

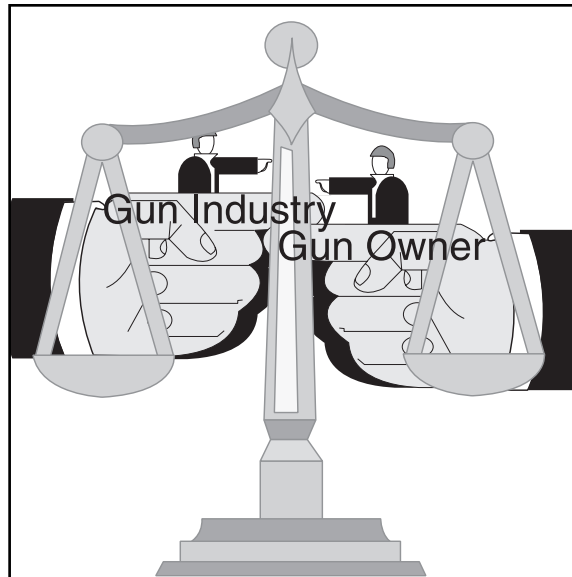
TAKING POTSHOTS AT THE GUN INDUSTRY: *THE DANGER IN PUBLIC LAWSUITS AGAINST A LEGAL PRODUCT*

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Cities throughout the United States are currently attacking the gun industry in a manner suggesting that guns have suddenly become a new threat to society. The attack is based on an essentially new theory of tort law, advertised as a close cousin to the tobacco lawsuits. The notion is that sellers of products that are dangerous, yet legal, should have to pay the so-called public

costs experienced from both the legitimate and illegitimate use of those products. For tobacco, those costs were the medical bills associated with treating smoking-related illnesses. In the case of handguns, these public costs are considered that of the additional policing and hospital care related to gun violence.

The current gun industry lawsuits are actually based on two distinct theories of fault, both leading to the same goal of recouping the public cost of combating gun violence. The first theory is basically a product liability claim, which charges gun makers with not adequately developing safety devices in their products, thereby causing them to be “unreasonably dangerous.” Last November, the City of New Orleans employed this theory and filed a lawsuit seeking to recover “millions of dollars” against gun makers. Shortly thereafter, Chicago and Cook



County jointly filed a suit to recover \$433 million from the gun industry under a second theory, charging the industry with creating a “public nuisance” by marketing their handguns in ways that made them available to criminals and juveniles. Miami, Atlanta, Albany (New York), Cleveland, Cincinnati, Detroit, and Bridgeport, Connecticut have all filed suits based on similar claims, while

many other cities await the results of these test cases. If one city wins a decision, that victory will invite any and all localities that suffer gun violence to sue.

Public officials in Milwaukee are also expressing interest in suing the gun industry under these theories of “public cost.” The motivation, as in other cities, comes largely from exasperation with the level of gun violence in urban areas. According to County Supervisor Dorothy Dean, “we’ve got to do something to stop the gun madness,”¹ and Alderman Michael Murphy goes so far as to say, “cities across the country are at the mercy of gun manufacturers. The manufacturers have

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some liability here.”² Anger towards the level of gun violence in Milwaukee is a very real and understandable emotion, shared by many people. Yet in the urgent quest to find solutions to this problem, governments must be cautious to not trample liberties and free commerce by redefining fault by some perverse idea of causation.

Milwaukee should resist the temptation to follow the trend and sue the gun industry because bad law and bad policy underlie these tactics. It is bad law because these suits would establish liability to the producers of a product that is misused for criminal purposes, which existing tort law has been properly hesitant towards allowing. It is bad policy because, despite the prevailing rhetoric, guns also provide social benefits that far outweigh the alleged social costs.

Members of the Wisconsin Assembly have already threatened a bill that would prohibit cities in the state from initiating such lawsuits. Hopefully things will not come to that. But if local governments sue industries in a manner inconsistent with standard legal principles, and put an undue burden on citizens in the process, then state action to protect those liberties is warranted. After all, are beer companies the next industry to be sued for the harm caused in part by the use of their products? Supporters of the gun industry lawsuits say such an extension of the theory is ridiculous to expect. Yet that was precisely the same claim made during the tobacco lawsuits.

Bad Law: Gun Control by Other Names, Yet Not Still the Same

Guns are a dangerous, albeit legal product. As such, guns have always faced great scrutiny from private lawsuits, mostly for product liability. Yet these lawsuits have, on the whole, been very unsuccessful, as juries have decided repeatedly that gun makers are not at fault for the misuse of their products.³ The reason these claims fail is clear. Product liability is primarily based on instances where a product functions in a way not anticipated, thereby creating a risk of harm. Yet the product liability strain of the gun industry lawsuits fails to explain how the handguns

are not functioning as specifically designed. The purposes of guns are clear and generally their effectiveness is measured by the ability to be fired accurately at something—whether a target, animal, or, unfortunately, another person. New Orleans claims that the industry has failed to incorporate enough safety devices so that only those who own a gun are allowed to shoot it. Unfortunately the belief that such technology is currently available is off target, since the necessary technology will not be available for years. Regardless, if these guns are truly “unreasonably dangerous,” as the New Orleans lawsuit claims, then why do we arm our law enforcement officers with these products?

It is not guns per se, rather the people who use them illegally who are unreasonably dangerous. Clearly, the attempt is to place blame on an inanimate object for social harms that are caused by the offensive actions of pernicious individuals. Yet it is generally not a good idea to use civil liability to solve a criminal problem, as is the true nature of these lawsuits. Such a style distorts who is truly at fault and why they bear the blame, namely criminals who use guns, not manufacturers of those guns.

Beyond the more common product liability claim, the newest legal theory charges the gun industry with marketing its products in ways that make it easy for criminals and juveniles to obtain guns. More specifically, the allegation is that guns are oversupplied in areas with weak gun laws, which then results in a flood of weapons to states or localities with strong gun laws. It is a much more ingenious claim, but also a much more hazardous one, which would establish a dubious legal precedent that could affect many other industries. Collective liability for creating some perceived widespread risk could befall any industry not taking affirmative action to ensure their products are only used as intended. This burden would cripple many industries, and leaves one to wonder whether that is actual goal of those supporting the gun industry lawsuits.

The viability of the negligent marketing claim received a boost this past February when

a U.S. District Court in Brooklyn ruled that three gun manufacturers were negligent in their sales practices and required to pay damages to a shooting victim.⁴ The case, *Hamilton v. Accu-Tek*, was brought by private plaintiffs but was generally viewed as a test of the negligent distribution theory upon which rest the cases brought by cities like Chicago. The plaintiffs' argument was that the gun distributors legally sold guns to persons in other states whom they knew would eventually sell or give them to people in New York who were not allowed to legally carry those guns. These weapons are then used to commit violent crimes, and based solely upon their respective market-share, gun makers could be found liable for the costs of these crimes — even if there is no proof the manufacturer made the gun that was used in any particular shooting.

Unfortunately, this claim insinuates that the gun industry has a standard practice of funneling weapons to illegal markets. Yet ignored in these lawsuits and the corresponding media coverage is that gun makers are not violating statutory law. In other words, gun manufacturers, distributors, and retailers are following the laws that currently regulate them and gun retailers are only selling to buyers that meet current regulations. As described by John Lott, Jr., a fellow at the University of Chicago School of Law, while referring to a questionable undercover operation by Chicago police to support the city's claim:

The gun dealers faced a no-win situation. These supposed gang members met all the state requirements by passing criminal background checks and signing the required forms promising to obey state and local laws. Had the retailers not sold firearms to black undercover officers posing as gang members, they

surely would have faced discrimination lawsuits.⁵

What is legitimate business person in the gun industry to do? A better option is to individually prosecute those few licensed retailers who do knowingly sell to straw men. According to the Bureau of Alcohol, Tobacco, and Firearms' (ATF) firearms bureau, 80 percent of licensed gun dealers did not have a single gun used in a crime traced to their stores last year. In addition only one percent of federally licensed gun dealers sold nearly half of the guns traced to crimes in 1998.⁶ And the percentage of those dealers who knowingly sell to someone who will allow the weapon to be used in a crime is likely much smaller. The problem is by no means industry-wide or inspired, and it creates a dangerous legal precedent to simply make this assumption.

Legislatively mandated restrictions on guns already exist that satisfy public policy considerations, such as: certain gun styles are banned; licensing and background checks are required; methods of carrying and using guns are restricted. Licensed retailers not

only comply with these existing laws, they also greatly assist law enforcement with information on suspicious gun trafficking. But actually policing illegal gun trafficking after their sale from gun dealers is something outside their ability to control. This duty falls necessarily to law enforcement, such as ATF, which has previously never required the industry to track their products to the streets. Nevertheless, the judge in the *Hamilton* case claimed there was an ability to show substantial cause for the killings based on an alleged large scale underground market from a gun sales system that is without adequate concern over the channels of distribution and possession. As a result, another affirmative duty is being created to make

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Smoking Guns? Differences Between Tobacco and Guns

The city-initiated lawsuits against the gun industry are widely recognized to be of the same breed as the recent tobacco industry lawsuits, which concluded in a \$246 billion settlement with the states. State and local governments are attacking both industries to reclaim public costs experienced due to the use of a legal, yet dangerous product. In addition, both industries are currently viewed with great hostility from the general public, as the social problems involving their products have received wide publicity.

Yet the comparison is actually more of a self-fulfilling prophecy propagated by supporters of the lawsuits. These supporters include gun control advocates, public officials unable to control crime in their cities, and trial lawyers seeking a multi-million dollar payday similar to the tobacco settlement. As to the lawyers, many of the cities bringing suit are being guided by the same lawyers who litigated against the tobacco companies. Yet despite the temptation to equate the tobacco and gun lawsuits, there are important distinctions between the two industries' products and between the conduct that prompted lawsuits against each. These distinctions highlight the much different level of culpability between each industry and counter the overly simplistic comparison between the two products

First, unlike tobacco, when guns are used correctly they do not cause harm to people -- at least law-abiding people. By the very act of smoking tobacco, which is the only purpose of tobacco, a person does damage to his or her health and possibly others. In contrast, the act of firing a gun does not by itself necessitate harm to people. Although this point seems overly basic, it strikes at the heart of the main legal difference between tobacco and gun marketing. The persons harmed by the use of tobacco are those who purchase cigarettes directly from the industry and its agents. The harms associated with guns are largely caused by criminal uses and are therefore one link further away in the chain of causation. Tort law has long avoided holding manufactures of legal products liable for the criminal misuse of their products, and for good reason. It would be quite a stretch, both in logic and policy, to say that a criminal who uses a gun to harm another does so under the auspices of gun makers.

Second, the cities cannot use the same argument the states did in their tobacco suits: that manufacturers misled consumers about the danger and addiction of their products. Everyone knows a gun is dangerous. There are no inherent hidden dangers unbeknownst to those who use guns, which could have a bearing on the risk they are willing to assume from using the product. In addition, gun makers are also highly involved with increasing gun safety knowledge and training that enables people to use guns appropriately. Such comparable efforts are largely lacking from the tobacco industry because such warnings would make little sense. Teaching one how to smoke correctly automatically teaches them how to harm their health. The opposite is the case with guns. Finally, there is clearly no chemical dependency that is developed from a person using guns, as there is with tobacco. Gun control pundits like to characterize guns as "infesting" our culture, suggesting that their mere existence is like a disease. But let us not be fooled. Guns, unlike tobacco, are not drugs that directly harm people. Instead they are merely instruments that must be used inappropriately to cause harm.

Third, the gun industry is far less financially prosperous than tobacco companies and has therefore vowed to not settle the suits in the same way. In 1997, the combined sales of handguns, rifles, shotguns, and ammunition totaled only \$1.4 billion, as compared to the \$48 billion in sales for the tobacco companies. Likewise, the gun industry is much more diffuse in its number of producers than tobacco's big names. Despite gun makers showing surprising unity during these new legal threats, the ability to broker a deal under these conditions is greatly reduced.

The gun industry lawsuits are portrayed as the legal and moral equivalents of the tobacco suits solely because both search for the same outcome: instead of the users of a legal product paying the costs of their wrongdoing, the industry that provides the product should pay the costs. At least with tobacco, those users were, to some extent, a deliberately misinformed public. Not so with guns, where the users who create the social costs are mostly criminals. Equating these two populations is just another example of the unsound reasoning upon which the gun industry lawsuits rest.

business people act as law enforcement officers.

Finally, these lawsuits threaten important political principles that go beyond the confines of the gun debate. The risks should make even supporters of gun control laws cautious about these legal tactics attempted against the gun industry. For example, *The Boston Globe* recently stated that it “is firmly in favor of strict gun control and keeping guns off the street. Yet using the courts in this way abuses the legal system and derogates the legislative process.”⁷ If gun distribution is too lax it is up to the legislature, not the courts, to change things. The real objective from these comprehensive public lawsuits is to have gun makers limit and regulate the flow of handguns, not to compensate those individuals already injured by gun violence. This is gun control pure and simple, and therefore should be treated as a policy issue rather than a legal matter.

Bad Policy: Who’s Protecting Whom?

Beyond the dangerous legal principles that would be established, the lawsuits must also be analyzed in terms of how effective they will be at achieving their advertised goals — namely more safety. Yet the dialogue over these legal claims has regularly failed to incorporate the social benefits from guns being in the hands of law-abiding citizens. It is a fallacy to only account for the social costs of gun violence without also balancing the securities to property and personal health that guns provide. The belief driving these lawsuits is that when fewer guns are made available to the public, fewer instances of gun violence will occur. But is this true?

The National Center for Policy Analysis, a nonprofit, nonpartisan research organization,

released a report in March that shows in detail how considerably more social harm than benefit will be generated if the lawsuits achieve greater restrictions.⁸ When using the statistics most favorable to proponents of the lawsuits, the benefits to society of defensive gun use are greater than the costs of firearm crimes by at least \$90.7 million and perhaps as much as \$3.5 billion per year. Using more standard estimates, that number reaches \$38.9 billion a year, or \$400 for every household in America. As the report appropriately states: “The savings to the cities from these defensive gun uses and the general savings to society from gun ownership dwarf the cost to municipalities of gun violence.”

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Certainly nobody wants gun violence to occur. Yet one may rightly question the efficiency of these lawsuits actually making people safer from gun violence, considering knowledge of how private gun ownership helps deter crime and its associated costs. In fact, given the figures mentioned above, the theories postulated by the lawsuits’ supporters would actually suggest that cities should be *paying* gun

makers for their aid. This idea is of course preposterous, but only as much as the converse notion of making them pay for the social costs of their products.

Better Methods to Address Gun Violence

Milwaukee should utilize the options already available to control gun violence before it begins applying irresponsible legal theories and attempts to shift blame to those who produce, distribute, and sell a legal product. There are other means to appropriately, efficiently, and justly deal with the social costs of handguns. Underlying these alternatives is the sensible concept that the costs due to hand-

gun use should be recouped against those who directly inflict these harms.

The most obvious option is using the legislative process to establish stricter laws forcing the types of restrictions that these lawsuits would create indirectly. An advantage to this approach is that the resulting laws will be clearer and give better notice to manufacturers, distributors, and retailers as to what they are expected to provide under the law. As much as these members of the gun industry may disagree with the added burdens and exposures to liability, at least they will know where they stand and if they need to take more precautions to comply.

As alluded to earlier, the American political tradition has commonly placed most true public policy decisions in the hands of the popularly elected officials of our government. Genuine public debate and accountability flow to legislatures unlike to members of the court. While using the legal domain to enact public policy change is not always unwise, such a strategy is usually reserved to protect individual rights from state infringement. If anything, it is individual rights that are being harmed by this court action, not the other way around. In this instance, the state is on the plaintiff's side, while in civil rights and other actions where the courts essentially made policy it was the state that was being compelled to ensure individual liberties.

Gun control advocates are avoiding state legislatures because time and time again they are coming down decisively against greater restrictions on guns. Proponents of the gun industry lawsuits have gone to the legal realm largely out of frustration with a general deaf ear from state legislatures and executives. In fact, both the U.S. Congress and numerous state legislatures, including Wisconsin, are threatening to or have already passed preemptive laws banning lawsuits against the gun industry. A likely retort is that the gun industry and its supporters, particularly the National Rifle Association, are coaxing legislators to come down in favor of the gun industry. But while the NRA does have a well orga-

nized and committed lobbying system, so do many advocate groups for gun control. Perhaps one should consider the possibility that legislatures are reflecting the will of the people by being cautious about restrictive gun control measures. That argument is strong in Wisconsin where voters last fall overwhelmingly approved the right-to-bear arms amendment to the State Constitution, and where in 1994, the residents of Milwaukee, the city most afflicted by gun violence, voted against a referendum to ban handguns in the city. Any court that established liability on the gun industry may therefore be subverting public opinion.

Yet before governments even look to establish stricter gun controls and regulations, they should first simply better enforce the multitude of existing gun laws. As discussed above, the gun industry is already one of the most regulated businesses in this nation, and rightly so. Therefore some members of the gun industry have challenged municipalities to first attempt stricter enforcement of these established laws before initiating lawsuits on other grounds. There are signs that such a commonsense idea would work. For example, Richmond, Virginia created a program in which the U.S. attorney prosecutes as many local gun-related crimes in federal court as possible and seeks federal mandatory minimum sentences. Homicides in Richmond dropped 50 percent in that city after that program took effect. The Wisconsin legislature is on the verge of approving a measure called Operation Ceasefire that would include a similar strategy. Once again, this approach identifies those populations truly at fault for gun violence, instead of punishing an industry willing to obey the law — provided the law is articulated to them and not developed on an ad hoc basis.

Translating the nebulous concept of social harm and public costs into the legal realm is exceedingly difficult and dependent on a contrived view of reality and cost accounting. It is within this fantasy world of cause and effect that the gun industry lawsuits fall. But beyond that, the costs that the cities are attempting to recover in these lawsuits are the costs of activi-

ties they should be expected to do. Policing the streets for violence and aiding in the provision of health care are policy decisions that cities make, largely because their citizens desire such protection. Looking for someone else to foot the bill is irresponsible and sets a dangerous precedent upon businesses. As long as private ownership and the restricted use of guns are allowed, there can be no logically consistent means of placing liability on the gun industry for the criminal misuse of their products unless we allow all legal products to face the same level of scrutiny.

1. The Milwaukee Journal Sentinel. December 1, 1998. *County Will Consider Suing Gun Industry.*
2. The Milwaukee Journal Sentinel. November 18, 1998. *Milwaukee Ponders Suing Gun Makers.*
3. *Courts have generally limited rulings in favor of the plaintiff to claims stemming from misfires caused by design defects, such as when guns caused harm to the shooter or someone other than the intended target.*
4. *The case was originally filed in 1995 in US District Court by families alleging the industry's negligent marketing practices caused gun-related violence that resulted in the deaths of six people and the serious injury of a seventh. While a victory was achieved in this case, supporters of further lawsuits along this theory had a largely tempered reaction since many factors in the case question the validity of the decision. For starters, the jury's decision was a bit tortured, as it deliberated for six days and informed the judge they were clearly deadlocked. Yet the judge told the jurors they must come up with a decision. The judge's reasoning was that so many people had invested so much time and energy into this obviously important case that it must be settled. In the end, the story that emerged was that of a lone*

juror, committed to finding guilt, crusading to get the other doubtful jurors to compromise in some fashion.

Second, 55 firearm manufacturers, distributors, and three industry trade associations were originally charged. All but 25 were dismissed, of which 10 were absolved of any negligence, 6 were found negligent but not in a manner causing injury to any of the plaintiffs, 6 were found negligent and liable but were not required to pay any damages, and only 3 were liable and paid damages of \$560,000. This judgment was done even though no negligence was found linking those three specific gun makers to the guns used to inflict that plaintiffs injuries. In other words, no one has any idea if the gun used in the crime was even made by the producers found at fault. In all, the relatively small amount of the damages awarded and that a large majority of the original defendants were not required to compensate the victim, further casts doubt upon the strength of the precedent set in Hamilton.

5. John R. Lott, Jr. *Suits Targeting Gun Makers Are Off the Mark.* The Wall Street Journal, March 2, 1999, p. A18.
6. The New York Times. April 30, 1999. *Most Crime Guns Are Bought, Not Stolen.*
7. The Boston Globe. January 19, 1999. *Mistargeting Gun Makers.* (Editorial).
8. Burnett, H. Sterling. *Suing Gun Manufacturers: Hazardous to Our Health.* Policy Report No. 233 (National Center for Policy Analysis: Dallas, TX) March 1999. The study is also available at the National Center for Policy Analysis website: <http://www.ncpa.org/studies/s223.html>.