air bags, the lawsuits contend that gun manufacturers should be found liable for failing to install feasible safety devices to prevent unintentional or unauthorized firearm use and many serious injuries and deaths.

In *Hurst v Glock Inc.*, a New Jersey appellate court recently held that even though guns present “obvious” dangers, a gun that was used in an unintentional shooting was a defective product because it did not have a device that would prevent discharge when the ammunition magazine was removed (causing the inexperienced shooter to believe the gun was unloaded). Central to the court’s reasoning was the fact that the manufacturer had the opportunity to eliminate the danger, because the manufacturer could have added the safety device without diminishing the gun’s usefulness.

According to an article in the *U.S. News* (6-22-98), there is available technology for some safety devices such as key-operated internal locks or loaded chamber indicators that show whether a gun is loaded through a color-coded display or a pop-up ring. Reportedly, even though gun manufacturers are aware that unintended users like children will gain access to their products, some have resisted calls to incorporate locks and other safety features that would “personalize” guns and prevent them from being used by children and other unauthorized persons. It could be argued, however, that personalizing guns would be inexpensive compared with the costs of liability that nonpersonalized guns could impose on a gun manufacturer. Therefore, the threat of liability against the gun manufacturers arguably could provide an incentive for them to incorporate available technology and design to make their products safer, and perhaps provide the most effective long-term approach to ending unintentional shooting injuries.

Nuisance/Negligent Distribution and Marketing. Some cities, including Chicago, Detroit and Boston, have filed lawsuits alleging that the gun industry created a public nuisance through the prevalence of illegally possessed firearms. These suits also contend that gun manufacturers and distributors have negligently and knowingly contributed to the illegal gun market, which significantly interferes with the public health and safety of city residents. The lawsuits allege that gun manufacturers are responsible for flooding the gun market even though they are aware that many of the guns are diverted to criminal use. For example, some of the lawsuits charge that semiautomatic assault weapons like the DC9 have no legitimate sporting or self-defense purpose but are particularly well adapted to a military-style assault in which the object is to shoot as many people as possible in the shortest period of time. The lawsuits charge that because the manufacturers knew or should have known that these products have no legitimate public use and encourage harmful and deadly attacks, sales to the general public violate a duty of care and constitute actionable negligence. The suits contend that placing these assault weapons in the public marketplace is just as irresponsible as leaving a gun accessible to a child or illegally selling a gun.

The lawsuits also claim that the gun industry ignores its responsibility to monitor and control the sales practices of gun distributors and dealers, who sell guns directly and indirectly into the illegal marketplace. For example, the City of Detroit and Wayne County sued gun manufacturers and local gun dealers on April 26, 1999, for more than \$800 million for “willful blindness” in allowing guns to be sold to criminals, youths, or other irresponsible persons through straw purchases (gun sales in which a dealer knowingly sells a weapon to someone acting as a front-man for a felon or juvenile).

According to an article in the *Detroit Free Press* (4-27-99), Wayne County officials say that from 1990 to 1998, 5,264 children under 16 years of age were charged with carrying a concealed weapon in Wayne County. According to the lawsuit filed by the City of Detroit, from 1992 through 1998, more than 1,550 youths under the age of 16 were shot in Detroit and more than 135 of these children were killed by gunfire. The suit claims that manufacturers knowingly and deliberately exploit, rely upon, and help maintain an active and profitable illegal gun market for felons, juveniles, and other dangerous individuals who could not purchase a gun legally. The lawsuit also asserts that the manufacturers and dealers are negligent in not preventing felons and juveniles from obtaining weapons.

In *Hamilton v Accu-Tek*, a Brooklyn jury found 15 of the 25 gun manufacturers sued guilty of negligence in their practices of marketing and distributing guns by oversupplying states that have relatively weak gun laws, with the knowledge that excess guns will be sold illegally in states with stricter gun laws. The case included testimony on the underground illegal marketing of new guns via convenience trafficking, straw purchases, corrupt practices by Federal firearms licensees, and stolen guns. It was argued that the gun manufacturers neglected to exercise a nominal duty of care that would help ensure that their potentially dangerous products would not end up in the hands of someone whom the manufacturers knew would be likely to use the product in an unreasonable manner. Three of the companies, American Arms, Beretta USA, and Taurus International Manufacturing, were ordered to pay a total of \$560,000 in damages to one of the seven plaintiffs. The jury's verdict marks the first time the firearms industry has been found collectively liable for gun violence.

Deceptive Marketing and Advertising. This type of lawsuit alleges that the gun industry has engaged in unfair business practices by advertising guns as increasing the safety of homes, when public health data indicate that bringing a gun into a home actually decreases the security of gun owners and their families. It is contended that the industry aggressively and deceptively promotes the idea that possessing a gun will increase personal and household safety, with slogans such as "homeowner's insurance", "tip the odds in your favor", and "your safest choice for personal protection". The suit asserts that firearms manufacturers have misled consumers with respect to the dangers and risks associated with handguns and misrepresented the benefits and risks of keeping a firearm in the home.

The lawsuits filed in San Francisco and Los Angeles take special aim at the Ring of Fire companies (gun manufacturers based in the Los Angeles area, including Phoenix Arms, Davis Industries, Lorcin Engineering, and Bryco Arms) that produce easily concealed, small-caliber, rapid-fire, cheap handguns known as "Saturday night specials" or "junk guns" (*Business Week*, "No Surrender from Mr. Saturday Night Special", 8-16-99). According to the lawsuits, these manufacturers design and market their guns to appeal to criminals. Another example is Navegar's TEC-DC9, which is a semiautomatic assault weapon that can accept a 32-round detachable magazine, and can be modified to be fully automatic. It also has a coating that is marketed as providing "excellent resistance to fingerprints". To win the lawsuits, the California cities will have to prove not that the gun manufacturers caused any specific injuries, but that the gun makers engaged in an unfair business practice in distributing the weapons. Instead of damages, the cities would be eligible to collect civil penalties for each violation.

Gun Manufacturers' Defense

Many people believe that holding a legitimate industry liable for the criminal actions of third parties defies common sense and distorts the justice system. They claim that the focus, instead, should be on stricter enforcement of criminal laws to hold armed criminals directly responsible for their actions. Many also believe that more effort should be made to attack other causes of gun accidents and violence, including domestic disputes, gangs, and inadequate safety training. They also point out that the lawsuits against the gun manufacturers would alter a well established principle in tort law that manufacturers are not responsible for the criminal misuse or negligent use of nondefective products. Some people argue that if the gun industry (like the tobacco industry) were held responsible for damages caused by individuals who willfully misuse its products, then similar liability could be extended to the automobile industry, the liquor industry, the cattle industry, or any other industry that may be associated with risky or unhealthy behavior (*Detroit News*, 2-18-99). Arguably, this would undermine and weaken the concept of personal accountability and individual responsibility.

Product Liability. According to the National Rifle Association (NRA), the Beretta Corporation recently issued a statement on "personalized" guns saying that the technology is still undeveloped and unproven and that careful consideration has not been given to potentially dangerous risks associated with it. Apparently, Beretta has grave concerns about the suitability of a personalized gun device for home use because some gun owners might believe that the weapon is childproof and may leave their guns loaded and accessible to children.

Under tort law, a defective product is one that does not operate as designed and made, as reasonably expected by a consumer, or as other products of its type function. Courts uniformly have held that a defect

must exist in the product at the time it was sold, and that the plaintiff's injury must have been the result of that defect. Arguably, a party should not be held liable for injuries that occur only because a properly operating product is criminally or negligently used. According to gun manufacturers, their products are safe when used properly, and they should bear no responsibility for unscrupulous dealers or for the actions of criminals or others who fail to use the guns as they were intended (*State Legislatures*, "Can Cities Sue Gun Makers?", May 1999).

Nuisance/Negligent Distribution. Apparently, the Florida circuit judge who dismissed Miami-Dade County's lawsuit stated that public nuisance is not relevant to the design, manufacture, and distribution of a lawful product. Further, many argue that there is no legal justification for imposing higher standards for gun marketing and sales than already exist or are imposed on other product manufacturers (National Center for Policy Analysis, "Suing Gun Manufacturers: Hazardous to our Health", March 1999).

Deceptive Marketing and Advertising. The NRA asserts that every year firearms are used three to five times more often for protection, about 2.5 million times, than they are misused by criminals, in approximately 450,000 crimes. Arguably, the lawsuits fail to acknowledge the many benefits that come from the proper use of firearms by people defending themselves and others against criminals. Cincinnati's contention that the manufacturers practiced deceptive advertising by claiming that ownership of guns increases home security, was dismissed in part on the ground that the manufacturers' claims stated an opinion of future events and reflected what was set forth under the Ohio Constitution and statute, which recognize the legitimate use of firearms for self defense.

According to the Claremont Institute, a California-based policy center, an analysis of guns recovered by police nationwide between 1980 and 1994 demonstrates that less than 2% of the guns used in crime are assault weapons. In addition, contrary to the recent lawsuit allegations, "Saturday night specials" reportedly are involved in less than 3% of violent crimes, and only about 2% of these weapons will ever be used in one.

Other Issues. In addition to the defenses described above, opponents of lawsuits against gun manufacturers contend that the increased cost of "smart guns" would make them unaffordable to law-abiding citizens; that requiring manufacturers to monitor the sales of guns beyond initial retail sales would pose potential privacy concerns; and that the lawsuits threaten individual liberties protected by the Second Amendment. Also, according to the NRA, fatal firearms accidents are at a historic low, which is due not to government mandates, but to voluntary firearms safety education.

Lawsuit Prevention Legislation

Gun manufacturers and gun rights advocates have been seeking state action to protect the manufacturers from the local litigation. They have sought and obtained legislation in Georgia, which passed a law in February 1999, barring cities from suing gun manufacturers; and in Louisiana, which passed a law precluding local government from suing any manufacturer, trade association, or dealer based on the lawful design, manufacturer, marketing, or sale of firearms or ammunition. In addition, in July 1999, Louisiana passed a law providing that the Louisiana Products Liability Act does not impose liability on a manufacturer or seller for improper use of a properly designed and manufactured product. Similar bills have been introduced in Alabama, Alaska, Arkansas, Kansas, Louisiana, Montana, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Vermont, and Wyoming. Arguably, litigation alone could make it impossible to manufacture and sell guns at reasonable prices, producing a de facto ban on gun sales.

In Michigan, House Bill 4379 and Senate Bill 494 would prohibit governmental entities from filing a civil action against gun manufacturers except for violations of State, local, or Federal laws, or for breach of contract or warranty. The House bill also would prohibit a governmental entity from requiring gun manufacturers to install a safety device or put warning or safety labels on a pistol or firearm. The House bill is currently in the House Committee on Family and Civil Law, and the Senate bill was referred to the Senate Committee on Local, Urban and State Affairs.

In addition, on April 20, 2000, House Republicans in Michigan announced a proposal that, among other things, would prohibit local governments from suing gun manufacturers, allowing only the Attorney General to file such

an action.

Recent Developments

In light of recent public shootings by minors, President Bill Clinton has urged Federal legislation requiring safety locks on all guns sold. According to an article in the *Detroit Free Press* (3-3-00), Wayne County recently reached an agreement with three large retailers (Gander Mountain, Sports Authority, and Dick's Sporting Goods) and all of their Michigan chain stores, to give free trigger locks to all firearm buyers. This is apparently the first time that retailers anywhere in the nation have voluntarily given free trigger locks to gun buyers without a law requiring them to do so.

The Federal government and some state and local governments reached an agreement on March 17, 2000, with Smith & Wesson, the nation's largest gun manufacturer, which agreed to make some 80 reforms concerning the design, distribution, and marketing of guns. Among other provisions, the agreement requires Smith & Wesson to install mandatory child-safety devices on all guns within one year; introduce personalized gun technology on all new guns within three years; install internal locking devices within two years; offer magazine disconnect safeties to all customers within one year; and install chamber loaded indicators within one year. In addition, the agreement requires Smith & Wesson to allow its guns to be sold only to certain authorized dealers and distributors who follow the specified terms and conditions governing sales and distribution, including mandatory background checks at gun shows, firearms safety training, security procedures to prevent gun theft, and multiple handgun sales limitations. Due to the agreement, the following local governments reportedly have agreed to drop their lawsuits against Smith & Wesson: Atlanta, Berkeley, Bridgeport, Camden, Detroit, Gary, Inglewood, Los Angeles, Miami/Dade County, St. Louis, and San Francisco. The agreement also was signed on behalf of the State of New York and Connecticut.

Meanwhile, Philadelphia became the latest municipality to take gun makers to court when it filed suit against 14 manufacturers (including Smith & Wesson) on April 11, 2000 (Associated Press, 4-12-00). The city is seeking to recover costs from gun violence, including medical care, police protection, emergency services, and prisons, as well as force the defendants to add safety features to guns and change the way weapons are marketed and distributed. Although the State of Pennsylvania recently enacted legislation prohibiting local governments from suing firearms manufacturers, that law reportedly bans lawsuits against the legal marketing of guns, while the city contends that the defendants marketed their products illegally.

Outcome

The outcome of the lawsuits filed by the cities and counties is difficult to predict. Some of the cases are based on the innovative legal theory that gun manufacturers are responsible when a third party uses their product to maim or kill. The gun industry, with annual sales of \$1.4 billion a year, is much more vulnerable to potential litigation costs and large verdicts in a few cases than was the tobacco industry, with annual sales of \$48 billion.

It is important, however, to note certain distinctions between the gun and tobacco cases. The tobacco cases involved some aspects of a "cover-up" by manufacturers to mislead consumers of the known dangers of the product. Most people know that guns are a potentially dangerous weapon when misused. In addition, some of the individual tobacco cases are supported by theories of addiction and chemical dependency, arguments not available in the gun cases (*State Policy Reports*, Vol. 17, Issue 3).