

CRIME -

GUN INDUSTRY LAWSUITS

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U.S. Department of Housing and Urban Development

GUN VIOLENCE IN PUBLIC HOUSING – A SMALL SAMPLE FROM 1998 AND 1999

Gun violence in public housing developments across the country has become an all-too-common tragedy. A search of newspaper articles over the years turns up thousands of stories about people who have been killed, people who have been wounded, and families living in fear. Here are brief summaries of just a small sample of news stories published in 1998 and 1999 about shootings in public housing in 15 states and the District of Columbia.

ALABAMA

MONTGOMERY – Police statistics show that 16 percent of the city's 32 homicides in 1998 occurred in public housing. In addition, about 12 percent of the city's aggravated assaults in 1998 were reported in public housing projects.

CALIFORNIA

RICHMOND -- July 22, 1999 -- Gaston Avila, 19, of Richmond was shot to death and three others -- including a 15-year-old girl who was nine months pregnant -- were shot during a birthday party at the Easter Hill public housing complex.

SAN FRANCISCO – March 31, 1998 -- A 27-year-old man was shot to death execution-style in the Sunnydale public housing development. The neighborhood has experienced gun violence in the past. In November, Charles Adams, a 60-year-old retiree, was killed by a stray bullet from a shoot-out between two young men.

SAN FRANCISCO – May 20, 1999 – Mayor Willie Brown wrote a letter to HUD Secretary Andrew Cuomo saying that the San Francisco Housing Authority is running out of money to pay for private guards and needs \$7 million from the federal government to keep crime, vandalism and gangs at bay. In a July 12 letter to HUD, Senators Feinstein and Boxer make the same plea.

CONNECTICUT

BRIDGEPORT -- February 1, 1999 -- The body of Delmar Epps, 23, was found lying in the road near the Green Homes public housing development, with multiple gunshot wounds.

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DISTRICT OF COLUMBIA

WASHINGTON -- October 21, 1998 -- A 4-year-old girl named Javina Holmes, a resident of the Frederick Douglass Dwellings public housing development, was killed when her 8-year-old brother found a loaded shotgun inside their apartment and began shooting.

WASHINGTON -- June 21, 1999 -- A 55-year-old grandmother, Helen Foster-El, was gunned down by two stray bullets fired by a group of feuding young men as she tried to usher neighborhood children to safety. Parents in the East Capitol Dwellings public housing development said they give their children survival instructions on what to do when shooting erupts, because it happens so often.

FLORIDA

CLEARWATER -- May 20, 1999 -- LaShonda Denise Williams, 19, was accidentally shot in her Jasmine Court public housing apartment when a revolver that she and her boyfriend were looking at went off. The bullet passed through Williams' neck and came out her shoulder.

MIAMI -- July 15, 1999 -- A resident of the James E. Scott Homes, the largest public housing development in Florida, recounted the story of a boy who was shot by two men driving by in a car while the boy was buying ice cream. The man said that another time he was sitting on his porch when he saw a boy being chased and shot.

TAMPA -- April 1, 1998 -- One man was killed and two others were critically wounded during a shootout in the Riverview Terrace public housing development. The dead man was found on a sidewalk and two wounded men were in a car stopped near the scene. Police said the incident initially appeared to be a drug deal gone bad, since drugs and guns were found in the car. The slaying was the third homicide in three weeks and the second in two days at Riverview Terrace.

ILLINOIS

CHICAGO -- January 19, 1998 -- Parents and other residents will begin escorting children to school January 20 with the hope of protecting them from gang gunfire in the Cabrini-Green public housing development. The escorts attended a training session to prepare them on what to do if gunfire erupts.

CHICAGO -- September 7, 1998 -- Lavell Jones, 22, was shot and killed by a Chicago Housing Authority policeman after threatening the officer with a 9-mm. handgun. Police were responding to reports of a shooting at the Robert Taylor Homes public housing development when the incident occurred.

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KENTUCKY

LOUISVILLE -- May 3, 1999 -- Suspected gang member Corey J. Bell, 25, was shot to death in an apparent drug dispute at the Clarksdale public housing development. The suspect in the shooting, Ricky LaSalle Glass, 22, shot in himself in the head on May 4, 1999, after a four-hour standoff with Louisville police. Glass died later in the day.

LOUISIANA

NEW ORLEANS -- May 3, 1998 -- A mother of seven children, Melissa Stone, was on her way to Jazzfest when she was abducted at gunpoint, raped, shot and left to die in an abandoned apartment in the Desire public housing development. Her body was found several days later. A New Orleans man with no adult criminal record was convicted of manslaughter.

NEW ORLEANS -- May 8, 1998 -- Theron Corey, 29, was gunned down in the Guste public housing complex. One of two men who shot him was described by prosecutors as a "hit man," and was later convicted of second-degree murder and sentenced to life in prison.

NEW ORLEANS -- March 18, 1999 -- Sean Jackson, 24, has been charged with two murders that occurred in the C.J. Peete public housing development. Demetrice Harper, 19, was robbed and killed on December 19 in a driveway. Jeremy Nunnery, 23, was shot to death on January 5 after a fight.

MARYLAND

ANNAPOLIS -- April 12, 1999 -- Bryon Antoine Jones, 22, was fatally shot near the front stoop of his girlfriend's Annapolis Gardens duplex. The shooting at the public housing community was apparently the result of an earlier altercation at Club Hollywood, a nearby nightclub.

MASSACHUSETTS

WORCESTER -- March 27, 1998 -- Luis A. Torres, 24, was shot in both legs while walking along a street in the Great Brook Valley public housing project. After being treated at University of Massachusetts Hospital, Torres was arrested on criminal warrants. Police say the shooting by five assailants wearing ski masks coincides with the assumed arrival in the neighborhood of a cache of stolen handguns.

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NEW JERSEY

NEWARK – January 9, 1999 – Newark Police Officer Frederick Johnson was shot and wounded and Douglas Lamont Parker was killed in a shootout during a routine drug arrest in the Stella Wright Homes public housing development. While the officer was preparing to arrest several men during a drug deal, police said Parker burst through a back door and began firing.

PATERSON – June 24, 1999 – Benjamin Reyes, 26, was shot in the back in his car by an unknown assailant at the Alexander Hamilton public housing complex. The shooter fired at least seven rounds into the vehicle, with four bullets piercing the rear window. Reyes and a companion in the car were later charged with possession and distribution of heroin.

NEW YORK

NEW YORK CITY – August 1, 1999 – Gerard Carter, a 28-year-old New York City police officer, died four days after being shot outside a building in the West Brighton Homes, a public housing development on Staten Island. The alleged gunman was Shatiek Johnson, 17. Carter and his partner were attempting to arrest Johnson on charges of shooting a 20-year-old man in July. Johnson was on parole for beating a homeless person to death two years earlier.

SCHENECTADY – June 20, 1999 – As children played nearby, 21-year-old Shawn Stevens was shot twice in the abdomen at a playground courtyard at the Steinmetz Homes public housing development.

NORTH CAROLINA

ASHEVILLE – June 2, 1999 – A 17-year-old youth died after he was shot at Deaverview Apartments, a public housing development. The suspect is a 16-year-old boy.

DURHAM – April 7, 1998 – While walking home from dinner with his mother, a five-year-old boy was hit by a stray bullet from a gunfight. The bullet severed his spine, and Taquan Mikell may never walk again. The bullet struck him more than a half block away from the gunfight, near a park where as many as 100 children play every day.

PENNSYLVANIA

BETHELEM – July 7, 1998 – Police said Julio Hernandez, 39, shot and killed William Lopez, 21, at the Pembroke Village public housing development. The killing took place shortly after Lopez shot and critically wounded Anthony Feliciano, 23, after an early-morning argument.

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EASTON – June 16, 1998 – A New York City man was shot in the leg at the Delaware Terrace public housing project in Easton. The alleged assailant, Troy Alvin, 19, was also arrested in another shooting at a Stroudsburg restaurant and bar that injured two bystanders. At the time of the restaurant shooting, Alvin was awaiting trial for the shooting of the New York City man.

MOUNT PLEASANT – October 10, 1998 – A 46-year-old man broke into a neighbor's apartment at the Pleasant Manor public housing development. He shot and killed 9-year-old Jeremy Barnhart and critically wounded the boy's 14-year-old sister, Cori Barnhart. The gunman, Alan Waterhouse, then returned to his own apartment and, after barricading himself inside for 12 hours, killed himself. Waterhouse was the former boyfriend of the children's mother.

TENNESSEE

MEMPHIS – June, 1999 – Two recent shootings of children at Fowler Homes public housing have increased public pressure for better protection, including a proposal to hire private security guards. In the past year, four homicides, 62 assaults, 133 burglaries and other crimes have taken place at Memphis Housing Authority developments, according to the agency.

NASHVILLE – July 2, 1999 – Nashville teenager, Eric Harvey Hazelitt, was fatally shot in the chest when gunfire erupted at the John Henry Hale public housing complex in Nashville. Just 14-years-old, Hazelitt was often seen riding his bike, helping older neighbors shop or emptying the trash. Witnesses said Hazelitt got caught in the crossfire of two groups shooting at each other.

VIRGINIA

PORTSMOUTH – July 10, 1999 – Linwood Scott killed a 28-year-old woman and himself, ending a 13-hour standoff with police at the Jeffrey Wilson Homes public housing development. The woman, Rene Childers, was one of four hostages held by Scott.

RICHMOND -- April 28, 1999 – A man was shot to death in the Creighton Court public housing development. A suspect was taken into custody shortly after the incident.

RICHMOND – July 23, 1999 – A woman was shot in the head and killed at the Gilpin Court public housing development while standing next to a pay telephone.

GUN LITIGATION CLAIMS

- I. **PRODUCT LIABILITY** – The first set of claims against gun manufacturers involves the application of product liability law to the gun industry. One such claim – design defect – asks the court to weigh the utility of guns against the dangers inherent in these products. Both the fact of widespread gun violence and the trends to design and market more powerful and dangerous guns would support this theory.

A second product liability claim asserts that gun manufacturers should incorporate safety devices into their products. This claim requires proof that guns present an inherent risk of injury and that they can be made safer without undue cost or interference with product performance. The technology to incorporate safety features into firearms has been available since the turn of the century. Some companies have successfully manufactured guns with child safety features, magazine disconnects and warnings that a round is in the chamber. The experience of companies that have used these safety features demonstrates that guns can be viable products even with such features.

Another product liability theory would hold gun manufacturers liable for failing to warn customers of the dangers inherent in their products. To succeed on this theory a plaintiff must show that guns present an inherent risk of injury and that either the warning given was inadequate or the lack of a warning was unreasonable.

Another possible legal claim is that the use of guns constitutes an ultrahazardous activity. This claim asks the court to engage in a risk utility analysis similar to that necessary to claim that there is a design defect.

A. Design Defect

1. Legal Standards

- a) Unreasonably dangerous condition existed in the product
- b) Condition existed at time it left the manufacturer's control
- c) Condition was a proximate cause of plaintiff's injury
or
- d) Risk/utility analysis (product is defective if its risks exceed its overall utility)

2. Possible Supporting Facts

- a) 1996 – over 34,000 Americans killed by gunfire
- b) 1996 – over 4,500 under age 20 were killed
- c) It is estimated that for every death there are 2 to 3 nonfatal shooting injuries
- d) 1996 – 1,100 deaths from unintentional shootings
- e) 1993 – 526 accidental shooting deaths of children and teens
- f) 1992 – 99,000 individuals treated in emergency rooms for non-fatal firearm injuries
- g) 1994 – firearms were second leading cause of death of people ages 10 to 24

- h) Dangerous gun manufacturing trends
 - (1) Greater ammunition capacity
 - (2) Higher caliber or power
 - (3) Greater concealability
 - (4) Point and rapid fire capability (e.g., pistol grips, shoulder straps)
- B. Failure to Incorporate Safety Device
 - 1. Legal Standards
 - a) Product presents inherent risk of injury
 - b) Product can be made safer without undue cost or interference with product performance.
 - 2. Possible Supporting Facts – reasonable safety measures include:
 - a) Magazine Disconnect
 - b) Warning that a round is in the chamber
 - c) Personalization
 - (1) Combination trigger lock
 - (2) Magnetic ring
 - (3) fingerprint recognition
 - d) Child proofing: Lemon Squeezer (1908 Sears, Roebuck catalog)
 - e) 1996 – 1,100 deaths from unintentional shootings
 - f) 1991 GAO report – 31% of accidental deaths might be prevented by child proofing guns and incorporating loading indicators
 - g) 500,000 guns stolen each year
- C. Failure to Warn
 - 1. Legal Standards
 - a) Product presents inherent risk of injury
 - b) Warning (or failure to warn) was inadequate (unreasonable)
 - 2. Possible Supporting Facts
 - a) 1996 – over 34,000 Americans killed by gunfire
 - b) 1996 – over 4,500 under age 20 were killed
 - c) It is estimated that for every death there are 2 to 3 nonfatal shooting injuries
 - d) 1992 – 99,000 individuals treated in emergency rooms for non-fatal firearm injuries
 - e) 1996 – 1,100 deaths from unintentional shootings
 - f) 1993 – 526 accidental shooting deaths of children and teens
- D. Ultrahazardous Activity
 - 1. Legal Standards
 - a) High risk of harm
 - b) likelihood that harm will be great
 - c) Inability to eliminate risk through exercise of care
 - d) Extent to which activity is uncommon
 - e) Inappropriateness of activity to place where it is carried out
 - f) Extent of the activity's value to the community
 - 2. Possible Supporting Facts

- a) 1996 – over 34,000 Americans killed by gunfire
- b) 1996 – over 4,500 under age 20 were killed
- c) It is estimated that for every death there are 2 to 3 nonfatal shooting injuries
- d) 1996 – 1,100 deaths from unintentional shootings
- e) 1993 – 526 accidental shooting deaths of children and teens
- f) 1992 – 99,000 individuals treated in emergency rooms for non-fatal firearm injuries
- g) 1994 – firearms were second leading cause of death of people ages 10 to 24
- h) Risks to urban and housing project population compared to that of nation as a whole

II. **DISTRIBUTION AND MARKETING** – A second general category of legal claims focuses on the distribution and marketing practices of the gun industry. One contention of plaintiffs in these cases is that gun manufacturers are negligent in the way that they market their products. Negligence arises because the manufacturers breach a duty of care to take precautions to prevent the sale of their guns to criminals. The fact that a small number of dealers account for most sales of crime guns goes directly to the failure of manufacturers to monitor or regulate the distribution of their products.

Another claim is that the way in which manufacturers market their products constitutes a public nuisance. In other words, the lax oversight of the distribution system makes it foreseeable that guns will end up in the hands of criminals and that deaths and injuries will result.

Housing authorities also could assert claims for private nuisance. Such a claim would require proof of an unreasonable interference with the use or enjoyment of land. Housing authorities own and operate public housing and can allege that the actions of gun manufacturers interfere with the safe use and enjoyment of these properties.

Plaintiffs may also have a claim against gun manufacturers for deceptive advertising. Plaintiffs must show that advertising claims are material, false and likely to mislead. Gun manufacturers often claim – explicitly or implicitly – that their products will protect their customers and make them safer. However, studies show that these claims are false. Having a gun in the home makes one far more likely to be injured or killed.

Civil conspiracy presents another possible legal claim. Such a claim asserts that gun manufacturers and dealers conspire together to sell guns in a way that circumvents the legal restrictions on such sales. This includes sales to straw purchasers with knowledge that the products will end up in the hands of unauthorized users – criminals.

A. Negligence

1. Legal Standards

- a) legal duty to take reasonable precautions to prevent acquisition of guns by unauthorized persons (possibly grounded in state laws against sales to unauthorized persons)
 - b) breach of legal duty
 - 2. Possible Supporting Facts – See II.E below
- B. Public Nuisance -- Unreasonable interference with a right common to the general public
 - 1. Legal Standards
 - a) Deaths and injuries are reasonably foreseeable results of manufacturers' conduct
 - b) Manufacturers' conduct is the direct and proximate cause of deaths and injuries
 - 2. Possible Supporting Facts
 - a) 1996 – over 34,000 Americans killed by gunfire
 - b) 1996 – over 4,500 under age 20 were killed
 - c) It is estimated that for every death there are 2 to 3 nonfatal shooting injuries
 - d) 1996 – 1,100 deaths from unintentional shootings
 - e) 1993 – 526 accidental shooting deaths of children and teens
 - f) 1992 – 99,000 individuals treated in emergency rooms for non-fatal firearm injuries
 - g) 1994 – firearms were second leading cause of death of people ages 10 to 24
 - h) See II.E below
- C. Private Nuisance
 - 1. Legal Standards
 - a) Defendants' actions interfere with the use or enjoyment of land
 - b) The interference is unreasonable.
 - 2. Possible Supporting Facts
 - a) 1996 – over 34,000 Americans killed by gunfire
 - b) 1996 – over 4,500 under age 20 were killed
 - c) It is estimated that for every death there are 2 to 3 nonfatal shooting injuries
 - d) 1996 – 1,100 deaths from unintentional shootings
 - e) 1993 – 526 accidental shooting deaths of children and teens
 - f) 1992 – 99,000 individuals treated in emergency rooms for non-fatal firearm injuries
 - g) 1994 – firearms were second leading cause of death of people ages 10 to 24
 - h) See II.E below
- D. Deceptive Advertising
 - 1. Legal Standards
 - a) Claims are material
 - b) Claims are false
 - c) Claims are likely to mislead

2. Possible Supporting Facts

- a) Claims that guns in the home will make the family safer
 - (1) A gun in the home is 22 times more likely to harm the family than defend it.

E. Civil Conspiracy

1. Legal Standards

- a) Combination by 2 or more persons/organizations
- b) to take some concerted action to either
 - (1) accomplish an unlawful purpose, or
 - (2) accomplish a lawful purpose through unlawful means.

2. Possible Supporting Facts

- a) Similarity of marketing actions among manufacturers
- b) Any discovery material? – Educational Fund to End Handgun Violence

F. Marketing Claims -- Possible Supporting Facts

- 1. Dealers sell to persons they know or should know will illegally transfer firearms
 - a) Multiple sales
 - b) Schumer Report – 1% of dealers account for 50% of crime guns sold
- 2. Dealers sell to persons they know or should know will illegally possess the firearms
 - a) Sales to residents of jurisdictions with more restrictive laws
 - b) Schumer Report – 1% of dealers account for 50% of crime guns sold
- 3. Manufacturers' distribution practices -- The result is straw purchases, illegal purchases from "kitchen table" dealers, gun show purchases and thefts from gun stores.
 - a) Using dealers in or around high crime areas
 - b) Using dealers who will sell to people they know or should know will use or possess weapons illegally
 - c) Don't require dealers to have a retail place of business
 - d) Don't monitor ATF tracing data to determine who is selling to criminals
 - e) Don't warn dealer about products that have been the subject of ATF traces
 - f) Don't require that dealers keep accurate records of sales
 - g) Don't require that dealers examine documentation from each purchaser to ensure a proper firearm owner's ID card, valid address, etc.
 - h) Don't require dealers to find out the intended use for a product
 - i) Don't require dealers to provide instruction on the proper use of weapons
 - j) Don't provide dealers with instruction on how to comply with applicable firearms statutes

- k) Don't provide dealers with a protocol regarding how to minimize the risk of transfers to illegitimate purchasers
- l) Don't provide dealers with signs stating that juveniles and felons cannot purchase weapons and that dealers seek to spot straw purchasers
- m) Don't help dealers equip stores to prevent theft
- n) Don't educate public about dangers of gun possession and use.
- 4. Police Department figures showing the guns recovered by manufacturer
- 5. Market saturation in areas with less restrictive laws
- 6. Percentage of new guns used in crimes
- 7. Manufacturers' advertising practices
 - a) TEC-DC9 – Tec-Kote provides "resistance to fingerprints"
 - b) TEC-DC9 – advertised as "assault-type pistol" that "deliver[s] more gutsy performance and reliability than any other gun on the market."
 - c) Tec-Kote also provides lubricity to increase bullet velocities (Ceriale complaint)
 - d) Kel-Tec Sub 9 – "will deliver much higher muzzle energy and penetrating than the relatively short barreled pistol. Further, the Sub 9 has greatly extended range compared to a handgun or shotgun."
 - e) Walther TPH – advertised as "[c]onsidered the ultimate hideaway, undercover, backup gun available anywhere."
 - f) Kel-Tec Sub 9 – "will deliver much higher muzzle energy and penetrating than the relatively short barreled pistol. Further, the Sub 9 has greatly extended range compared to a handgun or shotgun."
- 8. Manufacturers design guns to stimulate demand by those who will use or possess them illegally
 - a) TEC-DC9 – sling swivel to allow shoulder strap to be attached (better mobility and ability to spray bullets)
 - b) TEC-DC9 – Tec-Kote "resistance to fingerprints"
 - c) Small concealable weapons (numerous, including Beretta, Browning, Bryco, Colt, Davis, Glock, H&R, Hi-Point, Rossi, Star, Walther, Lorein, Phoenix, Raven, Smith & Wesson, Sturm Ruger, Sundance, Taurus)
 - d) Bryco Jennings Model 48 – combat style trigger guard
 - e) Kel-Tec – Sub 9 automatic rifle can accept most double high capacity magazines, by rotating the barrel it can be reduced to a size of 7x16 inches

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The case for taking action against the gun industry is compelling. The problem of gun violence affects every American. Each year there are approximately 600,000 violent crimes committed in the United States with the use of guns. This results in numerous injuries and deaths. In 1996 alone, more than 34,000 Americans were killed by gunfire and it is estimated that there are 2 to 3 nonfatal shooting injuries for every death. Tragically, more than 4,500 of those killed had not even reached their 20th birthday. In fact, firearms are the second leading cause of death for Americans between the ages of 10 and 24.

Guns in Public Housing

Public housing suffers from some of the most intense, concentrated gun violence in the nation. Residents of many public housing projects – already disadvantaged by the negative effects of intense poverty – must endure constant fear of violent crime because of the widespread availability of unsafe guns. The Chicago Housing Authority (CHA) presents one example. Between 1994 and 1998 there were 1,372 people arrested with guns and an additional 788 guns seized at the CHA. This flood of guns is the result of the gun industry's failure to take even basic measures to curb marketing and selling guns to criminals. A recent report issued by Senator Schumer demonstrated that 1% of gun dealers account for 50% of all crime guns sold. Even if manufacturers and distributors merely shut down this 1% of dealers it would dramatically decrease the number of violent crimes committed and guns available in public housing.

The funds that must be expended to combat the problems of gun violence and gun trafficking in housing authorities are enormous. In 1997 for example, \$43,777,157 of Chicago's Public Housing Comprehensive grant funds were budgeted for security along with \$57,000 of Cook County's Public Housing Comprehensive grant funds and \$3,887,445 of Chicago's Drug Elimination Grant funds. The one year cost for CHA security of \$47,721,602 represents 37% of the total funds for these three grants and does not even include dollars used for security from the Community Development Block Grant program and Operation Safe Home. Yet even these huge expenditures have not ended the scourge of gun violence at the CHA.

Stemming the violence is a central part of the goal of HUD and housing authorities to provide "decent, safe and sanitary" housing as called for by the United States Housing Act of 1937. However, the widespread availability of guns and prevalence of gun crimes in public housing impact upon every part of the mission of housing authorities. HUD grant funds spent on security by housing authorities reduce the funds available to carry out other functions. For example, there is a backlog of approximately \$20 billion worth of unaddressed modernization needs in public housing across the nation. Removing or ameliorating the more immediate need for heavy security would allow housing authorities to direct more funds to these unattended needs.

DETERMINED TO BE AN ADMINISTRATIVE

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The Gun Industry's Responsibility for the Problem

Manufacturers bear much of the responsibility for the flood of guns into public housing and the acquisition of guns by criminals. For example, manufacturers have failed to take action against dealers that repeatedly sell guns that are used in crimes and turn up on Bureau of Alcohol, Tobacco and Firearms trace requests. Plus, manufacturers engage in advertising campaigns targeted to the criminal market. For example, the gun manufacturer Intratec has advertised its TEC-DC9 as an "assault-type pistol" with a coating that provides "resistance to fingerprints."

While housing authorities around the nation fight an uphill battle against gun violence, the gun industry has the ability to take basic steps to make thousands of Americans safer. Many shooting injuries and deaths could be prevented through the use of relatively simple safety mechanisms by the gun industry. Such measures would be particularly effective in preventing unintentional shootings. In 1996, there were 1,100 deaths from unintentional shootings. Available safety measures include: magazine disconnects that do not allow guns to be fired once the magazine is removed; warnings indicating that a round is in the chamber; child-resistant locking mechanisms; and personalization techniques (including a variety of locks such as combination locks, magnetic rings and fingerprint recognition). The General Accounting Office has estimated that 31% of accidental shooting deaths might be prevented simply by child-proofing guns and incorporating loading indicators into their design. Personalization also could help stem another form of crime – the theft of approximately 500,000 guns each year. While there are a few gun models that include safety devices, the gun industry has failed to incorporate these relatively modest safety devices on a scale that would have any significant impact.

GUN FACTS

Gun Violence in the U.S.

- ⇒ There are more than 600,000 gun crimes in the United States each year – Department of Justice, Bureau of Justice Statistics 1994
- ⇒ 38,505 firearm-related deaths in the U.S. in 1994 – Centers for Disease Control and Prevention, National Center for Injury Prevention and Control
- ⇒ Nearly 70% of all murders are committed with a gun – FBI, Uniform Crime Reports 1997
- ⇒ More than 40% of all robberies are committed with a gun – FBI, Uniform Crime Reports 1997
- ⇒ Approximately 1,300 unintentional deaths are caused by guns each year – Centers for Disease Control and Prevention, National Center for Injury Prevention and Control
- ⇒ For every death there are about 3 nonfatal gun injuries – Centers for Disease Control and Prevention, National Center for Injury Prevention and Control

Gun Violence Against Children

- ⇒ 4,643 children and teenagers were killed with firearms in 1996 – Centers for Disease Control, National Center for Health Statistics 1998
- ⇒ Gunshot wounds are the second leading cause of death for people aged 10-34 – Centers for Disease Control, National Center for Health Statistics 1998
- ⇒ Rate of firearm death of children aged 0 to 14 is almost *12 times higher in the U.S.* than in the 25 other industrialized countries *combined* – Centers for Disease Control 1997
- ⇒ In 1994, almost 90% of murders of children aged 15 to 19 were committed with a gun – Centers for Disease Control and Prevention, National Center for Injury Prevention and Control
- ⇒ In a 1995 survey, 1 in 12 students reported carrying a gun for fighting – Centers for Disease Control and Prevention, National Center for Injury Prevention and Control

Violence in Public Housing and Its Costs

- ⇒ In the 100 largest Housing Authorities there were more than 500 murders each year from 1994 to 1997. In fact, in 1995 there were 627 murders in those Housing Authorities. – Compiled by the Department of Housing and Urban Development
- ⇒ 454 murders were committed in New York public housing from 1994 - 1997 – Compiled by the Department of Housing and Urban Development
- ⇒ 177 murders were committed in Washington, D.C. public housing from 1995 - 1997 or one murder for every 61 homes over a three year period – Compiled by the Department of Housing and Urban Development
- ⇒ 185 murders were committed in New Orleans public housing from 1994 - 1997 or one murder for every 70 homes over a four year period – Compiled by the Department of Housing and Urban Development

- ⇒ On July 21, 1999, one teenager was murdered and three others – including a 15 year old who was 9 months pregnant – were shot at a birthday party in the Easter Hill public housing complex in Richmond, CA – San Francisco Chronicle, “Richmond Teen Dies After Party Shooting” July 23, 1999
- ⇒ On July 10, 1999, Rence Childers, her 9 year old son and two others were held hostage for 13 ½ hours before the gunman killed Mrs. Childers and himself in the Lincoln Park public housing community in Portsmouth, VA – The Virginian-Pilot, “Police Wanted to Charge Man Months Before Fatal Standoff; In December, Portsmouth Prosecutors Decided the Case Wasn’t Strong Enough” July 22, 1999
- ⇒ On June 21, 1999, grandmother Helen Foster-El was shot to death as she tried to shepherd neighborhood children to safety in the East Capitol Dwellings public housing complex in Washington, DC – Washington Post, “Renovation Planned at Slaying Site; Agency to Rebuild East Capitol Units” July 1, 1999
- ⇒ On June 13, 1998, 17 year old Antonio Taliaferro was killed and two friends were wounded in a drive-by shooting on the steps of the New Hope Apostolic Temple across the street from the Southside Terrace public housing development in Omaha, Nebraska – Omaha World-Herald, “One Dead in Shooting at Church Two Others are Injured After Shots are Fired From a Passing Car Early Saturday Morning” July 14, 1998
- ⇒ In May 1998, Melissa Stone, a 29 year old mother of 7, was abducted at gunpoint, then raped and killed in the Desire public housing complex in New Orleans, LA – The Times-Picayune “Body of Woman ID’d by Family; Mother of 7 Last Seen on Sunday” July 7, 1998

The Economic Costs of Violence in Public Housing

- ⇒ HUD provides approximately \$2.5 billion each year in Public Housing Comprehensive Grants – Department of Housing and Urban Development
- ⇒ Chicago spent \$43,777,157 of its 1997 Comprehensive Grant on security – 38% of its Comprehensive Grant funding – Department of Housing and Urban Development
- ⇒ In 1998, HUD spent \$243,736,400 on the Public Housing Drug Elimination Program – about 46% of those funds went to security, law enforcement, investigators and tenant patrols – Department of Housing and Urban Development

Gun Industry’s Responsibility for the Problem

- ⇒ 1% of all gun dealers account for 50% of crime guns sold – “A Few Bad Apples: Small Number of Gun Dealers the Source of Thousands of Crimes” by Senator Charles Schumer
- ⇒ “The company and the industry as a whole are fully aware of the extent of the criminal misuse of handguns. The company and the industry are also aware that the black market in handguns is not simply the result of stolen handguns but is due to the seepage of handguns into the illicit market from multiple thousands of unsupervised federal handguns licensees.” -- Robert Hass, former Senior Vice President of Smith & Wesson

- ⇒ Gun maker Intra-Tec has advertised one of its weapons as an "assault-type pistol" that has "excellent resistance to fingerprints." In discussing the ad, Intra-Tec's sales director said, "Hey, it's talked about, it's read about, the media write about it. That generates more sales for me. It might sound cold and cruel, but I'm sales oriented." – U.S. Newswire April 23, 1999
- ⇒ The General Accounting Office, in a 1991 study, estimated that 31% of accidental shooting deaths could be prevented by child-proofing guns and including loading indicators that show whether a bullet is in the chamber
- ⇒ Childproofing guns would **prevent every accidental death** from shots fired by **children under age 6** – General Accounting Office 1991

PUBLIC HOUSING COMPREHENSIVE GRANT INFORMATIONTotal Public Housing Units

1,300,000

Total Public Housing Residents

3,250,000 (approximate)

Total Public Housing Authorities

3,191

Public Housing Comprehensive Grants (HAs with 250 or more units)

\$2,500,000,000 per year

Public Housing Comprehensive Improvement Grants (HAs with less than 250 units)

\$500,000,000 per year

One Example: Chicago 1997

Public Housing Comprehensive Grant Funds \$116,055,155

PHCG Funds Spent on Security: \$ 43,777,157 (38% of total)

DRUG ELIMINATION PROGRAMTotal Grants Awarded

1998	748 grants	\$243,736,400
1997(2)	185 grants	\$ 44,750,000
1997(1)	532 grants	\$205,630,000
1996	665 grants	\$259,000,000
1995	526 grants	\$250,340,000
1994	520 grants	\$228,880,000
1993	439 grants	\$145,530,000
1992	426 grants	\$140,550,000
1991	496 grants	\$140,780,000

Funds Used by Activity – Fiscal Year 1998

	Amount	% of total
Law Enforcement	\$68,876,692	28%
Security	\$31,234,680	13%
Investigators	\$ 6,295,935	3%
Tenant Patrols	\$ 4,151,885	2%
Improvements	\$ 6,885,084	3%
Intervention	\$15,222,602	6%
Prevention	\$92,034,620	37%
Treatment	\$ 3,669,780	2%

Funding to Selected Housing Authorities

	1995	1996	1997	1998
New York City HA	\$40,578,147	\$35,000,000	\$35,000,000	\$35,000,000
Chicago HA	\$10,008,250	\$ 7,754,038	\$ 9,050,270	\$ 8,679,970
Los Angeles HA	\$ 2,180,500	\$ 2,190,500	\$ 2,199,600	\$ 2,129,140
New Orleans HA	\$ 3,432,000	\$0	\$ 3,371,940	\$ 2,565,160
Camden HA	\$ 582,250	\$ 582,250	\$ 582,250	\$ 602,240
East St. Louis HA	\$ 583,750	\$ 570,250	\$ 581,100	\$ 572,260

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SUGGESTED GUN REMEDIES

* After a specified date, incorporate as part of the internal mechanism of each handgun sold, safety features that would:

- Prevent the accidental and/or criminal misuse by children or other unauthorized users;
- Alert users that a bullet is in the chamber;
- Prevent firearms from being fired when the magazine is removed.

* Purchase all cop-killing bullets currently in the retail system so that the police can safely patrol our streets.

* As part of the manufacturing process and prior to being delivered to a wholesale and/or resale distributor, test fire each handgun using an IBIS system. The shell and slug markings from that handgun will be recorded and stored by the manufacturer and cross-referenced with identifying information related to that handgun. This information would be available to law enforcement pursuant to a criminal investigation and with the appropriate court order.

* Redesign all gun clips so that they only fit magazines with ten (10) or less bullets, with the exception of those produced for law enforcement.

* Guarantee that every gun manufactured is equipped with a safety lock.

* Cease the production of any handguns from materials that are fingerprint resistant.

* Produce guns with serial numbers that are impervious to defacing.

* Certify that every gun manufactured passes a "drop test."

- * Agree to produce all handguns with a standardized level of trigger resistance that is high enough to make it difficult for a child to shoot the weapon.
- * Stop the production of all domestic handguns that do not meet barrel length and other construction standards set under the 1968 Gun Control Act for imported firearms. Further, agree that any guns already produced that do not meet these standards will not be sold in either the retail or wholesale sectors.
- * Actively support the passage of federal legislation to regulate all gun sales transacted at gun shows to ensure that all required background checks and record keeping is completed for each sale prior to the gun being given to the purchaser.
- * Testify on behalf of the federal and all state legislative efforts to pass anti-gun trafficking legislation that limits handgun purchases to one per person per month.
- * Cease all efforts to affect the manner in which gun records are maintained by State Police, ATF and other law enforcement organizations implementing the second phase of the Brady Bill.
- * Agree to an industry-wide set of advertising standards that prohibit youth-oriented gun promotions and general audience promotions that claim that having a gun in the home makes a person/family safer.
- * Agree to the creation of a review committee - made up of manufacturers' representatives, ATF officials and representatives of the United States Conference of Mayors -- which has the power to modify distributing plans if they are designed to circumvent a city's existing gun control laws.
- * Examine gun industry marketing and distribution practices and modify these practices to eliminate the "dumping" of firearms in urban, lower income neighborhoods.
- * Expend one percent (1%) of gross revenues on research and production of smart gun technology that would enable a gun to be discharged only by the original and intended owner. Support federal legislation that would appropriate additional federal dollars for research aimed at developing such technology.



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American Shooting Sports Council, Inc.

January 8, 1999

The Honorable Edward G. Rendell
Mayor of Philadelphia
Office of the Mayor
Room 215 City Hall
Philadelphia, PA 19107

Dear Mr. Mayor:

We appreciate, and look forward to, the opportunity of meeting with you this coming week to further discuss issues of concern, some of which were first broached between us last year. As we have previously stated, while we may not agree on every issue regarding the best approach to pursue in combating gun-related violence, the industry sincerely hopes that this will not prevent us from moving forward and working together on those areas on which we do agree.

The following is a list of issues that the American Shooting Sports Council is interested in moving forward on with you and the U.S. Conference of Mayors.

1. Anti-Crime Programs: The ASSC urges cities to focus their law enforcement and criminal justice efforts on enforcing current gun laws, and to adopt proven anti-crime programs such as the Boston Project and Richmond's Project Exile where federal, state and local authorities focus and coordinate their law enforcement and criminal justice efforts to interdict crime where possible, and to apprehend and convict those responsible for criminal activity. The ASSC is willing to work with the mayors in whatever capacity we can to assist in implementing these programs.
2. Firearm Education/Safety Awareness: The ASSC urges support from the mayors in helping the industry to promote firearm safety education programs in their municipalities, and to join with our educational foundation, the American Firearms Council, in promoting its National Safe Family Initiative where firearm safety locking devices are distributed in the community through local government agencies, civic groups, churches or similar organizations.
3. Shooting Ranges: We urge the majors to work with the industry in seeking municipal support and funding, or other considerations such as special tax incentives, for the development and construction of shooting ranges in order to provide opportunities for their citizens to enjoy recreational shooting, and to obtain training in firearm safety and responsibility.
4. New Technology: We urge the majors to assist the industry in seeking research and development funding for pursuing research into the design, manufacturing and marketing of firearms that can be operated only by their recognized, authorized user.
5. Advertising Code of Conduct: The ASSC is willing to work to develop and implement industry-wide advertising standards and will urge all firearm and ammunition manufacturers, distributors and retailers to adopt and abide by such standards.

6. Manufacturing Standards: The ASSC is open to the consideration that all firearm manufacturers should be required to adhere to and abide by the manufacturing standards developed by the American National Standards Institute and the Sporting Arms & Ammunition Manufacturers' Institute.

7. Straw Man Sales: In an effort to address the problem of individuals making multiple purchases of firearms from a licensed dealer with the express intent of subsequently transferring them illegally to prohibited persons, we would suggest that the federal Bureau of Alcohol, Tobacco & Firearm's multiple sales form, which the dealer is required to send to the ATF and to local law enforcement, be revised. The new form would include a statement requiring the purchaser's signature swearing under oath and under penalty of perjury punishable as a federal felony that the firearms being purchased are for the buyer personally and not for subsequent transfer to a third party. The form would also include notification to the purchaser that it is a violation of federal law to transfer any firearm to an individual that the purchaser knows, or has a reasonable cause to believe, to be prohibited from purchasing or possessing firearms under federal, state or local laws. Additionally, the dealer would be required to immediately notify by facsimile before the buyer leaves the gun store the Chief Law Enforcement Officer (CLEO) in the jurisdiction where the purchaser resides of the multiple sale and to inform the purchaser of such notification.

8. Gun Show License: With regard to the transfer of firearms at gun shows, flea markets and similar public gatherings, we are open to the suggestion that such transfers should be subject to all federal, state and local laws and regulations applicable to licensed firearm dealers including the requirement that purchasers of firearms submit to the National Instant Background Check (NICS) to determine that they are not prohibited by law from purchasing or possessing firearms. To facilitate the conducting of the background check, the person or entity responsible for promoting and conducting the gun show, flea market or similar public gathering might be required to obtain a special gun show license to be issued by the Bureau of Alcohol, Tobacco & Firearms, and the gun show licensee would be required to submit all firearm transfers through NICS.

Mr. Mayor, we are very serious and sincere in our desire to work with you on mutually acceptable solutions to combating gun-related violence in our communities. We strongly feel that more is to be accomplished by working together than will ever result from our being at odds.

Again, we look forward to meeting with you, and to a mutually satisfying dialogue.

Very Truly Yours,



Richard J. Feldman
Executive Director

cc. Mr. Thomas Cochran, U.S. Conference of Mayors
Honorable Lee Brown
Honorable Jim Dailey
Honorable Clarence Harmon

Honorable Vera Katz
Honorable Scott King

Honorable Arlene Mulder
Honorable Deedee Corradini



National Shooting Sports Foundation, Inc.

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ROBERT T. DELKAY
PRESIDENT AND
CHIEF EXECUTIVE OFFICER

For Release 10:00 a.m.
Monday, May 10, 1999

STATEMENT OF THE NATIONAL SHOOTING SPORTS FOUNDATION CONCERNING POSITIONS ON LEGISLATIVE INITIATIVES TO CURTAIL YOUTH FIREARMS VIOLENCE

The National Shooting Sports Foundation (NSSF) is the shooting sports industry's largest – and most diverse trade association representing some 1,500 manufacturers, wholesalers, retailers, publishers, conservation organizations and sportsmen's groups with an interest in the recreational shooting sports. The NSSF is not a politically active organization. We are chartered to increase public understanding of the shooting sports and we have traditionally devoted all of our effort to that purpose. The NSSF is prohibited from lobbying by its by-laws.

Tragic and highly publicized events like those at Columbine High School in Littleton, Colorado have resulted in an intense and understandable questioning of the role and causation of firearms in these tragedies and the acceptability of firearms ownership in our modern and, at times, troubled society. This public questioning challenges responsible organizations like the National Shooting Sports Foundation to respond to the public's concern while also guarding the rights and privileges of the nation's 30 million hunters and target shooters to use firearms safely and responsibly.

Therefore, today, the National Shooting Sports Foundation, in concert with the Sporting Arms and Ammunition Manufacturers' Institute, Inc., an industry trade group founded in 1926 at the request of the federal government, supports in principle the following legislative proposals. Much thought and evaluation must be given to the careful drafting into legislation of these positions by appropriate authorities.

SPONSORS OF THE SHOOTING, HUNTING, OUTDOOR TRADE SHOW (SHOT SHOW®)

- **Instant Background Checks at Gun Shows**
Industry supports background checks at gun shows provided the FBI does not maintain the names in violation of the law and the White House agrees to be more aggressive in prosecution of felons turned up by the background checks.
- **Mandatory Locking Devices**
Locking devices are now included with more than 80% of all new firearms and will be included on approximately 90% before the end of 1999. The NSSF could support the mandatory inclusion of locking devices with all firearms if part of an overall safety program (such as Project HomeSafe) to educate all firearms owners in safe and responsible storage with appropriate liability safeguards.
- **A Lifetime Ban on Gun Ownership for People Who Commit Violent Felony Crimes as Juveniles**
The NSSF could support this proposal, but would defer to the position of the nation's major law enforcement authorities.
- **Mandatory Penalties for Adults Who Allow Children Access to Guns**
The NSSF could support this position, realizing this is a complex issue. Drafting of legislation will be difficult and critical.
- **Zero Tolerance For Unauthorized Firearms in Schools**
The NSSF supports a zero tolerance policy for firearms in schools. Any individual bringing a firearm to school for other than previously approved, or licensed activity, and any individual threatening or joking about bringing a gun to school for criminal purposes would be subject to immediate suspension and prosecution.
- **Government Support of Project HomeSafe**
As an extension and expansion of its on-going firearms education programs, the NSSF has recently launched project HomeSafe to distribute safety education materials and locking devices in major urban areas. Endorsement and funding for this effort by the federal government would be enormously effective.

Every hunter and sportsman in our nation may not agree with each of these positions but we believe the vast majority will support these efforts to assist law enforcement, school officials, parents and firearms industry to help prevent firearm-related youth violence.

Our friends at the National Rifle Association, we know, can not support all of our proposals but we have agreed to disagree and to pursue our separate, but similar paths.

We have referred to the National Shooting Sports Foundation's lack of experience in political issues and to our strong commitment not to participate in the politicizing of this issue. Representatives of the NSSF were invited to participate in the White House Strategy Session of Youth Violence and Responsibility. We accepted and then were forced to decline the invitations for the following reasons:

- The National Shooting Sports Foundation was looking forward to participating in the May 10 Strategy Session on Children, Violence and Responsibility and was invited to meet with White House representatives on Tuesday, May 4, for a preliminary discussion of our position on possible legislative proposals.
- We had been working intensely to communicate with our members and to develop, prior to May 10, positions and consensus on the various issues discussed. We were surprised and disappointed, to see the White House proceed with the introduction of its legislative proposals on May 7.
- We were disappointed, also, to learn that the White House had decided not to invite executives of the National Rifle Association to participate in the May 10 meeting even though representatives of anti-gun advocacy groups had been invited.
- In view of the above, and after very serious examination, we made the determination to respectfully decline participation in the session.

The National Shooting Sports Foundation understands and respects the heartfelt concerns of the American people about the role of firearms in hugely disturbing tragedies such as those that have been inflicted on the community of Littleton, Colorado. We are committed to a rational, responsible and, hopefully effective, response. We are not interested in politicizing the issue or in pointing blame at other groups or factions. We welcome and urge the cooperation of Congress, the Clinton administration, responsible sportsmen and the general public in this important effort.

Gunsmith's Creation Now Infamous

Maker of Rifle Used in Massacre Feels Pride, Pain

By SHARON WALSH
Washington Post Staff Writer

Tom Deeb knows both the pleasure and the pain of a gunmaker. The pleasure is in the work—designing and building something with his hands, having good employees, getting letters from folks who have enjoyed sports with his guns or even felt their lives were saved by one of them.

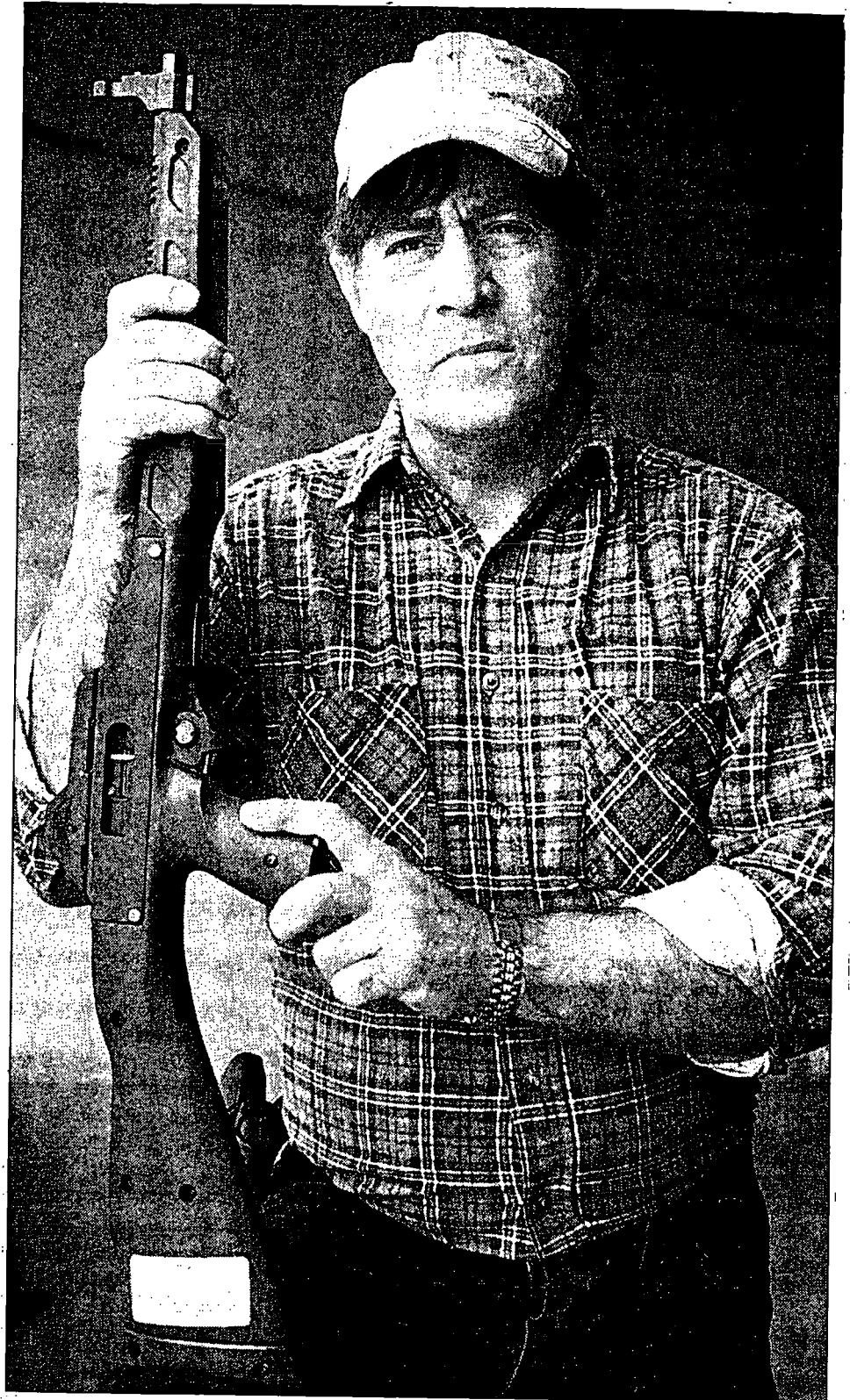
But lately, he says, pain has been the larger part of his livelihood. The 9mm Hi-Point carbine he designed was one of the guns in the arsenal of Eric Harris, 18, and Dylan Klebold, 17, who used them to kill classmates, a teacher and themselves in Littleton, Colo.

"It just broke my heart," said Deeb, 49, the founder of Hi-Point Firearms in Mansfield, Ohio, who has kids in high school.

The publicity may be unwanted, but it is proving profitable. Deeb's 9mm rifle is suddenly as scarce as black trench coats. Even before the shooting, Deeb had 6,000 back orders. Now, after CBS's "48 Hours" flashed a picture of the gun during a show devoted to the Littleton shooting, it's in even greater demand. Dealers complain that he isn't making his guns fast enough.

The tension between feeling pride in the weapons he makes—"a blast to shoot"—and the conflict he feels about making guns used in a rampage emerges frequently during a wide-ranging interview with Deeb over several hours. The gun is increasingly traced to crimes, federal statistics show, but Deeb says he makes guns for "the working guy."

"I'm not some unfeeling bastard who gets a kick out of watching people whack each other," he said. He said he designed the 9mm gun specifically so that high-capacity magazines will not work in it. With all his guns, he gives away a trigger lock he designed. And he's patented a device that keeps a loaded handgun



BY PHIL LONG FOR THE WASHINGTON POST

Tom Deeb with the rifle he designed and builds. Demand for it has risen since the Colorado massacre.

Pride of Rifle's Creator Now Tinged With Regret

GUNS, From E1

from going off if it's dropped.

"I like what I'm doing. I have fun with it," he said. But he added: "I sincerely feel worse about making guns than I ever have in my life. ... I've never been so ambivalent."

At the same time, Deeb said, the market for this gun "is real hot—it's on fire." Why? "Because I make one that's a blast to shoot. It's neat-looking. A light gun. Just weighs 5½ pounds. It's not high-capacity and never will be. It's quick to shoot, easy to shoot."

The stigma of his gun, he says, seems to be that it's cheap, retailing for \$169 to \$189.

The gun was traced for being at a crime scene or used in a crime 128 times in 1997, according to the federal Bureau of Alcohol, Tobacco and Firearms. And in a recent ATF crime trace study on guns confiscated from young people, the Hi-Point carbine was one of the top 10 guns in cities such as Atlanta, Detroit and Cleveland.

Dealer ads for the rifle, which features a pistol grip and pistol ammunition, call it "the hottest gun since the SKS." The SKS is a military-style weapon that was imported from China and sold cheaply in the United States. It is now illegal to import the SKS.

Hi-Point's a company that came out of nowhere on the crime trace list, said Kristen Rand, director of federal policy at the Violence Policy

Center, a gun-control group. The fact that a rifle shows up on the list, which is usually dominated by handguns, is significant, she said. The pistol grip allows marksmen to shoot from the hip rather than from the shoulder, like most rifles used for hunting and recreation.

Deeb made some money initially as the owner of several video stores, but making guns was his dream, he said.

Deeb started production in the early 1990s. In 1994, he decided that making pistols wasn't a very stable business. Besides, he didn't like the stigma of making cheap handguns. So he designed a new gun—the 9mm carbine, that is 16½ inches long, lightweight, quick to shoot and cheap. It could be used for shooting tin cans, known as "plinking," or to shoot the groundhogs that plague his farmer neighbors, he said.

Deeb still makes cheap handguns, though not as many as he did before he designed the 9mm. He's about 13,000 handguns behind in production.

"I make guns for the working guy," he said. "He ought to be able to have a gun to defend himself and take out and plink and shoot tin cans ... a decent gun without spending a fortune."

Still, he said, "some people should not have a gun. ... I'd be a liar if I didn't agree that handgun violence is a problem in this country."

Deeb's company is not one of the big five rifle makers—which include



BY PHIL LONG FOR THE WASHINGTON POST

Robert Kudika wipes down a finished Hi-Point rifle at the company's factory. The model was one of several guns used in the Littleton, Colo., massacre.

Sturm, Ruger & Co. and Remington Arms Co.—but is a financially healthy firm that is about eighth on the list of rifle makers, with production of 28,000 rifles last year, in addition to 27,000 pistols, he said. With 18 employees, the company had sales of between \$3 million and \$4 million and made a profit of a little over \$1 million.

A number of police agencies in the western part of the country use his 9mm rifle as a "trunk gun" in patrol cars. He donated about 50 of them to the sheriff's office in his own Richland County, halfway between Cleveland and Columbus.

The gun is an "excellent weapon for limited situations," said Richland County Sheriff James Stierhoff. Officers there have never had an occa-

sion to use the gun, but they undergo 20 hours of training with it every six months. Stierhoff said it is light and durable and officers would use it for a manhunt or hostage situation if it arose.

Deeb is a gun enthusiast himself. "I have some free time, a shooting range. ... My kids and I go out and shoot. It's a family thing for me."

He carries a gun to work in a holster each day and considers himself the security for his business—though, for safety's sake, the gun is unloaded and he carries the clip in another pocket.

"In all honesty, it bothers me that I sell guns," he said. "It scares me that people use them to commit crimes. ... I set out to win you over and I feel like I'm backsliding."

Jumping the Gun?

Attacks on Firearms Echo Earlier Assaults On Tobacco Industry

But Contrasts Are Big, Too;

No Leaked Memos Yet,

Nor Same Sums at Stake

'Cigarettes Can Only Kill You'

By PAUL M. BARRETT

Staff Reporter of THE WALL STREET JOURNAL
Tobacco lawsuits indisputably spawned the new wave of suits against the gun industry. In the escalating public debate over mass-injury litigation, the two tend to be equated, as if gun makers will inevitably tread the same path.

Not so fast.

Depicting themselves as children of the tobacco crusade, a determined group of antigun lawyers has mounted a serious threat to the way the gun industry does business that would have been unimaginable only two years ago. But at least some veterans of the tobacco fight aren't yet convinced the analogy holds up. David Kessler, the former chief of the U.S. Food and Drug Administration who played a critical role in pressuring tobacco companies to the bargaining table, says he still doesn't "see the comparison" between cigarette makers and gun makers.

On the Sidelines

Attorney Richard Scruggs helped lead the courtroom offensive on tobacco. But he has turned down invitations to get involved in the gun suits. Likewise, Prof. Laurence Tribe of Harvard Law School, who helped shape strategy against cigarette makers, rejected feelers made on behalf of gun foes.

The legal theory behind the gun suits—that governments should be reimbursed for public costs related to gun violence—was adapted from the tobacco suits brought by state attorneys general. But, as suggested by the reticence of Messrs. Kessler, Scruggs and Tribe, the legal fight over guns so far lacks elements that were critical to achieving the states' landmark settlement with the tobacco industry.

Guns, while controversial, can be used for self-protection, target shooting and law enforcement, and thus can't be demonized to the degree tobacco was, says Mr. Scruggs, who keeps a handgun at home. "Cigarettes can only kill you," he says.

No Smoking Guns, Yet

Internal memos and whistleblowers revealing corporate deceit badly weakened tobacco defenses, notes Dr. Kessler, now dean of Yale Medical School. They haven't surfaced—at least not yet—in the gun story. Conditioned by real-life headlines and Hollywood legal thrillers, potential jurors, judges and politicians now expect this kind of "smoking gun" evidence before taking mass-injury suits seriously, says Harvard's Prof. Tribe.

But while cigarette makers for decades disputed the fundamental deadliness of smoking, firearm companies don't hide the fact that guns are designed to kill.

In private, some lawyers suing the firearm industry concede that, as one puts it, "Guns are more complicated than cigarettes." The mere names of some of the companies being sued—Colt's Manufacturing Co. and Smith & Wesson Corp., for example—bring to mind for many people images of frontier individualism or honorable law enforcement.

In another important respect, gun suits can't imitate their predecessors. The dollars aren't there. With annual U.S. sales of \$45 billion, cigarette manufacturers had the wherewithal to settle with the states for a total of \$246 billion over 25 years. Annual gun manufacturer sales total \$1.4 billion.

Shallow Pockets

Mr. Scruggs says he isn't convinced "that there's so much money at the end of the day" for a potential settlement. With an estimated 230 million guns already in circulation in the U.S., the Pascagoula, Miss., attorney questions whether lawsuits are the best way to curb violence. And he also acknowledges that unprecedented fees from the cigarette wars have dulled some lawyers' pecuniary appetites. His own small firm stands to take home hundreds of millions for its tobacco work.

Fatigue is another issue for some top tobacco antagonists. "We need to recharge our batteries," Mr. Scruggs says.

But a consortium of plaintiffs' firms that tried unsuccessfully to mount a national class-action suit on behalf of smokers—and therefore might be hungrier than Mr. Scruggs—has turned its attention to guns. Headed by New Orleans attorney Wendell Gauthier, the group has already signed up that city as a client and is negotiating with several other municipalities about representing them.

Mr. Gauthier, who despite missing out on the big tobacco settlements has won many millions for plaintiffs over the years, warns that it is far too early to write off gun lawsuits. The tobacco suits at first were ridiculed as fanciful, he notes. "We're going to see whistleblowers coming out of the woodwork on guns," he predicts. And he sees last month's partial victory in federal court in Brooklyn, N.Y., by a group of individual shooting victims who sued gun companies as a promising sign for the municipal litigation.

Although his group would take 30% of any jury award to New Orleans, or 20% of a settlement, Mr. Gauthier says he isn't in the gun fight primarily for the money. He maintains that if enough municipalities sue the gun industry simultaneously, com-

Please Turn to Page A6, Column 1

PHOTOCOPY
PRESERVATION

Jumping the Gun: Where Tobacco and Firearms Diverge

Continued From First Page

panies will be forced to agree to long-registed regulation of how they make and market firearms.

The cities' claims bear some similarities to those against the tobacco industry. New Orleans and other cities allege that gun companies failed to make "safer" guns that can be fired only by authorized users, much as states claimed the tobacco industry blocked development of a safer cigarette. Another allegation against the gun companies is that they target markets with lax gun laws, causing weapons to flow to criminals; tobacco companies were accused of targeting minors, who legally can't buy cigarettes. (The gun industry strongly denies both allegations.)

But legal theory, says Prof. Tribe, doesn't tell the whole story. When trailblazing tobacco suits drafted on behalf of attorneys general in Mississippi, Florida and Texas ran into political opposition in the mid-1990s, "it was the intangibles, a gut sense of the participants," that ultimately pushed the cases forward, says the professor, who advised government and private attorneys in the three states. The gut sense was that a growing body of leaked internal corporate documents indicating tobacco industry dishonesty about the dangers of smoking, as well as marketing allegedly aimed at hooking teenagers, had made the once-invincible cigarette business vulnerable.

Antitobacco lawyers' instincts in the mid-1990s were critically reinforced by Dr. Kessler, who relied on the same sort of documents to publicly brand smoking a "pediatric disease," turning the debate into one about protecting children. In 1995, he proposed for the first time that the FDA regulate nicotine as a drug. The pincer-like threat of state lawsuits and federal regulation was critical in motivating tobacco chieftains to seek a deal.

Dr. Kessler doesn't see the same threat against the gun companies, at least not yet. Those companies haven't obfuscated the lethality of what they make, he points out, and a gun whistleblower comparable to Jeffrey Wigand hasn't yet emerged to put a human face on the revelation of alleged duplicity.

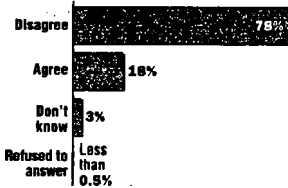
Mr. Wigand, former research chief for the Brown & Williamson Tobacco Corp. unit of British American Tobacco PLC, testified in a 1995 deposition that the chairman of his former employer had lied under oath to Congress about his views on nicotine addiction. This revelation and others "eroded the industry defense that people choose freely to smoke," Dr. Kessler says.

The only potential gun-industry turncoat to surface so far hasn't had any discernible

Public Opinion on Guns

Gun Makers' Liability

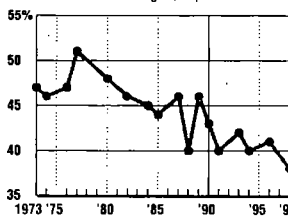
Companies that make guns should be held financially liable if judges or juries find that their products were used to commit a crime.



Sources: I.C.R. Survey Research Group; Roper Center for Public Opinion Research, 1997

Guns in the Home

Households that have a gun, in percent



Sources: National Opinion Research Center, University of Chicago, 1998

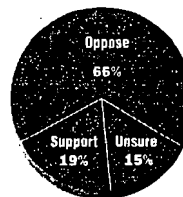
impact. Robert Hass, a former senior vice president for marketing at Smith & Wesson, a unit of Britain's Tomkins PLC, said in a deposition in the Brooklyn lawsuit that gun companies could do more to police distribution of their wares. But because of his reluctance to speak publicly, combined with health problems, the Connecticut retiree didn't appear at trial to elaborate. Lawyers familiar with the situation say he isn't eager to do so in other cases.

A defector of a different sort also helped push tobacco interests to seek a truce. Bennett LeBow, a New York financier who controls Liggett Group Inc., the weakest of the industry's five largest players, agreed in 1996 to cut his losses and settle four state suits at a time when other tobacco firms were vowing never to surrender. A year later, he again broke with rivals to declare nicotine addictive and admit that cigarette makers target minors.

More fractious and diverse than the tobacco business, the gun industry could conceivably produce a renegade who would effectively turn state's evidence. But so far,

Support for Lawsuits

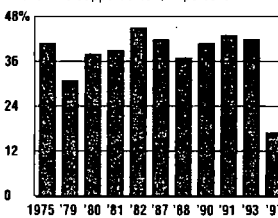
Do you support or oppose governments suing gun manufacturers for the cost of violent crime?



Source: DecisionQuest, 1999

Handgun-Ban Support

Those who support a ban, in percent



Sources: Gallup Organization; Prof. Gary Kleck, Florida State University

that hasn't happened. The recent ousting of a firearms trade group executive who opened back-channel communication with antigun lawyers has been seen as a sign that industry hard-liners aligned with the National Rifle Association are trying to take control of the litigation.

Some veterans of the tobacco wars nevertheless see the same sort of process beginning again with guns. Richard Daynard, a law professor at Northeastern University in Boston who for 15 years has advocated tobacco suits, is leading the first academic conference to foster gun suits, scheduled for May. He has changed the title of his strategic-litigation course to: "Controlling Tobacco, Guns & Other Politically Protected Hazards."

"Political pressure will build for mayors to bring these cases against gun companies, just as it did for the attorneys general with cigarettes," Prof. Daynard says. If the number of cases grows, "the possibility of even a few breaking through" becomes a serious threat. "The connection between cigarettes and guns," he continues, "is that both used political influence to escape safety regulation, and eventually people got tired of that and turned to the courts" to rein them in.

Popular opinion of makers of cigarettes and guns is hard to discern. Hostility toward smoking increased distinctly in the 1980s and 1990s, as measured by national polls and imposition of workplace and restaurant smoking bans. But even as the tobacco suits mounted, large majorities of poll respondents said they opposed pinning liability on the companies, as opposed to smokers.

Similarly, popular support for modest forms of gun control, such as requiring permits and buyer background checks, has remained steady and strong, but most poll respondents express opposition to government suits against gun makers. A survey released in January of 1,008 adults by DecisionQuest, a jury-consulting firm in Los Angeles that has done work for the gun industry, found that 66% opposed such suits and only 19% supported them, with 15% unsure.

Prof. Daynard maintains that, in contrast to answering abstract poll questions, the experience of seeing first-hand the evidence of alleged corporate deceit has inspired juries in a handful of smokers' suits to hold manufacturers liable—and that the possibility of this recurring in a state suit drove cigarette makers to settle. If similar evidence emerges about the gun industry, he adds, it would face the same threat.

Phil Anthony, DecisionQuest's chief executive, sees a distinction, though. A majority of focus-group participants inter-

viewed by his company tend to associate the Second Amendment right "to keep and bear arms" with other constitutionally protected freedoms. The Second Amendment doesn't ban suits against gun makers, but it has deep meaning for many Americans, especially in the South and West, Mr. Anthony says. Millions of law-abiding people still hunt. There is no tobacco equivalent to the politically potent NRA, with its three million dues-paying members.

In contrast, says Mr. Anthony, as legal attacks on tobacco mounted in the mid-1990s, few people in focus groups or on actual juries spoke up for smokers' rights. Many smokers want to quit.

The jury in the Brooklyn case reflected the assessments of both Messrs. Anthony and Daynard. Interviews with five of the 11 jurors revealed that most members of the panel saw themselves as sympathetic to manufacturers. But a persistent minority persuaded the majority to interpret certain manufacturer contracts with wholesalers as evidence of "negligent distribution" by 15 of the 25 defendants. Three defendants were ordered to pay a total of \$520,000 in damages.

What concerned some jurors about the contracts was that some manufacturers had failed to ban wholesalers from selling handguns to dealers who operate at gun shows or who don't have stores—two sources of illegal gun trafficking, according to law-enforcement officials.

This evidence may lack the drama of disclosures that cigarette manufacturers allegedly manipulated nicotine levels to addict smokers. In Brooklyn, though, it was enough for a breakthrough verdict—the first ever to hold the industry collectively responsible for a criminal shooting.

The question is whether that verdict was an aberration or an analog to the handful of successful smokers' suits that presaged the settlement of state litigation against the tobacco industry.

PHOTOCOPY
PRESERVATION

Fight Over Gun Suits Escalates On Hill

Competing Bills Set for Introduction

By HELEN DEWAR
and SHARON WALSH
Washington Post Staff Writers

The escalating controversy over efforts by cities to hold firearms manufacturers accountable for gun violence moved to Capitol Hill yesterday, as two Democrats introduced a bill to regulate weapon safety and a Republican readied legislation to curtail lawsuits against gunmakers.

The opening shot in Congress's latest battle over guns came as a dispute within the firearms industry over how to respond to such lawsuits threatened the job of one of its leaders and put at risk a recently-won detente among pro-gun groups.

Both developments stem from suits by local governments seeking damages from gun manufacturers and dealers and more recent efforts by state legislators, encouraged by the National Rifle Association, to preclude such suits. A bill filed recently in Florida, for instance, would make it a felony for a local official to file a suit against gunmakers.

The two opposing legislative proposals face an uncertain future in a Congress that has enacted few bills on either side of the gun control controversy since passage of the Brady bill requiring background checks for handgun purchases in 1993 and legislation banning most assault weapons in 1994. Congress passed—and President Clinton signed—both bills before Republicans took control of both houses in the 1994 elections. Since then, there's been a virtual standoff on the issue.

The bill to regulate gun safety, introduced by Sen. Robert G. Torricelli (D-N.J.) and Rep. Patrick J. Kennedy (D-R.I.), would require the federal government to regulate the design, manufacture and distribution of guns, just as it does for



BY RAY LUSTIG—THE WASHINGTON POST

Rep. Patrick J. Kennedy (D-R.I.), left, and Sen. Robert G. Torricelli (D-N.J.), holding guns, unveil gun bill.

other consumer products ranging from toys to trucks.

"It is outrageous that our government is powerless to regulate this industry and unable to warn consumers of the risks which guns may pose," Kennedy told a news conference.

The bill to curtail lawsuits is being prepared by Rep. Bob Barr (R-Ga.), an NRA board member and leading foe of gun control. An aide to Barr said the lawmaker was not ready to discuss details of the legislation but planned to introduce it "in the near future."

Barr issued a statement attacking the Torricelli-Kennedy bill, calling it a "thinly veiled attempt to further restrict the constitutionally guaranteed rights of law-abiding citizens." Barr said a gun manufacturer who negligently produces a faulty product can be sued under existing law and asked: "Do Sen. Torricelli and Rep. Kennedy really think the same federal government that assigns separate agencies to regulate frozen pizzas based on whether they are topped with meat or cheese should have a vastly expanded role in regulating lawful products?"

The Torricelli-Kennedy proposal would give the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (BATF) broad au-

thority over all safety-related aspects of firearms commerce, including setting safety standards, issue warnings and recalling defective products.

Under the measure, the BATF could prohibit manufacture and transfer of specific firearms as a last resort. All products would have to carry a manufacturers label so defective guns could be traced. The bill would set civil penalties of up to \$5,000 per violation, along with criminal penalties that include up to two years in prison.

Meanwhile, the position of Richard J. Feldman, executive director of the American Shooting Sports Council, a powerful Atlanta-based group that includes a number of gun manufacturers and distributors, was in jeopardy for taking positions that were not always in line with those of others in the industry.

NRA officials and some leaders of other gun groups who were unhappy with Feldman's past pronouncements—particularly an indication that the industry could sit down and talk about the lawsuits with lawyers who filed them—decided at a meeting last weekend in Phoenix that Feldman should go.

But, as of today, Robert Ricker, a lobbyist for the ASSC, said that the group's board had taken no action

and that Feldman had not resigned. "He still considers himself the executive director," said Ricker.

The fight exemplifies the often fractious relationships between those working on behalf of gunmakers and owners. With the filing of lawsuits by five different cities against gun manufacturers and a recent jury decision in Brooklyn holding gun producers liable for harm, representatives of gun owners and the industry have attempted to call a truce and work together against the lawsuits and possible congressional actions.

But discord emerged at a meeting in Phoenix, where gun industry representatives finalized a plan to form an umbrella organization of gun groups, to be called the Hunting and Shooting Sports Heritage Fund. It will collect from gunmakers 1 percent of their sales to go toward fighting the lawsuits. The NRA, which represents gun owners, will not be a member of the fund.

"It's a very emotional, very tense situation," said Ricker of the issues facing the gun industry and the stresses that might be contributing to the fight over Feldman's ouster. "We don't have the kind of funding the tobacco industry did. People [in the gun industry] are looking at losing their livelihood, their life savings."

Aiming High

A Lawyer Goes After Gun Manufacturers; Has She Got a Shot?

In a New Approach That Hints At Attacks on Tobacco, Ms. Barnes Goes to Court

A Whistleblower Emerges

By PAUL M. BARRETT
Staff Reporter of THE WALL STREET JOURNAL
NEW YORK — Attorney Elisa Barnes was casually reading a report about gun violence when this question occurred to her: Why hadn't the gun industry been sued for negligently distributing a dangerous product — much as makers of the drug DES were sued a decade ago?

The fact that Ms. Barnes knew little about firearms and had never sued a gun maker didn't deter her. A sole practitioner who played a junior role in litigation over the anti-miscarriage drug diethylstilbestrol, or DES, she brought suit three years ago against the gun industry on behalf of relatives of gun-shot victims.



Elisa Barnes

And somehow, this unlikely lawsuit, run on a shoestring budget from a disheveled Manhattan law office and scheduled to go to trial before a federal jury next month, has become one of the most closely watched assaults on the firearm industry ever.

This is partly because Ms. Barnes, 45 years old, came up with the novel, if long-shot, strategy of suing the industry as a whole. It is an idea that seems less far-fetched in the context of DES cases in the 1980s and '90s, and, recently, in the wake of broad-scale litigation against cigarette makers.

In another brash move, the attorney has maneuvered her suit, known as Hamilton vs. Accu-Tek, into the Brooklyn, N.Y., courtroom of a U.S. district judge, Jack Weinstein, known for fostering new injury-law theories.

A gun-industry insider has also stepped forward—for the first time in the history of gun-control litigation — to endorse Ms. Barnes' central allegation that manufacturers negligently fail to supervise how handguns are distributed. The plaintiffs'

lawyer claims a parallel with the key tobacco-industry defector, Jeffrey Wigand, though firearm makers say the gun whistleblower is out of touch and lacks damning documents. At the same time, gruesome school shootings in Arkansas, Kentucky and elsewhere have refocused attention on attempts to curb guns. And taking their cue from state prosecutors who have sued the tobacco industry, officials in several cities, led by Chicago, are actively researching possible suits of their own against gun manufacturers.

Apart from cases of malfunctioning guns, the firearm industry has not suffered a significant loss in two decades of product-liability suits. Industry lawyer Anne Kimball says her clients sell a lawful product and shouldn't be blamed for its misuse any more than makers of kitchen knives are blamed for stabbings. More than a dozen defense attorneys, some from big corporate firms, are collaborating with Ms. Kimball, a partner in Wildman, Harrod, Allen & Dixon in Chicago.

As formidable as the firearm defenses seem, it is worth noting that cigarette makers seemed similarly impervious as recently as early 1997. Then, the pressure of potentially huge damage awards caused the tobacco giants to come to the bargaining table and begin handing out multibillion-dollar settlements. Ms. Barnes, whose suit has survived preliminary defense attacks, predicts a similar turnabout in gun litigation, especially if big-city mayors follow her into the fray.

Where They Came From

The lead plaintiffs in the Hamilton case say that until their relatives were killed, they hadn't given gun companies any thought. Then, in 1993, Freddie Hamilton of Brooklyn, lost her teenage son, Njuzi Ray, who was felled by a bullet she says was intended for another teenager. About a year earlier, Katina Johnstone of Staten Island, N.Y., lost her husband, David; he was shot by a would-be robber. The defendant in the Njuzi Ray shooting was tried and acquitted; David Johnstone's assailant pleaded guilty to murder and was sentenced to up to eight years in a juvenile facility.

Ms. Hamilton, 55, says that in her grief, "it just came to me that somebody makes these guns," and they should be held accountable. For months, she pestered attorneys at local activist groups but was told that such suits always failed.

Ms. Johnstone, 47, was similarly consumed by where the revolver used to shoot her husband came from. The two women met through a local antigun group, which in 1994 introduced them to Ms. Barnes.

Courts have consistently rejected suits alleging that guns are so inherently dangerous they shouldn't be sold, concluding that these suits effectively seek sweeping restrictions that only a legislature can impose. Ms. Barnes explained to her new clients that she wanted to argue that manufacturers negligently "oversupply" the legal gun market, turning a blind eye to problems such as dealers who make multi-

Please Turn to Page A6, Column 1

Continued From First Page

ple sales to "straw men," who sell to criminals.

Their lawyer's passion, even obsessiveness, counterbalanced her lack of experience, the clients say. "The gun case took over, and she hasn't had time for anything else," says Barnes mentor Sybil Shainwald, a prominent plaintiffs' attorney and office neighbor. Ms. Barnes confirms that she has allowed the rest of her practice to dwindle while focusing on Hamilton.

As a young lawyer, Ms. Barnes quit the prestigious New York firm of Willkie Farr & Gallagher because she found corporate litigation boring and impersonal. She apprenticed herself to Ms. Shainwald, who specializes in bringing suit on behalf of women claiming injury from health products. "We do God's work," Ms. Barnes was fond of saying. "She believed that," Ms. Shainwald recalls.

The Right Judge

Ms. Barnes assisted in the early 1990s with DES litigation in the courtroom of U.S. District Judge Weinstein. Nationally known since the early 1980s for his creative solutions to mass-injury lawsuits, the judge had lent support to the theory that under rare circumstances—such as when consumers can't identify the makers of an allegedly harmful product, which was the case with DES—manufacturers can be held liable according to their share of the market, rather than particularized proof of fault.

In 1994, having hung out her own shingle, Ms. Barnes immediately thought of Judge Weinstein for her gun case. Although 77 years old and technically semiretired, the judge maintains an active docket and is thought of by lawyers who know him as still keen to demonstrate his knack for courtroom innovation. Ms. Barnes' clients' residences were within the jurisdiction of the Brooklyn courthouse, but there are 20 judges in that district who are normally assigned cases randomly. Ms. Barnes steered the suit to Judge Weinstein by means of a rule that allows attorneys to request the services of particular judges who have handled "related cases." The related cases in this instance: a DES suit that settled in 1992 and a failed 1981 suit alleging a design defect in a Remington Arms Co. shotgun.

Despite the fact that the Remington case was a defense victory, lawyers for the roughly 50 Hamilton defendants, including Smith & Wesson Corp., Sturm, Ruger & Co. and Accu-Tek, tried unsuccessfully to take the case away from Judge Weinstein. They asserted a key difference between DES and handguns: Unlike generic-looking DES, guns usually have distinctive markings. And they noted the dated nature of the related cases. The U.S. appeals court in New York rebuffed the defendants without explaining its reasoning.

Having obtained her chosen judge, Ms. Barnes then faced managing her first complicated multidefendant case. A more typical example of her repertoire, she says, was a suit last year in which she won a \$19,000 jury award for one of two former employees of Outlaw Biker magazine who claimed their boss sexually harassed them.

THE WALL STREET JOURNAL

SEPTEMBER 17, 1998

Ms. Barnes stumbled at first—consuming countless hours, for example, in a fruitless effort to prove that gun makers illegally collude to block regulation. Backed by only a secretary, a paralegal and occasional lawyer volunteers, Ms. Barnes has received less than \$10,000 for expenses from her clients. To finance the case, she says, she has spent more than \$150,000 of her own money. Under a standard contingency-fee arrangement, she stands to collect one-third of any recovery.

She sought legal help and money for expenses from the Center to Prevent Handgun Violence, an affiliate of Washington-based Handgun Control Inc., the biggest group of its sort. But she insisted on keeping control of her suit. She was turned down. Handgun Control's litigation arm "thinks I'm wacky because I'm not going after a particular gun with a chain of title back to a particular manufacturer," she maintains. "Well, they've tried that, and it hasn't worked."

Dennis Henigan, the center's legal director, declines to comment on his financial discussions with Ms. Barnes. But, he stresses, "Our resources are very fully committed to bringing our own cases," including one in California scheduled to go to trial next month that alleges that a Beretta U.S.A. Corp. handgun was defective because it lacked a safety device to block "unauthorized users." Still, he says, the collective-liability theory "deserves to be tested."

The Phone Call

In November 1995, as she was slogging through the information-gathering process known as discovery, Ms. Barnes got a telephone call from a man who said he was a former Smith & Wesson executive and wanted to help.

"Yeah, right," she recalls answering, thinking he was an industry plant.

But the caller, Robert Hass, indeed did serve as Smith & Wesson's senior vice president of marketing for 11 years, until he left in 1989 to run his own business. In an April 1998 deposition, the now-retired Connecticut resident explained that for several years he had been ruminating about his time in the gun trade, and had concluded that his former employer and its rivals could lessen the flow of guns into criminal hands by policing their wholesalers and retailers. "When you're retired," the 68-year-old said, "you really get a chance to think about things you didn't in the past."

A blunt and at times bristly witness, he scorned what he called the industry's attitude of, "Gee, our hands are clean." Referring to the 11 corporate-defense lawyers at his deposition, he said, "I'm sure the legal talent in this room could figure out a way" to track gun sales more closely.

The industry is "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," he said in a February 1996 affidavit.

No Trace?

Periodically, when investigating gun trafficking, the federal Bureau of Alcohol Tobacco & Firearms requests information from manufacturers about specific weapons thought to have been used in crimes. But ATF enforcement is selective. Manufacturers could—but don't—use their internal records to supplement government efforts to trace these guns through the distribution chain, looking for retailers whose sales are linked repeatedly to law breakers, Mr. Hass said in deposition testimony last April.

Companies could cut off offending dealers "in the same way a retailer would be cut off who broke price" below manufacturer recommendations, he added. "God knows we did that enough."

Gun lawyers counter that Mr. Hass's

suggestions aren't mandated by law, and that police should handle policing. The attorneys add that amateur sleuthing by their clients could hinder government investigations. The ATF says that, while gun makers are "generally cooperative" in responding to specific requests, it encourages them to inform the agency "when they observe abnormal activities in the course of doing business."

Energized by Mr. Hass's emergence, Ms. Barnes got a further boost from Judge Weinstein in August 1996, when he issued a critical ruling permitting Hamilton to move forward. Unapologetically making new law, he declared that there may "come a point that the market is so flooded with handguns sold without adequate concern over the channels of distribution and possession that they become a generic hazard to the community as a whole because of the high probability that these weapons will fall into the hands of criminals or minors." The judge allowed Ms. Barnes to expand her plaintiff group, which now stands at 11 individuals, and reminded her that she would still need to prove the defendants' negligence at trial.

There, the industry contends, she will fail, because neither Congress nor the ATF has ever required manufacturers to track their products to the street. Ms. Barnes, on the other hand, believes that when she puts current industry executives on the stand, their professions of ignorance about gun distribution will remind jurors of the top tobacco executives who swore before Congress in April 1994 that they didn't think nicotine is addictive.

Support in Numbers

In a deposition last February, for instance, Larry Nelson, a senior executive with Browning Arms Co., a unit of Browning Inc., explained how he knew their dealers are abiding by the law: "Just based on reputation, who they are. They risk severing their relationship with Browning if they breach that. We know them. They just don't do that."

At the recommendation of defense lawyers she knows from breast-implant litigation, Ms. Barnes hired the New York corporate-consulting firm National Economic Research Associates to analyze government statistics and reports on guns. NERA has concluded that most gun smuggling is from states that have relatively weak gun laws, such as Florida, to states with strict controls, such as New York. In low-regulation states, moreover, sales of handguns are significantly higher than would be expected, given the level of legitimate gun ownership, NERA found. These conclusions "robustly" support the theory that low-regulation gun markets are negligently "oversupplied," says NERA economist Lucy Allen, who plans to testify at trial.

"Simply rubbish," responds Ms. Kimball. She accuses NERA of using "overstated, wrong assumptions to get to preposterously high figures." For instance, she accuses NERA of assuming that every gun crime involves a separate weapon, when in fact, illicit guns are often used repeatedly; NERA says that it clearly disclosed the potential problem with the assumption, which, in any event, applies to only one chart in its 36-page report.

Whoever wins this debate, plenty of other obstacles remain. It isn't clear how Ms. Barnes will juggle the testimony of victims' relatives, experts and the convicted criminals she has been deposing on the subject of gun trafficking. She will have to link the deaths of her clients' relatives to black market activity the defendants could have stopped. Mr. Hass, who prizes privacy and refuses media interviews, said in his April deposition that he didn't plan to testify in court. His absence would hurt the plaintiffs' side, although Ms. Barnes, who represented him at his deposition, says he has since changed his mind and will appear.

In March, another gun suit that Judge Weinstein allowed to go to a jury ended in a defense verdict, illustrating that his presence isn't a foolproof charm. Ms. Barnes ticks off a long list of differences between the two cases. But she admits that she is interviewing other lawyers who might help her in court.

"No one thought I'd get this far," she says one day from behind a cluttered desk. "But now I have to finish it."

TARGETING GUNS

The Legal Assault

Offensive Heats Up Against Gun Firms

First in a series
Of occasional articles

By SHARON WALSH
Washington Post Staff Writer

When Stephen Young arrived at the emergency room of St. Francis Hospital in Evanston, Ill., on June 10, 1996, he knew his son had been shot. But he wasn't prepared for the sight of a doctor standing over 19-year-old Andrew, pumping desperately on his chest.

It was futile. The doctors were unable to repair the damage from a bullet that ripped through Andrew's heart. Young, his wife and three other sons were brought into the cold, white room to say good-bye. Andrew's body was still warm, his skin soft. Stephen Young clipped a lock of his son's hair and put it in an envelope.

Then he looked down at the hole in his son's shoulder, where the bullet that pierced his heart had come out. "I don't know where I was then, but I just thought, 'Where did that gun come from? Who put that gun on the street?'"

Young's questions form the core of a new legal assault on the gun industry that seeks to hold it accountable for the growing costs of gun violence. For nearly 20 years, gun manufacturers have fended off lawsuits charging that guns are abnormally dangerous

and defective products because they kill people. Plaintiffs lost virtually all of those cases. But gun control activists now have a new and potentially more successful legal tack—attacking gun makers and sellers for letting guns into the illegal market.

In more than two dozen lawsuits filed across the country, individuals such as Young and cities such as Chicago have begun to argue that the gun industry knowingly allows many of its products into the illegal market and thus is negligent because manufacturers do nothing to prevent it. Already this approach has yielded a major court victory. In February a federal jury in Brooklyn found nine gun makers negligent for failing to exercise stringent control over the guns they sell.

The Chicago case, filed in November, alleges that gun makers and distributors flood gun stores in the suburbs ringing Chicago—such as Evanston—with more guns than they can legitimately sell. This allows many buyers, known as straw purchasers, to illegally pass the guns on to juveniles. Young filed his lawsuit, *Young v. Bryco Arms*, in June after he found a straw purchaser bought the 9mm semiautomatic Bryco 59 handgun, serial number 602683, that wound up in the hands of the gang member who killed his son. Five thousand people younger than 19 die from gun violence every year.

Gun manufacturers have asked the judge in the Brooklyn case, *Hamilton v. Accu-tek*, to overturn the jury verdict, arguing there was no evidence of negligence on the part of gun makers. Gun industry officials say the current wave of litigation is a bizarre attempt to hold manufacturers accountable for sales they cannot control.

"Obviously, a manufacturer doesn't sell to someone he knows is a criminal," said Robert Delfay, president and chief executive of the National Shooting Sports Foundation and a spokesman for the industry. "He sells to a distributor or retailer. He knows that person isn't a criminal because the federal government has licensed that person."

James Sabalos, an attorney for Bryco, predicted: "The Young case will fail completely.... Our society is in a lot of trouble if we attempt to assign blame to one person or company for the wrongdoing of another."

The new offensive has been compared with the ultimately successful litigation that states waged against the tobacco industry. Tobacco companies also were charged with negligence in marketing. More significantly, they were charged with fraud and conspiracy—two elements not present in the gun cases. Internal tobacco company documents also emerged that greatly undercut the tobacco industry's defense. So far, no such documents have surfaced in the gun suits.

Still, one gun industry official made a statement under oath in the Brooklyn case that might put manufacturers under greater scrutiny. "The company and the industry as a whole are fully aware of the extent of the criminal misuse of firearms," said Robert I. Hass, former senior vice president of Smith & Wesson, the world's largest maker of handguns.

In spite of their knowledge, however, the industry's position has consistently been to take no independent action to insure responsible distribution practices.

Tracking a Deadly Weapon

After his son's death, Stephen Young, formerly in the advertising and piano businesses, decided to learn as much as he could about gun distribution. He zeroed in on the path the 6½-inch Bryco gun followed from its California manufacturer into the hands of 19-year-old Mario Ramos—his son's killer. He said he found little interest from the police, so he turned to a gun-control activist with connections in the Bureau of Alcohol Tobacco and Firearms.

He learned from an ATF trace of the weapon that the gun wielded by Ramos was shipped in July 1993 to an Indiana distributor. Less than six weeks later it was bought by Mariano DiVittorio at Breit & Johnson Sporting Goods Inc., a gun store near Chicago, according to ATF forms. DiVittorio, according to Young's lawsuit and a statement by DiVittorio, was a gun trafficker who had bought more than 40 guns at the shop and was well known to the owner.

Daniel Escobedo, a convicted felon, entered the store with DiVittorio, according to DiVittorio's statement. Escobedo said he wanted to buy a gun for his sister. But he told the store owner that he could not fill out the ATF's Form 4473, which every gun buyer must complete.

Form 4473, called a firearms transaction record, asks nine basic questions: Are you a convicted felon, a fugitive, an addict, mentally deficient, an illegal alien, have you been dishonorably discharged, renounced your citizenship, or are under a restraining order for harassing or stalking, or have been convicted of misdemeanor domestic violence? A single "yes" answer makes it illegal to buy a gun. Lying on the form or selling a gun to someone you know has lied is a crime.

Escobedo had been convicted of narcotics trafficking and attempted murder and could not legally buy a gun. He also had ties to the Latin Kings, one of Chicago's brutal and highly organized street gangs. The store owner filled out the form, which was signed by DiVittorio, according to the lawsuit. Escobedo gave the money for the gun to DiVittorio, who paid the store owner, a classic example of what ATF agents call a "straw

man" purchase.

Mary Kay Scott, who represents Breit & Johnson, would not comment because the case is in litigation. No response to the lawsuit has been filed. Escobedo is now in a federal prison.

Mixed Signals

Almost three years after the gun was bought, on June 10, 1996, Andrew Young, his twin brother, Sam, and two friends were cashing a check at the Rogers Park Fruit Market in Evanston. Sam Young later told his father that a group of gang members was there, "throwing signs" at them. In this case it was the sign of the Latin Kings gang—the ring and middle fingers turned down, the others thrust up.

When no one in the car returned the gang sign—they were not gang members—two young men jumped on a bicycle and started chasing the car.

When Andrew Young stopped for a left-hand turn, the bicycle pulled alongside the car. Roberto Lazzano, the gang member pedaling the bike, handed the Bryco 59 to Ramos, who wanted to be in the gang and was riding behind Lazzano on the bicycle. It is unclear how the gun got from

The Washington Post

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Escobedo to Lazzano in the three years after it was bought at the gun store.

"Do it," Lazzano said to Ramos, according to witnesses at the scene. Just the day before, Ramos had graduated from Evanston Township High School, the same school the Young brothers attended.

When Andrew was hit, one of his friends pushed him out of the driver's seat and took the wheel, running red lights and sideswiping another car in his race to the hospital. Andrew, who was held by his twin brother, Sam, never regained consciousness, Stephen Young said.

Cynthia Harris, director of victim services for the Evanston Police Department, sees younger and younger people with guns in the quiet, ethnically diverse community of 73,000.

"One of my jobs is to make the death notification to the next of kin," Harris said. "I've been in emergency rooms with parents wailing over a dead child. ... I've taken them to the medical examiner's to identify the body."

Often, the children are gang members, she said. The Chicago Crime Commission has identified members as young as 8. Even though most are too young to buy guns legally, it doesn't appear difficult for them to obtain a firearm. It often happens as it did in the Young case, with a straw buyer.

This, say the new gun lawsuits, is the fault of the gun industry, which sell its guns to distributors with few caveats. Some gun companies prohibit wholesalers from selling below a certain price. But few of them prohibit sales to shady dealers or those who sell to straw buyers, according to copies of the agreements.

Josh Horwitz, director of the Firearms Litigation Clearinghouse, said the goal of gun manufacturers "is to sell as many guns as possible. ... We're all paying because the system makes it the industry's responsibility to monitor who gets guns and who sells guns. When that breaks down, you get a faucet that's just left open with guns flowing into society."

Industry representatives reply that no gun manufacturer, distributor or

retailer would knowingly sell guns to someone violating the law because its federal firearms license would be taken away. It is up to the government, they say, to enforce the law.

But the ATF, the agency that regulates guns, says it has too few people to closely monitor gun sales.

Under federal law, there is no central repository or registry of firearms. There are 250 million guns in America and 4.5 million new guns sold each year. But the government does a better job keeping track of the 190 million motor vehicles in this country, said Timothy Lytton, a professor at New York Law School who has closely followed the various lawsuits against gun manufacturers.

"There are 100,000 people with federal firearms licenses," Lytton said. "If it's true that guns sold off the back of a truck are used in more crimes than guns sold at [a retail store], then gun makers selling to the guy with the truck are negligent."

'Ring of Fire' Gun Firms

The Bryco 59 was made by one of the "Ring of Fire" companies, a group of six companies that ring Los Angeles and make the cheap handguns referred to as Saturday Night Specials.

The half-dozen companies were, in a sense, nurtured by the Gun Control Act of 1968. The act outlawed the importation of small, cheaply made handguns, but not production in the United States. After 1986, when the law was relaxed, the Ring of Fire companies' production jumped to 869,000 in 1993 from 133,000—or 32 percent of all handguns made in the United States at that time. Sales have since dropped.

Delfay of the National Shooting Sports Foundation defends the Ring of Fire handguns. "They make a relatively low-priced firearm," he said. "In some cases, that's the only firearm some people can afford."

Stephen Young now works full

time for Help for Survivors, a Chicago group that counsels families affected by gun violence.

Maurine Young, Andrew's mother, said she has forgiven Mario Ramos and Roberto Lazzano, who was riding the bicycle and told Mario to "do it." She has visited Ramos in Joliet Correctional Center, where he is serving 40 years. And she plans to visit Roberto Lazzano in Menard Penitentiary, where he is serving 65 years because of a past criminal record and because he instigated the crime.

After the Rev. Robert H. Oldershaw read about Andrew's death, he realized that Mario Ramos was a member of his parish. He began counseling the Ramos family, started a program for Hispanic teenagers and got a parishioner to represent Mario at his sentencing hearing.

Oldershaw reached out to the Youngs, as well. At a court hearing for Ramos, Oldershaw introduced Maria Ramos, Mario's mother, to Stephen Young. "They just wept in each other's arms," Oldershaw said. "They've both lost their sons."

Gun activists say the Young lawsuit is an improvement on other negligence cases because the gun was recovered and traced. There is still a high legal hurdle, however, to prove that the maker should be held responsible for the action of a buyer several steps removed from the manufacturer's original sale. Lawyers in the fight against gun manufacturers say that the companies have a special duty to exercise control over distributors and dealers because the products they make are so dangerous.

Gun industry officials don't agree. "We'd extend our strongest sympathy as one parent to another," Delfay said of the Young family's loss. "But the manufacturer who sells to a distributor or retailer who's been licensed by the federal government cannot be held responsible."

2 GUN COMPANIES IN NEW YORK TALKS

Concessions Are Sought From Colt's to Avoid State Suit

AI

By RAYMOND HERNANDEZ
with FOX BUTTERFIELD

ALBANY, July 20 — In a move that could lead to a major break in the solidarity of the gun industry, two major gun makers are negotiating with the New York State Attorney General, Eliot L. Spitzer, over a lawsuit he plans to file against gun manufacturers, people involved in the discussions said.

Mr. Spitzer has accused the gun industry of irresponsible marketing that has allowed firearms to fall into the hands of criminals.

The negotiations center on whether the gun makers will agree to several far-reaching concessions, including better supervision of how its guns are marketed and sold, participants said.

In exchange, Mr. Spitzer would agree to exclude the companies from the lawsuit, they said. The talks involve Colt's Manufacturing of Hartford, one of the country's oldest and best-known gun makers, and a second company that was not identified, the participants say.

New York would be the first state to sue gun manufacturers, but 23 cities and counties across the nation have already done so.

In a move with equally important implications, people close to the talks said, Mr. Spitzer has also begun discussions with Robert Delfay, president of an association that represents gun makers, wholesalers and some dealers, on a code of conduct for the gun industry.

The negotiations between Mr. Spitzer and the gun makers have also focused on other areas, participants in the discussions said.

Mr. Spitzer has asked that gun makers participate in a system in

Continued From Page A1

which the companies would give the Federal Bureau of Alcohol, Tobacco and Firearms bullets that have been fired during the testing of new guns. Each bullet has distinctive grooves and other markings, which would identify the guns from which they were fired. The agency has the technology to convert these markings into a database of digital gun fingerprints.

Such a system would enable law enforcement officials to identify a gun quickly when a bullet is recovered from a crime scene.

Mr. Spitzer has also asked that payments be made to a state panel that provides monetary compensation to victims of crimes for any losses they have suffered. It is not clear how much money Mr. Spitzer is seeking for the panel, known as the Crime Victims Board, but people involved in the talks say it is an important symbolic step.

Richard Esposito, a consultant to Colt's, said, "We are not opposed to any such talks," but added that Colt's did not want to discuss the terms in public.

In an earlier interview, Mr. Esposito said that before being approached by Mr. Spitzer, Colt's had already been trying to develop a way to collect information on bullets test-fired from new guns and provide it to law enforcement.

Mr. Esposito said that Colt's was



Suzanne DeChillo/The New York Times

New York Attorney General Eliot Spitzer has criticized gun makers.

also taking the important ethical step of independently reviewing the code of behavior for the distributors to whom it sells guns. Colt's has also been working to pioneer what has been called a smart gun, incorporating a computer chip to insure that only its owner can fire it.

If either gun company agrees to Mr. Spitzer's demands, it will be the first time a gun maker has made a concession to gun control proposals in response to the lawsuits.

A voluntary settlement by Colt's

or the other company could act much like the agreement by the Liggett Group, a tobacco company that broke ranks and reached a settlement in suits filed by the state attorneys general against that industry, a breakthrough that shattered decades of unanimous resistance by cigarette makers.

Mr. Spitzer's negotiations, if successful, could also result in a national model for other state and local governments in pursuing gun makers, wholesalers and dealers.

The discussions between Mr. Spitzer and Mr. Delfay, the president of the National Shooting Sports Foundation, the largest gun industry trade association, which has close ties to the National Rifle Association, involve establishing what one person familiar with the negotiations described as a code of conduct for the gun industry. As in the discussions with the gun makers, the talks with Mr. Delfay appear to focus on how to make companies more responsible in their marketing and distribution of firearms.

Mr. Delfay said today that he could neither confirm nor deny that he had met with Mr. Spitzer.

Only a few weeks ago, a rival trade organization, the American Shooting Sports Council, was abolished, and its two chief officers lost their jobs after reports that they were meeting with a lawyer for several of the cities that had filed suit. Their ouster was widely seen in the industry as a result of pressure by the National

Rifle Association and hard-liners in the industry who oppose making concessions to settle the lawsuits.

Mr. Spitzer declined to comment on the issue in an interview this afternoon, saying that he could not discuss any matter that might be the subject of litigation.

Executives at several handgun manufacturers have said privately that they would like to find ways to monitor their sales better, but that such steps could also make them more vulnerable to lawsuits.

People close to Mr. Spitzer say that he would prefer to avoid protracted litigation with the gun industry in favor of a quick settlement that would keep guns out of the hands of criminals.

People involved in the discussions say that Mr. Spitzer has given Colt's until Wednesday to respond to his demands, but that company officials have asked for more time.

Colt's was one of several gun makers found liable for negligence this year in a Brooklyn lawsuit on behalf of three people shot by stolen guns.

Colt's executives have said they are prepared to get out of the consumer handgun business if it cannot be kept profitable.

They have focused much of their efforts on expanding their military small-arms business and on lobbying Washington for help in financing research on a smart gun, a new class of gun that can be fired only by its owner.

Although the Colt's name is presti-

gious, a New York banker, Donald Zilkha, bought 85 percent of the company in 1994 for only \$12 million, and in 1997, the last year for which numbers are available, Colt's earned only \$2 million on \$96 million in revenue.

Mr. Spitzer's focus in trying to make the gun industry more responsible for how guns are sold grows out of a new understanding by law enforcement officials that many criminals are able to buy guns easily from corrupt firearms dealers or gun traffickers buying on their behalf.

Data compiled by the Bureau of Alcohol, Tobacco and Firearms show that more than half of all guns used in crimes that can be traced to their point of sale were sold by less than 1 percent of licensed dealers.

Gun makers have long maintained that they have no knowledge of what happens to their products after they leave the factory, because they sell only to distributors, or wholesalers, who in turn sell to individual dealers, like gun shops or sporting goods stores.

But gun control advocates and some law enforcement officials have become skeptical of this claim, as the firearms agency has traced more and more guns used in crimes during the last five years and found that certain brands move quickly from manufacture to crime, often in less than a year.

THE FRESH AIR FUND: 1877-1999

The New York Times

WEDNESDAY, JULY 21, 1999

Maneuver by Kennedy's Plane Suggests He Was Disoriented

He Made 2 Turns Away From His Destination

AI

By MIKE ALLEN with MATTHEW L. WALD

BOURNE, Mass., July 20 — John F. Kennedy Jr. twice turned away from Martha's Vineyard just before his plane began plunging toward the sea on Friday night, Federal investigators said today, leading several authorities on aviation to conclude that he had become lost or disoriented.

The disclosure came on the fourth day of looking for the wrecked plane and the remains of Mr. Kennedy and his wife, Carolyn Bessette Kennedy, and sister-in-law, Lauren G. Bessette — a search that has generated many questions here and in Washington about the use of Federal resources in what could be a fruitless effort. Partly as a result of the new radar information, investigators warned tonight that they might never find any large pieces of the plane.

At a briefing this evening, Robert L. Pearce, who is leading the investigation for the National Transportation Safety Board, said radar records were filling in the harrowing details of the last seven minutes of the Friday night flight as Mr. Kennedy, 38, and his 33-year-old wife headed for a family wedding.

Mr. Pearce said Mr. Kennedy had been headed straight toward Martha's Vineyard, about 34 miles out and traveling at 5,600 feet, when the plane began to descend at about 700 feet a minute.

"The descent continued for about five minutes to 2,300 feet, when the airplane was about 20 miles from the airport," Mr. Pearce said. "The airplane started a turn to the right and climbed back to 2,600 feet. It remained at that altitude for about one minute on a southeasterly heading."

"Thirty seconds into the maneuver, the airplane started a turn to the right and descended at a rapid rate of descent. The rate of descent may have been greater than 5,000 feet per minute. The last radar return was about 16 miles from the airport and the altitude indicated 1,100 feet."

In other words, Mr. Kennedy was headed away from the airport when the plunge began. Mr. Pearce would not characterize the information beyond saying that Mr. Kennedy had been on the right path before he began turning. Anything away from that path "would not go to Martha's Vineyard," he said.

Michael L. Barr, the director of the Aviation Safety Program at the University of Southern California, a leading training center for accident investigators, said Mr. Kennedy had apparently lost his way after making the first turn away from Martha's Vineyard, then went into a dive as he tried to right himself.

"We call this getting yourself in a square corner, when you run out of ideas and experience at the same time," said Mr. Barr, a fighter pilot in the Vietnam War. "He would have been looking straight out at the dark ocean on a nearly moonless night. He probably looked over his right shoulder for lights, then when he started to sink, he would have been trying to

get the nose back to the horizon, get the wings level and find where he was, all at the same time. Even for a good pilot, that could produce a death spiral."

Other experts offered a similar assessment, while cautioning that it may never be possible to know what happened in the cockpit. Warren D. Morningstar, the director of media relations for the Aircraft Owners and Pilots Association, said the scenario "suggests that the pilot was disoriented."

Mr. Morningstar said that a pilot might intentionally turn away from his destination to reduce altitude, but that Mr. Kennedy had been at about the right altitude for his approach before he began the turns.

Another factor that could have affected Mr. Kennedy's handling of the plane was his having recently broken an ankle. He had used crutches for a while and took a flight instructor on a trip earlier in the week because he was having difficulty manipulating the pedals.

The new information is based on an analysis in Washington of radar data that is being collected from stations along Mr. Kennedy's flight path, including stations in New Jersey, New York, Connecticut, Rhode Island and Massachusetts.

So far all the records reviewed have been on paper, and Mr. Pearce said an even more complete picture

might emerge as specialists delve into computerized records that are being sent to them.

After four days of searching, investigators said no debris has been salvaged from the ocean floor; the small pieces that have been found were floating or washed ashore. Mr. Pearce said most are interior cabin pieces, and the largest piece found so far is a three-foot section of overhead molding. Asked about the likelihood of finding sizeable pieces of wreckage, Mr. Pearce said, "I'm sure you could draw a conclusion based on the debris that we've been bringing in, which is fragmented."

As for the search itself, several officials said today that the effort was the first by the Government to retrieve an aircraft other than for public safety. While salvages of crashed planes, even at sea, are common, they are almost always paid for by insurance companies or by families, aviation officials and salvors said.

At the White House, a spokesman acknowledged the unusual nature of the effort. "We're taking some reasonable measures beyond what we might normally do in this instance," the spokesman, Jake Siewert, said.

At the National Transportation Safety Board, which is in charge of air crash investigations, Lauren L. Peduzzi, a spokeswoman, said that the board had paid for salvage when it had an extraordinary reason to discover what happened.

But aviation officials were clear in stating that they were not undertaking this search because they expected to uncover a generic flaw in Piper Saratogas of the type Mr. Kennedy was flying.

In ordinary circumstances the Government does nothing to retrieve such wreckage. The Federal Aviation Administration provides radar data to help find a wreck, and the Coast Guard will control marine traffic while private parties pay for salvage. Airplanes that crash, whether they are operated by private individuals, corporations or airlines, are

almost always salvaged by the insurance company that covered them.

An exception was TWA 800, the Boeing 747 that went down off the south shore of Long Island three years ago. The airline and its insurer declined to recover the wreckage, but the National Transportation Safety Board said the plane had to be raised to determine the cause of the explosion.

But James M. O'Dell 3d, a spokesman for the Coast Guard, said this was the first time he knew of that his agency had participated in the salvage of a private plane.

The delay in finding bodies is posing an awkward situation as Mr. Kennedy's uncle, Senator Edward M. Kennedy, and other family members try to plan a funeral or memorial service. The Kennedy family has not

requested that Mr. Kennedy be buried with his parents in Arlington National Cemetery, a White House official said this afternoon.

"We don't think they are going to ask," the official added, citing informal contacts with members of the family.

Because Mr. Kennedy does not qualify for burial in the military cemetery, interment there would require a Presidential waiver.

As most of the family waits in

seclusion at Hyannis Port, two Navy ships, two Coast Guard cutters and two research vessels from the National Oceanographic and Atmospheric Administration are being used in the effort to map the sea off of Martha's Vineyard, using high-resolution sonar to detect objects with straight edges, indicating they are manmade. Then 10 divers from the Massachusetts State Police and 20 from the Navy use those maps to look for wreckage.

The New York Times

WEDNESDAY, JULY 21, 1999

Big National Law Firms Leap to Help Gun Industry as It Fights Suits by Cities

By PAUL M. BARRETT
And MILO GEYELIN

Staff Reporters of THE WALL STREET JOURNAL
Major national law firms are sprinting to the rescue of the gun industry as it faces spreading litigation by cities and counties around the country.

Brand-name firms, such as Cleveland's Jones, Day, Reavis & Pogue and New York's Simpson Thacher & Bartlett, have entered the fray, as have prominent regional firms, such as Holland & Knight of Tampa, Fla. The massing of legal forces reflects the mounting threat to the gun industry, which, with a few exceptions, has previously been represented by product-liability lawyers with less well-known and smaller firms.

Motions for Dismissal

So far, 23 municipalities have sued the industry, seeking reimbursement for the public costs of gun violence and restrictions on how firearms are made and marketed. The suits, which began last fall, are now reaching the stage where gun-company lawyers are filing motions to have them thrown out before the cities and counties begin to demand deposition testimony and documents from the companies. If the litigation drags on, the work promises to be lucrative for the law firms.

There has been some preliminary talk of settlement by industry representatives and lawyers for some of the cities. But according to Anne Kimball, a partner with Chicago's Wildman, Harrold, Allen & Dixon, a longtime courtroom defender of the industry, "we are just moving ahead, litigating the cases, and we fully expect to see them dismissed." Wildman Harrold is continuing its representation of manufacturers Smith & Wesson Corp., a unit of Britain's Tomkins PLC, and Sturm, Ruger & Co. of Southport, Conn.

The gun companies' main argument is that they can't be held liable for making and distributing a legal product that ends up being criminally misused. Echoing earlier state lawsuits against the tobacco industry, the municipalities are seeking reimbursement for what they contend is the public cost of gun violence. Their suits allege that harm done to their communities by guns can be measured in the public cost of providing emergency medical and police services.

Colt's Manufacturing Co., West Hartford, Conn., has been the most aggressive manufacturer in seeking to augment its legal defenses against the municipal assault.

subsequent warnings to other executive-search firms, created a tremendous uproar among headhunters. The company threatened those recruiters with similar legal action unless they steered clear of Federated employees under contract.

The Cincinnati-based operator of such department stores as Bloomingdale's and Macy's has seen several senior executives jump ship in recent years.

A spokesman says the gun manufacturer considered more than a dozen law firms before selecting Jones Day as its national coordinating counsel. The large law firm represented R.J. Reynolds Tobacco Holdings Inc. in state suits filed nationwide to recover public health-care costs connected to smoking. Jones Day will handle the gun-litigation defense work through its offices in Dallas and Washington, D.C., says partner Thomas Fennell.

Firms Beaten Out by Jones Day

The firms bested by Jones Day in the Colt's "beauty contest" were Rogers & Wells of New York, O'Melveny & Myers of Los Angeles and Shook, Hardy & Bacon of Kansas City, Mo. Shook Hardy remains local counsel for Colt's in Kansas City and would like to do more gun litigation, says managing partner Patrick McLarney. A spokeswoman for Rogers & Wells plays down the firm's disappointment, noting that its litigation practice is more geared to antitrust, intellectual-property and securities law, not product-liability work. A spokeswoman for O'Melveny & Myers declined to comment.

To handle its appeal of a breakthrough verdict in February against the gun industry in a suit brought by relatives of gun victims in Brooklyn, N.Y., Colt's has called on Barry Ostrager, a litigator at Simpson Thacher.

The U.S. unit of Italy's Beretta SpA has signed up Baltimore's Gordon, Feinblatt, Rothman, Hoffberger & Hollander, as well as Philadelphia-based Schnader, Harrison, Segal & Lewis, to defend it nationwide. Lawyers who recently joined Schnader Harrison's San Francisco office had earlier successfully defended Beretta in a major California suit filed by parents of a boy who was accidentally killed with a Beretta handgun.

Holland & Knight, a major force in the Southeast, also has expanded on earlier experience in individual gun suits. The law firm, which has previously represented gun maker Heckler & Koch Inc. in individual cases, is now the Sterling, Va., company's national coordinating counsel.

Slower Growth Is Expected In Health-Care Spending

WASHINGTON (AP)—National health-care spending is projected to grow more slowly than had been expected in the next decade, the government said.

The revised projection is due largely to decreased Medicare spending last year and slower growth projections for both private and Medicare spending in the latter part of the next decade, according to a study by the Health Care Financing Administration.

Despite the downward revision, national health spending still is expected to double by 2008 to \$2.2 trillion, up from \$1.1 trillion in 1997.

The new projections show the rate of annual growth slows to an average of 6.5% for the 1997-2007 decade. Last year's calculations had projected a 7% yearly average growth. "These figures show that our efforts, such as waste, fraud and abuse initiatives, have helped control health-care costs in the United States," said Donna Shalala, secretary of health and human services.

Medicare spending is projected to grow just 4.5% a year over the 1997-2000 period, compared with 5.1% as predicted last year, the study said.

Small-Company Pensions Spur Lawmakers' Concern

By ELLEN E. SCHULTZ

Staff Reporter of THE WALL STREET JOURNAL

If you overhear a group of professionals discussing "SEP offenders," you aren't misunderstanding a vice-squad conversation. Instead, you have caught wind of actuaries and accountants discussing certain small-business clients.

The term refers to one of many practices in which small-company owners turn pensions and other retirement plans into personal tax shelters, while providing little, or nothing, for their employees. An SEP offender? One who plays around with a tax-advantaged Simplified Employee Plan.

Retirement consultants say pension practices that skew benefits toward owners involve many types of pensions and are becoming more widespread. The techniques are increasingly controversial as worries abound about the adequacy of retirement coverage for the 40 million Americans who work at auto shops, print shops, poodle parlors and other enterprises with 100 or fewer employees.

Because of such concerns, lawmakers in Washington are meeting this week to consider ways to modify retirement-plan laws covering small companies. Many proposed changes are backed by small-business groups, whose members maintain that government regulations make it too complicated and costly to offer retirement benefits. But some pension experts who work with small businesses say the measures would simply make it easier for entrepreneurs to treat retirement plans as tax shelters.

The result could be "more game-playing by employers who want to deny appropriate benefits to participants in plans," says Dianne Bennett, president of a Buffalo, N.Y., law firm that works with small businesses who testified on the topic before a congressional committee in March.

Small-business groups, on the other hand, argue that an easing of the rules would prompt more employers to set up retirement plans. "It's time to give small businesses that want to provide retirement benefits for their employees an extra break, not an extra burden," says Carol Sears, president of the American Society of Pension Actuaries, a professional group whose clients are primarily small-business owners.

There is little dispute over this: Across the U.S., retirement coverage at small companies is lousy. Only 20% of workers at small companies have any kind of

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retirement plan, compared with 66% at larger companies.

The good news is that thousands of small employers have set up 401(k)s in recent years. Many have been prompted by declining administrative costs, which can be \$2,000 a year or lower, and the ease with which the plans now can be set up; it takes little more than a call to a toll-free number to set up a full-service 401(k) program operated by Merrill Lynch & Co., Massachusetts Mutual Life Insurance Co., Charles Schwab Corp., Vanguard Group and T. Rowe Price Associates, among many others.

But many companies say they need more encouragement, and numerous small-business groups have thrown their support behind a bill sponsored by Reps. Rob Portman (R., Ohio) and Ben Cardin (D., Md.). Among its features: measures that would enable higher-paid employees to put more money into profit-sharing and 401(k) plans.

One proposal would increase the ceiling on total per-employee contributions, by both employer and employee, to \$45,000. The current limit is 25% of pay, or \$30,000, whichever is less. Another provision would raise the ceiling on employee contributions to a 401(k) to \$15,000 a year (or \$20,000 if the person is age 50 or older), up from \$10,000.

But few employees can afford to put in \$10,000, let alone more than that, "so these provisions would increase retirement savings only for the high-income people," says Daniel Halperin, a pension and tax professor at Harvard Law School and former assistant secretary of the Treasury for tax policy.

That, say employer groups, isn't the point. "You want to make it attractive to the small-business owner to set up a retirement plan," says James Delaplane, vice president for retirement policy for the Association of Private Pension and Welfare Plans, a trade group for large and small employers. "They want to be able to fund a reasonable benefit for themselves, and the current limit levels don't make that easy." Provided higher limits, they'll be more likely to set up retirement plans, he says.

Employers also say "antidiscrimination" rules need to be simpler. These are rules that require employers to include a certain percentage of rank-and-file employees in the retirement plan, alongside the executives. In recent years, employers have successfully lobbied to soften the rules, and this has led to a proliferation of so-called cross-tested plans—dubbed "cross-dressing" plans in the actuarial

world—that can legally skew most plan contributions to the highest paid. Indeed, at the Investment Company Institute 1999 Retirement Plan Conference for benefits professionals in Washington in March, the handout for one presentation gave tips for employers whose "goal" is to "skew benefits/contributions significantly to management/owner."

The Portman-Cardin bill includes a handful of provisions that would offer employers more flexibility in applying the rules. Mr. Delaplane, the trade-group retirement expert, says the changes "would not be a setback to assuring that benefits will flow to all segments of the employee population."

Other legislative proposals that trouble some observers include a plan to reduce scrutiny of small-company retirement plans. Proposals would allow small companies to file simplified returns for their retirement plans, and to provide summary annual plan reports only if the employee asks, rather than annually, among other things. Mr. Delaplane says, "We need to balance the need to have information available to employees" with the paperwork burden it creates for employers.

Reducing disclosure isn't a wise move, counters Karen Ferguson, director of the Pension Rights Center, in Washington, D.C. It would simply make it harder for employees to get information about their benefits—assuming they even knew they had a plan.

As evidence that reduced disclosure can produce problems, Treasury officials point to the Simplified Employee Plan, or SEP. Employers aren't required to file returns on the plans, a situation that has resulted in significant SEP fraud, according to Treasury officials. "They're supposed to cover everyone at a company, but the owners treat them like personal savings accounts," says an IRS official. Because employers aren't required to provide SEP reports to employees, employees often don't know there is a retirement plan from which they may be illegally excluded.

The lack of barriers to SEP abuses were easily detected when a reporter went to several large banks in New York saying she wanted to set up an SEP plan. Bank employees asked for no verification that the business existed. When the reporter went so far as to write a \$30,000 check—supposedly the company contribution for all the mythical employees—the only question asked: "How do you want to invest the money?"



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salon.com > News July 13, 1999

URL: <http://www.salon.com/news/feature/1999/07/13/guns>

City slickers

New Orleans, Boston, Detroit and Alameda County, Calif., are suing gun manufacturers and dealers for distributing what they deem a dangerous product -- and then turning around and selling guns themselves.

BY JAKE TAPPER

When Paul Jannuzzo, the vice president and general counsel of Glock Inc., the Smyrna, Ga., gun manufacturer, heard that the city of New Orleans was preparing to sue the gun industry, he couldn't believe the hypocrisy.

Jannuzzo, after all, had been working with New Orleans, to help the city swap around 10,000 guns in its possession -- most of which had belonged to criminals -- in exchange for 1,700 new Glock .40-caliber pistols for its officers. The deal was worth \$613,000.

Thus the city of New Orleans was dumping onto the street the same allegedly "unsafe" product that it was now suing Glock and several other companies -- including some New Orleans pawn shops -- for distributing.

Since last October, more than 20 U.S. cities and counties, copying the states that sued the tobacco industry and won, have filed lawsuits against gun dealers and manufacturers for various forms of negligence and irresponsibility. The NAACP joined the action on Monday.

One small glitch in the argument, however: Some of these cities and counties have been more than willing to engage in quiet deals with these same manufacturers to trade in their old police weapons -- and sometimes even confiscated criminal weapons -- for new guns for their officers.

In essence, these cities served as gun distributors themselves. In order to save a buck, they're dumping thousands of firearms, despite the fact that many of them are publicly trying to get guns off the street. New Orleans isn't the only city with the contradictory gun policy: Boston, Detroit and Alameda County, Calif., which includes the high-crime city of Oakland, have also sold confiscated guns while suing the industry. By contrast, the federal government, as well as cities like San Francisco and Los Angeles, destroy criminals' guns.

"It's unfortunate because some of them are beautiful guns," says a

spokesman for the LAPD, which eventually melts down all of its confiscated weapons. "But if a gun's been used to kill someone, they don't want it out there where it could kill someone else."

In the New Orleans swap -- which is believed to be the largest police trade-in of criminally used weapons -- Kiesler Police Supply and Ammunition in Jeffersonville, Ind., worked as the broker between New Orleans and Glock. The city traded 7,300 weapons seized in crimes as well as 700 Berettas that at one point belonged to New Orleans cops.

Included among the 7,300 criminals' guns that the city of New Orleans was willing to see dumped back out on the street: 230 semiautomatic assault weapons -- including TEC-9s, AK-47s, Cobray M11s, an Uzi and a Fabrique National, a self-loading military rifle. The manufacture and importation -- though not the sale -- of all of these weapons were banned by Congress in 1994.

Dennis Henigan, legal director of the Center to Prevent Handgun Violence, which is co-counsel for many of these lawsuits, says that the gun industry's outrage over this perceived hypocrisy is "part of an overall strategy to change the subject." [Full disclosure: I worked at the Center for six months in 1997.]

"Ever since we filed the case on Oct. 30 of last year," Henigan says, "the gun industry wants to talk about gun swap programs, they want to talk about how greedy trial lawyers are. What they don't want to talk about is how dangerous their products are. You'll notice: They're not defending their products."

But Henigan didn't defend the merits of the gun swaps themselves. Assuming that these products are unsafe and the companies should be held liable, which is what Henigan is arguing through lawsuits, cities that engage in gun swap programs would seem to have some liability as well.

So many cities have engaged in the practice that the International Association of Chiefs of Police was moved to pass a resolution last October condemning police gun swaps. "The re-circulation of these firearms back into the general population increases the availability of firearms which could be used again to kill or injure additional police officers and citizens," the IACP resolution read. It urged "all law enforcement agencies to adopt a mandatory destruction policy," like the federal government has.

But despite the IACP resolution, and federal law enforcement's example, police departments -- often short on cash for new weapons -- continue to cut financial corners by dancing with the very devil their friends at city hall are suing.

Take the city of Boston, which is the most recent city to file a suit against the gun industry, on June 3. The Boston suit argued that "The defendants employ a strategy which couples manufacturing decisions, marketing schemes, and distribution patterns with a carefully constructed veil of deniability regarding point of sale transactions."

But according to a Boston Police Department administrator, the city has for years traded its old guns with the Interstate Arms Corporation, a

Massachusetts gun dealer that refused to comment.

William Casey, deputy superintendent of the Bureau of Administrative Services for the Boston Police Department, says that thousands of guns belonging to uniformed Boston cops and detectives were swapped one-for-one for new guns. A few years ago, the Boston PD traded 3,000 to 4,000 .38s for the same number of 9 mms, says Glock's Jannuzzo. Then just a few weeks ago, the Boston PD traded around 4,000 9 mms for .40-caliber Glocks, a deal that could be worth up to \$1.7 million to the city.

"I just got mine two weeks ago," Casey said in an interview with Salon News on Friday. "We did this with the caveat that the guns would be sold outside of the United States, so as to prevent them from being circulated in the U.S."

But according to Jannuzzo, Boston's previous gun swap -- when it traded .38s for 9 mms -- had "no such caveat. There were no restrictions on that first deal whatsoever."

Talk about a "veil of deniability." And this from a city now suing the gun industry for, among other things, "willful blindness."

Police departments -- in order to pay for much-needed equipment -- have sometimes turned to creative ways to find money for new weapons.

The city of Detroit filed its lawsuit against the gun industry on April 26. But when Detroit sought to buy new Glock .40-caliber pistols in the mid-'90s, amid a budget crisis, the city looked to sell the 9,000 guns it had in its inventory, says Jannuzzo. "Those were old guns, dating back to when Teddy Roosevelt charged up San Juan Hill," he says. Detroit didn't swap its inventory, however, as New Orleans, Boston and Alameda County did. According to Jannuzzo, Detroit put out word that the inventory was for sale, and then accepted the highest bid, from a private gun dealership in northern Vermont. Then, with that money, Detroit purchased its new weapons from Glock. A spokesman for the Detroit Police Department could neither confirm nor deny where the funding came from, though he did say the department uses relatively new .40-caliber Glock pistols.

Just a few weeks ago, on May 25, San Francisco filed its lawsuit against the gun industry on behalf of several jurisdictions, including Berkeley, Sacramento and nearby San Mateo and Alameda counties.

According to Jannuzzo, however, just last year the Alameda County Sheriff's Department traded 500 9 mm Glocks for roughly the same number of Sigs. "About two years ago we did have the Glocks and we did trade them for Sig Sauers," said Deputy Sheriff R. Glen, who added he didn't know the process by which the guns were traded.

This stands in marked contrast with the San Francisco Police Department, which destroys all of its old weapons. "I got the guy right here who cuts them up with a saw, puts them inside wrecked cars and watches them go through a conveyor belt and get shredded," said San Francisco Police Officer Charlie Lyons of the property clerk's division.

But by far the most extreme example of this practice can be seen in the

Big Easy. New Orleans, it should be noted, isn't just one of some 20-odd cities and counties to sue gun manufacturers and distributors. When it filed its suit last October, New Orleans was the first city to do so -- which Mayor Marc Morial is fond of reminding voters and reporters and fellow mayors and anyone within earshot.

The New Orleans gun swap was similarly groundbreaking, says Doug Kiesler, who brokered the deal. He calls it "the largest confiscated deal ever to happen in the U.S."

(Morial refused comment; a spokesman said that his office was investigating the deal with Glock and would make no comments until that investigation was concluded.)

Rafael Goyeneche, the president of the Metropolitan Crime Commission of New Orleans, a private watchdog group, says he was offended when he heard of the mayor's double-dealing. "In many cases, police officers had put their lives on the line in order to get those guns," Goyeneche says. "To put them back out there through commerce we felt was really the wrong message."

Especially when you consider Morial's own rhetoric. "We have been so focused here in New Orleans on getting guns off the street and protecting our citizens," he said at the press conference announcing the Oct. 30 lawsuit.

Something about New Orleans' gun policy seems markedly out of focus, of course, and not just the surface irony of its putting more guns on the street while trying to "get guns off the street."

The New Orleans suit, for instance, takes a consumerist approach to the issue of guns, arguing that the industry has the technology to make its guns safer, but it refuses to do so. The guns should have locks, the lawsuit states, and the guns should be making use of the high-tech options that use fingerprint ID and computer-chip technology to make sure that no one but the approved user can pull the trigger.

"Guns are sold without the means to prevent their use by unauthorized users, without advance warning which would prevent such shootings by alerting users of the risks of guns, and of the importance of proper storage of guns, and without other safety features," the suit reads.

Gun dealer Kiesler observes that "one of the reasons they said they were going to sue us was that we weren't providing gun locks." But on the 8,000 guns the city sent to Kiesler's company in Indiana, he says, only two were equipped with locks.

To hear Jannuzzo tell it, there's little difference between what Glock does and what New Orleans did. "We're an importer," he says, explaining that the Georgia office of Glock assembles, test-fires and conducts all warranty work on Glock firearms, but the guns are actually manufactured in Austria. "We distribute our guns to make money; [Morial] did it to save money. What's the difference?"

"That was kind of hypocritical," says Paul Bolton, of the International Association of Chiefs of Police. "To say that 'guns are bad and terrible, guns are unsafe,' and then they turn around and instead of destroying

they sell them -- it does seem to lean in that direction, of saying one thing in a lawsuit and then turning around and doing another thing."

The story first came out during a Jan. 27 confrontation between Jannuzzo and Morial on NBC's "Today" show. After a discussion of the New Orleans lawsuit, Jannuzzo -- in a last-minute snarky aside -- mentioned the gun swap.

Morial, for his part, tried to justify the deal by mentioning that, as part of the agreement, Glock had "agreed not to sell them in Louisiana."

And that was, in fact, part of the deal. Morial was apparently fine with these guns returning to the streets, as long as none of the streets had a Louisiana ZIP code.

Still, even that minimal pledge means little in reality. The April 8 New Orleans Times-Picayune contained an ad from a local gun shop advertising the sale of Beretta 9 mms formerly belonging to members of the New Orleans Police Department.

"Own a piece of New Orleans history," the ad said, "All are original duty weapons and are numbered and stamped N.O.P.D." The guns came with two 15-round "pre-ban clips."

Goyeneche says that the gun swap -- even with the Not-in-my-bayou promise not to resell in Louisiana -- was a joke. "Some of the weapons resurfaced at gun shops in the New Orleans area," he says. "They were sold from Kiesler to someone in Texas, who sold them to a shop in New Orleans. That's the folly of thinking you can stop these weapons from reentering your community."

Kiesler says that the five or so gun distributors that broker these deals offer different trade-in values for the guns depending on to whom they're permitted to resell them. "Say it's a Smith & Wesson model 686 revolver, which is a very popular gun," he explains. "We pay \$200 if we can sell them to any lawful buyer. Now, New Orleans put in this thing with Glock so that the weapons could not be sold in Louisiana, so they would have gotten probably \$175 on trade. Then the next level is if you can only sell the guns to other police departments, that would drop the value to \$100."

After taking heat from the local press on this issue, Morial suspended the gun swap; according to Jannuzzo, New Orleans still owes Glock around 1,500 to 2,000 guns.

"Let's get to the bottom of it," Morial said in a news conference he called when local criticism of the gun swap grew deafening. "Were any weapons that should not have been traded, in fact, traded?" he asked. In March, Morial told the Times-Picayune, "Do you know whose idea [the gun swap] was? The Police Foundation's. But when the controversy came, they hid and left me to defend a controversy that basically started at the Police Department."

But the gun swap had all been done according to an agreement that Morial signed on Feb. 5, 1998. "It is our understanding your representatives [have] determined, based on a preliminary inspection, that we have a sufficient number of confiscated firearms to make this an

even exchange, resulting in no monetary obligation to the City of New Orleans," reads the document, which bears the signatures of both Morial and Richard J. Pennington, the New Orleans superintendent of police.

Meanwhile, the practice continues.

In 1997, the New Hampshire State Police signed a contract with Smith & Wesson to trade its 9 mms for .45s, a deal worth about \$236,000, according to the state police. "It saved the taxpayers an enormous amount of money," says Sgt. Patrick Pourier. The concern that the guns might fall into the wrong hands "is always there," he adds, "but Smith & Wesson is only going to sell them to a dealer, and the dealer is only going to sell them to a qualified person. And now we've got top-quality firearms so we can protect citizens of New Hampshire. And I guess it's good advertising [for Smith & Wesson] to have a state police agency carrying their weapons."

Like free Nike shoes for NCAA basketball teams.

In the last few months, the Charleston, W. Va., Police Department traded 175 or so Smith & Wesson service pistols for 200 Glocks. "We had to make a decision on what to do, ethically," says Maj. Pat Epperhart. "The other option was to destroy them. But without getting into the ethical arguments, we did it." Bottom line, says Epperhart. "If it had not been for the swap program we would not have been able to afford new weapons."

New Jersey's Bergen County Sheriff's Department and the Alaska State Troopers have also recently engaged in gun swaps. And according to a Glock document, the following law enforcement agencies are not only trading old law enforcement weapons but confiscated criminal weapons as well: Alabama State Troopers; the Mobile, Ala., and Biloxi, Miss., police departments; the Dayton and Lima police departments in Ohio; the Clayton County Sheriff's Department in Georgia; the Gary, Ind., Police Department; Virginia's Mecklenburg County Sheriff's Department; the Oklahoma City Police Department and Washington state's Yakima County Sheriff's Department.

One big difference between the above law enforcement agencies and those of New Orleans, Boston, Detroit and Alameda County: The former are, of course, not suing the gun industry for marketing an unsafe product; the latter group is.

The New Orleans gun swap has caused more problems than just a local embarrassment for Morial. In one instance, as the Times-Picayune reported in February, a 9 mm Beretta used in a January 1997 shootout had accidentally been traded to Glock through Kiesler, which was only able to recover the gun's barrel and slide.

What's more, Goyeneche says that the gun industry has an interesting strategy in the works in the event that any of the swapped firearms turn up at the scene of a crime.

"I've heard that the defendants are going to [name as a] third-party the city of New Orleans, so the city will be named as a defendant," Goyeneche says.

New Orleans suing New Orleans. It's easy to see a certain poetic justice in that.

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Lawsuits Lead Gun Maker To File for Bankruptcy

By FOX BUTTERFIELD

In the first sign of the impact of the growing number of municipal lawsuits against the gun industry, a well-known manufacturer of handguns has filed for bankruptcy protection, raising concern among city officials across the country that other firearms companies may also use bankruptcy to try to avoid the suits.

The bankruptcy filer, Davis Industries, one of a group of companies in suburban Los Angeles that are controlled by a single family and its friends, produces Saturday night specials, cheap handguns favored by criminals. Davis is one of the 10 largest makers of handguns, and studies have found that its products tend to be characterized by a short "time to crime" — that is, a remarkably brief period between sale and the point at which they show up as weapons used in criminal acts.

In another indication of the pressure created by the municipal lawsuits, Bob Delfay, president of the gun industry's largest trade association, says he plans to propose an unusual conference with senior law-enforcement officials, representatives of the National Rifle Association and executives of gun companies to discuss how the industry and government might curb trafficking by people who buy firearms on behalf of criminals and juveniles.

It is unclear precisely what measures Mr. Delfay, of the National Shooting Sports Foundation, has in mind to stop these so-called straw purchases. But any proposals by the gun companies for greater government regulation or industry self-policing of sales and marketing practices would be a substantial departure from the manufacturers' insistence that they are already sufficiently regulated by thousands of laws.

Only last week, Mr. Delfay's group took over a more conciliatory gun-industry organization, the American Shooting Sports Council, which had been trying to open negotiations with lawyers for some of the cities suing the firearms makers. In an interview, Mr. Delfay insisted that his idea for a conference was not intended to open the way for a settlement.

So far, 22 counties and cities, including Chicago, Los Angeles and Detroit, have sued the gun makers, accusing them of failing to include enough safety devices or negligently marketing their guns in ways that enable criminals and juveniles to buy them. The suits seek damages for extra police and hospital costs resulting from gun violence, but more important, city officials say, they want to force the gun companies to accept greater regulation of the way they design, manufacture and distribute their products.

More cities are expected to file suit soon, and lawyers familiar with the issue say New York is close to becoming the first state to bring such a suit. "If New York comes into this, and there are more suits, at some point soon a critical mass will be reached where the costs alone of defending these suits are going to eat up the gun companies," said John Coale, a lawyer in Washington who is representing New Orleans and several other cities that have sued.

Mr. Coale, one of the Castano Group of lawyers who were active in

suing the tobacco industry — the group is named for a friend of several of them who died of a tobacco-related disease — estimated that the cigarette companies had spent \$600 million a year defending themselves against the states. "The gun companies simply can't afford it," he said, since they are so much smaller and sales of guns have been flat or declining for a decade.

"So if you get too many cities and states suing," Mr. Coale said, "the manufacturers will go into bankruptcy protection. And the day that happens, the suits stop and it is lose-lose for everybody."

Davis Industries, of Chino, Calif., filed for bankruptcy reorganization in the Federal bankruptcy court in nearby Riverside on May 27, said Alan Stomel, a lawyer who represented creditors in the unrelated 1996 bankruptcy of Lorcin Engineering, another of the gun makers controlled by the same owners as Davis Industries and known as the Ring of Fire companies (because their locations form a ring around Los Angeles).

"Bankruptcy is a very useful negotiating tool," Mr. Stomel said, "and predictably the more suits that are filed, the more these gun companies

A maker of Saturday night specials seeks refuge in court.

are going to file for bankruptcy."

A spokesman for Davis Industries, who declined to give his name, confirmed that the company had filed for bankruptcy. "We do what we got to do" in response to the suits, the spokesman said. "I'm sure other companies will do the same thing."

Mr. Stomel said Davis Industries faced several problems: the municipal lawsuits, wrongful-death and personal-injury suits by individuals, a messy argument between the two owners, Jim and Gail Davis, who were recently divorced, and a bill that is expected to pass the California Legislature that would bar the manufacture of cheap handguns.

A lawyer for one of the cities suing the gun makers said bankruptcy "is going to be a huge pain" because it will require much more time and expense for the cities, limit the amount of damages they may collect and, perhaps most important, put the litigation in Federal bankruptcy court. Bankruptcy judges, the lawyer said, are more likely to act favorably to the gun companies than urban juries in state courts.

But Paul Januzzo, general counsel for Glock Inc., one of the largest handgun makers, said it was unlikely that the older, more established, mostly Eastern firearms companies would turn to bankruptcy.

"We are confident we can win the suits, if we have a number of companies litigating together," Mr. Januzzo said.

Lawsuits, he added, are nothing new to the industry. "It would be an unusual gun company that doesn't have a dozen lawsuits a year against it," he said. "This is America."

The New York Times

THURSDAY, JUNE 24, 1999

Microsoft's Final Witness Is Questioned on Payments

By JOEL BRINKLEY

WASHINGTON, June 23 — A Government lawyer began cross-examination of Microsoft's final witness in its antitrust trial today and quickly prompted him to disclose that Microsoft had paid about \$250,000 for his testimony and related work.

The witness was Richard L. Schmalensee, dean of the Sloan School of Management at the Massachusetts Institute of Technology and Microsoft's expert economist for the trial. He said that over the last two years he has charged Microsoft \$800 an hour for his trial work. In addition, the private company through which he bills Microsoft paid him a \$200,000 bonus last year, double that of the previous year, presumably because of the Microsoft income.

A fee of \$800 an hour is not an unusual retainer for an expert witness of this sort. But David Boies, the Government's lead trial lawyer, apparently hoped the disclosure would further his broad effort to impeach Mr. Schmalensee's testimony. The last time Mr. Schmalensee was on the stand, in January, Mr. Boies suggested that he was Microsoft's "house economist."

Expert witnesses are routinely paid for their testimony. And Mr. Boies posed his questions long after the Government's own expert economist, Franklin M. Fisher, another M.I.T. professor, had left the stand, giving Microsoft's lawyers no opportunity to pose similar questions to him. Testimony while Mr. Fisher was on the stand suggested that he, too, stood to profit handsomely from participating in the trial.

Michael Lacovara, a Microsoft lawyer, ended his friendly examination of Mr. Schmalensee this morning with a long series of questions about Web-based applications — software programs that reside on the Web and are used while on line.

He showed several examples of new entrants in this budding market and observed that the trend suggested Microsoft did not have a durable monopoly in personal computer operating systems. Judge Thomas Penfield Jackson, who is hearing the case without a jury, had shown interest in the subject Tuesday evening, saying he imagined software companies were writing these programs "in droves."

This morning, Mr. Lacovara introduced as evidence an Internet news article published just two hours before Judge Jackson's remark, head-

lined "Web-based applications debut in droves."

"Sometimes, Your Honor, we get lucky," Mr. Lacovara said, and the judge smiled appreciatively.

But when Mr. Boies's turn came, he asked Mr. Schmalensee if it was not true that to use a Web-based application, a user needed a Web browser and an operating system — in most cases, Windows. Mr. Schmalensee reluctantly agreed. The unspoken question was: How does this phenomenon threaten Windows if a Windows computer was needed to use the programs?

In quick succession, Mr. Boies also managed to discredit two charts that Mr. Schmalensee had offered as evidence on Monday and, by implication, to raise questions about the validity of a wide range of statistics the witness had offered as evidence.

The charts were meant to show that the Netscape browser was growing and thriving, despite Microsoft's efforts to crush it. Mr. Boies quickly pointed out that the chart was flawed, the conclusions exaggerated. Mr. Schmalensee, clearly flustered, stammered a bit as he said: "A comparison here suggests there's a difficulty. One of these things is wrong, that's apparent."

Later, Microsoft offered a corrected version of the chart. But then Mr. Boies set about attacking the underlying data. He showed several E-mail messages in which a survey company had told Microsoft that one of the key questions used to derive browser market share was badly flawed, resulting in unreliable answers. But Microsoft had not accepted the company's suggestion to change it.

Mr. Schmalensee said he had not even been aware of the discussion, though the private company with which he is associated was a party to the E-mail dialogue. In any case, the witness said, "I'm not a specialist in writing surveys, and wouldn't have felt competent to evaluate it." Besides, he added, "I don't consider it particularly material."

Then Mr. Boies showed that one key question was so badly designed that 20 percent of the answers were demonstrably unreliable. "A 20 percent figure inconsistency — wouldn't that bother you?" he asked Mr. Schmalensee.

"It would really depend on the exact question asked," the witness replied.

THE NEW YORK TIMES,

THURSDAY, JUNE 24, 1999

Focus of Gun-Control Fight Shifts to Cities and States

By PAUL M. BARRETT and JEFFREY TAYLOR
Staff Reporters of THE WALL STREET JOURNAL

WASHINGTON—The drive for gun-control legislation is running out of steam on Capitol Hill, but the growing municipal litigation against the firearm industry presents a separate opportunity for restricting how guns are made and sold.

The gun industry, to be sure, has projected a hard line in defending against the municipal legal assault. But executives at some gun companies privately leave open the possibility that a settlement of the lawsuits could include regulation that would never stand a chance in Congress.

"I don't know where the litigation is going, but that's where the real action could be," says Robert Spitzer, a political scientist at the State University of New York and author of the book "The Politics of Gun Control."

Another arena worth watching is state politics. California, Massachusetts and New Jersey, for example, are stepping up efforts to curb how guns are marketed within their borders.

The shift from the national stage comes less than three months after the school massacre in Littleton, Colo., seemed to inject new urgency into the gun debate. But the campaign for strengthened national gun-control laws already is dwindling. "To be honest, the momentum is gone," concedes Kristen Rand, a lawyer and lobbyist for the Violence Policy Center, an antigun group in Washington.

Gun politics in Washington continue to be "dominated by one giant player, the NRA," Prof. Spitzer says. The National Rifle Association again last month demonstrated its vaunted ability to mobilize a vocal membership to pressure House members, many of whom count on the gun owners' lobby for campaign contributions, and block gun-control legislation.

But because the NRA isn't a direct participant in the litigation process, Prof. Spitzer says, there is some potential for regulation to come from the courtroom. Suits filed on behalf of 23 cities and counties—a number that is expected to grow—demand hundreds of millions of dollars to reimburse the public costs of gun violence. However, a number of big-city officials have indicated their real goal is to pressure the industry into producing safer handguns and policing their distribution more vigilantly.

A vivid illustration of the litigation's real goal is a proposal for settlement drawn up by attorneys representing Atlanta, Cincinnati, Cleveland, New Orleans and Newark, N.J. Circulated to gun-industry representatives in May, the proposal makes no reference to cash payments to the cities. Instead, it lists 17 "remedies," such as limiting consumers to one gun purchase a month and requiring manufacturers to invest 1% of their gross revenue on research and production of "smart gun" technology that would enable firearms to be discharged only by authorized users. (Under federal law, individuals who pass a background check may buy as many guns as they wish.)

The proposal became the basis of pre-

liminary settlement discussions between a lawyer for the cities, John Coale, and a gun-industry lobbyist, Robert Ricker. Those discussions and conciliatory public statements by Mr. Ricker led to a hard-line backlash from some gun executives. The trade group Mr. Ricker ran, the American Shooting Sports Council, was folded, and he is leaving the industry to set up a lobbying business in Sacramento, Calif.

But the truce talks aren't dead, according to Robert Delfay, the head of a rival trade group, the National Shooting Sports Foundation. "Industry is interested in discussing some of the issues raised by the municipal lawsuits," Mr. Delfay says. "We're just going to do it in a more structured fashion, with more people involved." Specifically, he says that depending on the details, gun companies are prepared to agree to ship all handguns with locks and to accept background checks for all gun-show transactions.

Another possible compromise position that has at least some support in the industry is intended as a counteroffer to the one-gun-a-month idea. Paul Jannuzzo, vice president and general counsel of the U.S. unit of Austria's Glock GmbH, a major handgun maker, has circulated a plan that would allow a purchaser who wanted multiple guns to leave the store immediately with only one. The buyer would have to wait a period—Mr. Jannuzzo has suggested 72 hours, but says perhaps it should be shorter—before the other guns were made available. The dealer would alert local and federal law-enforcement officials, who would then have enough time to decide whether to investigate.

"There are undoubtedly other common sense solutions that take a crime-fighting approach without affecting law-abiding citizens," Mr. Jannuzzo says. Combatants on both sides of the gun issue agree, however, that legislation introducing a new waiting period of this sort would be dead on arrival on Capitol Hill.

As the municipal lawsuits proliferate, states are also taking action. The California Senate last week approved a one-gun-a-month limit and sent it to Democratic Gov. Gray Davis, a strong gun-control advocate. Also last week, the New Jersey Senate passed legislation mandating sale of only smart guns in the state, although not until the technology is available from at least two manufacturers.

And the top court in Massachusetts ruled last week that the state's attorney general has authority to regulate guns as consumer products, a power that no such state official now exercises. Already, some gun wholesalers are curbing sales in Massachusetts out of concern about tougher regulation of handguns, according to industry officials.

Still more gun-control efforts are expected at both the state and local levels.

"There is a rumbling discontent that nothing is happening in Congress," says Ms. Rand of the Violence Policy Center, "and that's why you see all of this other activity."

In Congress, a Senate-passed juvenile-justice bill containing modest gun-control proposals has been unilaterally stalled by conservative Republican Sen. Robert Smith of New Hampshire. Under Senate rules, any senator can put a "hold" on a bill for about any reason; Sen. Smith, a long-shot presidential hopeful, says he is holding up the bill because he objects to its gun-control provisions.

The four provisions are: a requirement of background checks for all buyers at gun shows; a ban on imports of high-capacity ammunition clips; a requirement that all handguns be sold with trigger locks; and a ban on gun sales to people convicted of gun crimes as juveniles.

In theory, the Senate bill is to be merged with a separate teen-crime bill approved by the House. But the maneuverings of pro-gun House members and the NRA resulted in a House version of the bill that lacks any gun-control measures. Pro-gun lawmakers "are going to throttle this bill any way they can," predicts House Democratic Leader Richard Gephardt of Missouri.

John Czwartacki, a spokesman for Senate Majority Leader Trent Lott of Mississippi, counters that there is "time to work things out" and get Sen. Smith to lift his hold on the legislation before the August congressional recess. But gun-control opponents doubt that any deal to which Sen. Smith might agree would pave the way for substantial new curbs on guns.

"No matter who controls Congress after the 2000 elections," Prof. Spitzer adds, "I don't think you'll see any significant steps toward meaningful national controls on the flow and availability of guns."

THE WALL STREET JOURNAL

THURSDAY, JULY 8, 1999

Archer Proposes Cut in Capital-Gains Tax

Top Rate for Individuals Would Decrease to 15% On Stocks, Other Assets

By GREG HITT

Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON — Rep. Bill Archer, chairman of the tax-writing Ways and Means Committee, is proposing to lower the top capital-gains tax for individuals to 15% from 20%.

The new rate would apply to stocks, bonds and other assets held at least one year and would be effective retroactively to July 1. For taxpayers in the lowest income-tax bracket, capital gains would be taxed at a 7.5% rate, down from 10%, under the Texas Republican's proposal.

"Studies show that lower capital-gains taxes keep our economy strong and help create jobs," Mr. Archer said in a statement released yesterday.

The Ways and Means Committee is scheduled to begin action next week on a broad tax-cut package, and Mr. Archer has been dribbling out details for more than a week in an effort to build momentum for the legislation.

Earlier, the chairman announced his bill would include proposals designed to ease the cost of long-term health care. Among other things, Mr. Archer wants to make long-term health-insurance costs fully deductible from personal-income taxes. Premiums for such insurance policies range from \$250 to almost \$4,000 a year, depending on the age of the insured. Mr. Archer also would create a new personal exemption for taxpayers caring for elderly family members in their homes.

Mr. Archer's capital-gains plan would make obsolete a measure enacted in 1997 that created a special 18% tax rate on gains from assets held at least five years. The new proposal wouldn't change the short-term capital-gains tax rate. Under current law, gains on assets held less than a year are taxed as ordinary income, and are potentially subject to much higher rates than assets held longer.

Trent Duffy, a spokesman for the Ways and Means Committee, said Mr. Archer is still studying whether to propose additional changes in capital-gains tax law. Among the issues under consideration is whether to lower the top 25% capital-gains

tax on depreciable real estate and the top 28% capital-gains tax on collectibles, as well as the 35% capital-gains tax rate paid by corporations.

White House spokesman Barry Toiv promptly blasted Mr. Archer's proposal, calling it a "risky, costly scheme" in which "the benefits would be skewed away from the average taxpayer and toward the wealthiest in our society." Still, President Clinton has repeatedly suggested in recent days that he is willing to entertain a GOP-crafted tax cut as part of a broad budget compromise that gives him some of his main spending priorities. Indeed, two years ago, Mr. Clinton worked with the Republican-led Congress to lower capital-gains taxes.

In the Senate, Finance Chairman William Roth (R., Del.) favors lowering the capital-gains tax and is expected to work closely with Mr. Archer to accomplish the goal.

Meanwhile, the White House yesterday invited top congressional leaders in both parties to meet with Mr. Clinton next week to discuss issues raised by the ballooning budget surplus. Mr. Toiv said the main focus of the meeting would be Medicare, but added that "that will undoubtedly lead to a discussion of other budget issues." Mr. Clinton "feels that we're halfway through the year and . . . we need to make real progress on this issue—he wants to kick-start that," Mr. Toiv added.

White House aides and top GOP leaders have spoken of the need to work together to avoid a year-end budget impasse, but have yet to establish any framework for doing so.

THE WALL STREET JOURNAL

THURSDAY, JULY 8, 1999

Suits Targeting Gun Makers Are Off the Mark

By JOHN R. LOTT JR.

Having won a landmark jury verdict in Brooklyn, plaintiffs' lawyers are lining up to take more shots at the gun industry. They claim that gun makers are negligently selling weapons that wind up being used in crimes and accidental deaths. And just as in the tobacco cases, government officials are jumping at the chance to collect some revenues by targeting an unpopular industry. Five cities have joined in suing gun makers, and others threaten to do so. Chicago went so far as to conduct undercover sting operations supposedly showing that retailers recklessly market their guns directly to undercover cops posing as gang members.

The Clinton administration is also doing its part for its friends in the plaintiffs' bar. The Bureau of Alcohol, Tobacco and Firearms recently released a report asserting that, more often than not, the guns used in crimes are purchased, not stolen. This finding received uncritical coverage on all the major television networks and newspapers. President Clinton also constantly asserts that gun shows serve as a source of guns to criminals, misleading people into believing that licensed firearms dealers can somehow sell guns at such shows without conducting criminal background checks.

A little perspective is needed here. Americans own about 240 million guns.

Some 450,000 gun crimes were committed in 1996. Even in the unlikely case that the average criminal uses the same gun just twice, only 0.09% of all guns are used for criminal purposes in any given year.

The administration report claims that "straw" purchases—in which guns are bought with the intent of reselling them to criminals—may account for between a third and half of the guns used to commit crimes, but its evidence is very indirect. Instead of actually tracing a gun's history, the administration study assumes that guns that are less than three years old are being transferred by straw purchases. The report acknowledges that many of the guns that find their way into crime after three years might have been stolen. Even so, let's say the administration's most extreme claims are true. If criminals on average use one gun to commit two crimes, only about 0.5% of recently sold guns have made it into illegal use.

The report never even traces more than 43% of the guns recovered in crimes—and, as the report acknowledges, these untraced guns are much more likely to be stolen. All the report's assumptions were consistently made to exaggerate the rate at which straw purchases are made.

Is this maximum estimate of a 0.5% of sales evidence of recklessness? Is the standard that no guns sold by retailers will ever find their way into criminal activity?

The plaintiffs' solution to this supposed oversupply of guns is even more remarkable. Without recognizing the obvious antitrust violations, they expect gun companies simply to reduce sales. How are they supposed to coordinate this industry-wide output reduction and simultaneously prevent the resulting higher prices from encouraging the entry of new competitors? And even if this output restriction could be accomplished legally, does anyone really believe that a reduction in sales would reduce only sales to criminals?

Given that citizens use guns to prevent crimes about five times more frequently than crimes are committed with guns, equal percentage reductions in gun ownership by good guys and bad guys will lead to more crime. Higher prices will most hurt those who most need guns for protection. Minorities who live in poor urban areas face the greatest risks from crime. They will be among the first squeezed out by higher prices.

Lawsuits seek to bypass the legislative process. If politicians are determined to reduce the use of a product, taxes or regulations accomplish that end much more effectively. If "too many" guns are being sold, as these suits claim, gun sales could have been taxed even more heavily. But Congress and state legislatures have decided against more controls. The plaintiffs now want the courts to punish law-abiding

manufacturers for past sales that complied with the law.

So what about the city of Chicago's evidence of gun shops selling to undercover police officers dressed in gang colors and using gang language? These were unusual sting operations, in which the police somehow failed to record any of the conversations and have yet to file criminal complaints. They are also a civil libertarians' nightmare (though the politically correct ACLU seems strangely silent about this). 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.

The Clinton administration seems unchastened by repeatedly having been caught falsely reporting data on the Brady law's effectiveness. With its new report, the administration is also shooting blanks.

Mr. Lott, a fellow in law and economics at the University of Chicago School of Law, is the author of "More Guns, Less Crime: Understanding Crime and Gun Control Laws" (University of Chicago Press, 1998).

Mayors Help Draft a Handgun Crackdown Bill

By MICHAEL JANOFSKY

WASHINGTON, Jan. 28 — In a sign that the assault on the gun industry is gaining political momentum, mayors from around the country announced today that they were helping prepare Federal legislation to slow the circulation of handguns and were urging additional cities to sue manufacturers and dealers.

Mayor Edward G. Rendell of Philadelphia, head of a United States Conference of Mayors task force on gun violence, said he had been working with several members of Congress on a measure that would forbid anyone to buy more than one handgun a month, would crack down on unlicensed sales at gun shows and would give the Consumer Product Safety Commission the kind of authority over real guns that it has over toy guns.

In remarks to several hundred mayors at their annual winter meeting, Mr. Rendell said he had been persuaded to seek Federal legislation after the failure of his own talks with manufacturers to solve gun-related problems in Philadelphia.

"With them," he said, "it all boils down to the same refrain: Guns don't kill people. People kill people."

Mr. Rendell long ago became the first big-city mayor to suggest that municipalities could recoup medical, law-enforcement and other costs stemming from gun violence by suing the manufacturers. While Philadelphia has not yet sued, four other municipalities have: New Orleans and Chicago first, followed by Miami-Dade County and Bridgeport, Conn., which filed their suits on Wednesday. In general, the suits charge that the industry is liable, either for failing to provide sufficient safety devices on its products or for stimulating an illicit trade by flood-

ing given areas with more weapons than a legitimate, lawful market could ever accommodate.

Today the mayors who have already sued encouraged other cities to follow their lead. "All of us should consider filing lawsuits," said Mayor Alex Penelas of Miami-Dade County, whose suit, against 24 gun makers and 3 trade organizations, seeks unspecified damages. "We need to force the industry to make dramatic changes to protect unintended victims."

One such victim, uninsured, who was shot in the chest in 1994 has cost the city \$768,000 in hospital expenses, Mr. Penelas said.

Mayor Marc Morial of New Orleans held aloft a bottle of Tylenol and said the seal on its box and the foil seal under the safety cap had resulted from public outrage after several people died of contaminated pills more than a decade ago.

"If this effort saves the life of one child in one of our cities," he said of the gun suits, "it is worthwhile."

Richard J. Feldman, executive director of the American Shooting Sports Council, a trade organization that represents many gun makers and is a defendant in the suits, said in a telephone interview that the mayors' initiatives were largely misguided. The mayors "point fingers," Mr. Feldman said, because their own efforts at fighting crime have failed.

Specifically, he said the industry opposed purchase limits because they were no solution: if only one gun is sold, it can always get into the wrong hands in the absence of safeguards. But he said the industry would support safety oversight, although not by the Consumer Product Safety Commission, which, he said, lacks expertise. "We would not be opposed to A.T.F. having that author-

ity," he said of the Bureau of Alcohol, Tobacco and Firearms.

Mr. Rendell said the one-handgun-a-month purchase limit in the Federal legislation he was proposing would dramatically reduce the number of guns that end up in the hands of criminals through "straw man" purchases. In many places, buyers can purchase from licensed dealers any number of handguns, which are then often quickly resold illegally.

The measure would also close what the mayors call the gun-show loophole, by requiring gun sellers working at state fairs, at flea markets and in other temporary quarters to have a license.

Further, it would create Federal safety oversight by an agency specifically charged with consumer protection. "It's ludicrous," Mr. Rendell said, "that the Consumer Product Safety Commission has authority over the Mattel toy company but not gun manufacturers."

Another provision of the legislation would make money available to develop palm-print, fingerprint or other identification technology allowing only the owner of a gun to fire it.

Mr. Rendell said several senators had expressed interest in co-sponsoring the legislation. But he mentioned only Democrats, which suggested that the bill might not have bipartisan support.

Mayor Paul Helmke of Fort Wayne, Ind., a Republican, conceded that Mr. Rendell's initiative would be a hard sell to many Republican lawmakers, especially those from states with large numbers of gun owners.

"All mayors want to end gun violence," Mayor Helmke said. "The question is, Can he support the Second Amendment" — on the right to bear arms — "and still find a way to make restrictions on small guns?"

E.J. Dionne Jr.

Tough on Guns

There's a basic principle: If you make a product that's genuinely dangerous, you have some responsibility for the damage it might cause. Oddly, this doctrine has rarely been applied to the manufacturers of guns. But thanks to five American cities, that's about to change.

Like the tobacco companies, the gun companies find themselves under siege in lawsuits. The suits allege that people who make guns should do all they can to see that they're used properly, provide all the safety devices possible, to prevent their misuse and organize distribution systems that don't make it easy for the guns to fall into criminal hands.

The suits have the potential to transform the gun debate. Until now, it has largely been about laws to regulate the purchase of guns and to force registration. It's been a battle involving "society's interest in controlling guns vs. the inconvenience to gun owners," says Dennis Henigan, legal director at the Center to Prevent Handgun Violence.

When the fight is cast that way, many law-abiding gun owners come to see themselves as under siege from liberal, big government regulators who want to complicate their lives and take away their hunting rifles.

But the lawsuits make gun controllers look less like advocates of a meddling nanny state and more like champions of consumer protection and corporate responsibility.

No wonder the National Rifle Association is pushing state legislatures to pass bills banning local governments from suing gun manufacturers and distributors. The bill introduced in Florida last week is a truly astonishing attack on local autonomy. It would make it a felony for any local official to file a lawsuit against the gun industry.

And this is no laughing matter. The Georgia legislature has already passed a bill prohibiting anti-gun lawsuits. And as Sharon Walsh reported in *The Post*, such proposals are about to be introduced in Texas, Michigan, Kansas, Vermont, Wyoming, Louisiana, Minnesota and Alabama. The Texas bill will be an interesting test for Gov. George W. Bush and his "compassionate conservatism."

Gun control has been gaining ground ever since former President George Bush pushed hard for a war on drugs and his drug czar, William Bennett, argued that some gun regulations were needed to win it.

Under President Clinton, gun control has become a winning political issue. In cities and suburbs, candidates who support gun control have won votes by insisting that being "tough on crime" means being tough on guns. Police officials have stepped out to urge gun restrictions. It's hard to paint advocates of stronger gun laws as upper-class wimps when the men and women in blue are at their side.

The lawsuits open new lines of argument. "We know that the illegal market in guns is formed largely from diversions from the legal market," Henigan said in an interview. "The gun lobby would like people to believe that it's formed largely through the theft of guns—how people steal guns from good people."

Henigan pointed to recent research showing that 24 percent of the gun industry's production finds its way into criminal activities within eight years of manufacture. "I doubt that you can say that of any other product."

In Chicago, "Operation Gunsmoke" sent police agents into 12 stores in the Chicago suburbs. Handgun sales are illegal in Chicago, and guns sold in suburban stores were later traced to crime in the city. The undercover agents found gun dealers lax and even willing to offer them advice on how to get around the law.

Chicago alleges that gun manufacturers send weapons to suburban stores knowing they'll be sold into Chicago.

The lawsuits—brought by Chicago, New Orleans, Bridgeport, Atlanta and Miami-Dade—have another agenda. If gun manufacturers fear paying large amounts in damages, they may agree to more rational rules regulating guns. Industry fears were heightened by a verdict two weeks ago in Brooklyn, N.Y., in a suit brought on behalf of seven shooting victims. The jury found that 15 manufacturers had distributed guns negligently.

"A benefit of these suits is that they may give the industry substantial incentives to change its conduct," Henigan said. "The industry may tolerate a certain amount of regulation that it has opposed in the past." No wonder the NRA wants to stop these suits cold.

Critics of excessive litigation are right to say that lawsuits are not always the best way to solve a problem. But lawsuits can clarify issues and force action. In this case, going to court may save lives.

Bill Would Subject Guns To Federal Safety Controls

By FOX BUTTERFIELD

As cities and states prepare to battle the gun industry in the courts, advocates of toughened gun control have opened a new front by introducing a bill in Congress to end gun makers' exemption from Federal health and safety regulation.

The bill, offered yesterday by Senator Robert G. Torricelli of New Jersey and Representative Patrick J. Kennedy of Rhode Island, both Democrats, would effectively abolish the gun industry's unique exclusion from regulation by the Consumer Product Safety Commission. But, rather than giving the new regulatory authority to the safety commission, the legislation would make the design, manufacture and distribution of guns subject to control by an agency with more expertise about them, the Treasury Department.

The measure faces tough going, however, because it will be strenuously opposed by gun makers and the National Rifle Association, which have long wielded enormous influence on Capitol Hill.

Under pressure from the N.R.A., Congress has excluded firearms from the health and safety standards of the Consumer Product Safety Commission ever since the agency was established in 1972. The only Federal body with any regulatory authority over the industry is the Bureau of Alcohol, Tobacco and Firearms, a Treasury Department agency, but its power is largely limited to issuing Federal firearms licenses, collecting excise taxes and tracing stolen guns.

"In almost every other aspect of American life, the Government sets minimum levels of safety, even for teddy bears, but not for guns," Senator Torricelli said yesterday. "It's a great irony."

The Senator said his bill would enable the Treasury Department to regulate the distribution of firearms so that gun makers could not sell large quantities of handguns in states with lax gun control laws, feeding a black market for handguns in states like New York with tougher controls. A Federal jury in Brooklyn found last month that 15 gun makers had negligently distributed their products in this fashion in Southern states, with the result that the guns ended up being used in shootings in New York City.

While that verdict was returned in a case brought by individual citizens, five cities, some of them using the same argument, have also filed suits against the industry in an effort to recover their police and medical costs attributable to gun violence. About 15 other cities and at least two states, New York and Massachu-

setts, are considering similar suits.

Senator Torricelli said his bill would also enable the Treasury Department to push for new safety devices like locks that would help prevent children from accidentally firing their parents' guns.

To responsible gun owners, he said, "There is nothing in this legislation for law-abiding citizens to fear."

But Bill Powers, director of public affairs for the National Rifle Association, said: "This is not about safety. The term 'safety' has been hijacked by these antigun politicians like Torricelli and Kennedy to restrict the public's use and access to firearms."

"The bottom line," Mr. Powers said, "is that no government regulation can make people safer, just as no government mandate can make people more moral." In addition, he said, "violence is not a safety issue."

Gun industry finds itself battling on a second front.

it's an issue of violent criminals, and to deal with them the N.R.A. believes we need more prison blocks and steel bars."

Robert Delfay, president of the Sporting Arms and Ammunition Manufacturers Institute, a trade association, said, "It is totally incorrect and misleading to say that a teddy bear or toy gun is more regulated than the production of firearms."

Mr. Delfay acknowledged that there was currently no Federal regulation for the design and manufacture of guns, but said the industry was subject to more than 400 standards set by the American National Standards Institute, which helps private industry set voluntary measures.

The idea for the Torricelli-Kennedy bill was the work of the Violence Policy Center, a research and advocacy group in Washington.

"Sooner or later the gun industry is going to have to submit to government regulation," said Kristen Rand, a lawyer for the Violence Policy Center. "Congress could be presented with a package of regulations, negotiated between cities, the courts and the gun industry, as happened with the states and the tobacco industry. And if that happens, this bill will be there as a standard."

New York Times
3/3/99

PHOTOCOPY
PRESERVATION

NRA Attacks Talks to Settle Gun Suits

Influential Lobby Opposes Any Discussions at All Involving Stiffer Rules

By PAUL M. BARRETT
And VANESSA O'CONNELL

Staff Reporters of THE WALL STREET JOURNAL

The National Rifle Association, angered by news of preliminary discussions aimed at settling gun lawsuits brought by cities, is opposed to any talks if a compromise would include stiffer gun regulation.

While the NRA isn't directly involved in the litigation, the powerful lobby that represents gun owners exerts considerable influence on gun and ammunition manufacturers. On the antigun side, meanwhile, an activist lawyer for cities that are suing handgun makers distanced himself from the preliminary talks.

Partisans on both sides were reacting to a report in The Wall Street Journal that a gun-industry trade group and an attorney for New Orleans had discussed tentatively the idea that the two sides could eventually hold substantive settlement talks rather than engage in prolonged, expensive litigation. Five cities, including New Orleans, have sued the industry in the past four months to recover the public costs of gun violence. Other cities are planning to follow suit, according to antigun lawyers.

Startling Conversation

The conversation between the lawyer for New Orleans, John Coale, and the American Shooting Sports Council, an Atlanta-based trade group, was startling at this early stage of the legal fight. It indi-

cated that at least some elements of the warring sides see potential advantages to avoiding years of court battles.

But the NRA said yesterday that any compromise that would involve greater government regulation is unacceptable. "There is little to no chance of settlement of these city suits based on conversations I've had with industry CEOs," said James Baker, the NRA's top lobbyist. "We will not agree to more regulation legislatively," he said.

Greater regulation of the way guns are manufactured and marketed would probably be part of any settlement. That's because the gun industry, made up of relatively small companies, lacks the resources to put sums of money on the bargaining table that would compare, for example, with the \$246 billion deal that the tobacco industry recently agreed to.

The NRA is fighting the municipal litigation by lobbying for state laws that would bar cities from suing the gun industry. Georgia has enacted such a law, and Louisiana and Florida are considering similar provisions.

Industry Meeting This Weekend

At an industry gathering in Phoenix this weekend, the NRA is expected to try to stifle the American Shooting Sports Council and its head, Richard Feldman, a former NRA staffer who has long been at odds with his former employer, according to people familiar with the situation. Mr. Feldman, who has tried to steer the industry away from the NRA's more militant public image and toward what he calls a "business-like approach," defended the idea of opening a line of communication to the cities that have sued.

"It was just one phone call, and that led to one conversation in John Coale's office

with my director of government affairs in Washington, and he was just there to relay the information back to the industry," Mr. Feldman said yesterday. "Our members said keep the lines of communication open. It doesn't cost much to talk."

But he conceded that his members are a little divided. Some think we should proceed, but the bulk of them think we shouldn't discuss anything.

Ed Shultz, chief executive officer of Smith & Wesson, one of the country's biggest handgun makers, said yesterday, "Clearly, we at Smith & Wesson are not in discussions with anyone." But he added that it was "appropriate for a trade association to listen to what people have to say and then report back" to its constituency. Smith & Wesson, a unit of Britain's Tompkins PLC, and most other major manufacturers that have been sued by the cities are members of the American Shooting Sports Council.

Timothy Bumann, a lawyer for Taurus International Manufacturing Inc., a unit of Brazil's Forjas Taurus SA (neither of which belong to the trade group), said his clients "are interested in having the lines of communication open, but in order to keep those lines used, the mayors will have to dismiss their suits."

On the other side of the fight, the top lawyer with a leading antigun group said that Mr. Coale's contact with the gun industry didn't indicate that the cities were eager for compromise. "Litigation brought by the cities is in its very preliminary stages," said Dennis Henigan of Handgun Control Inc., which is co-counsel for New Orleans, as well as Miami and Bridgeport, Conn. "I don't believe there are serious plans to engage in settlement," he said.

But Mr. Coale said he made "very preliminary contact" with the shooting council because "you always talk and litigate at the same time."

Wall Street Journal
2/26/99

PHOTOCOPY
PRESERVATION

Guns vs. Hired Guns

The mish-mash verdict that came out of the Brooklyn case against handgun manufacturers threw off one clear signal: The jury didn't like gun makers selling their wares to dealers who don't operate from fixed premises, who'd rather deal informally at guns shows or out of their car trunks.

Whatever it lacked in evidentiary rigor, it was a nice little pat on the head to Smith & Wesson and Sturm Ruger, which have policies of selling only to gun stores.

That said, the jury ignored the guns-cause-crime argument offered by the plaintiffs. Yet such will be offered again by big-city mayors, whose lawsuits accuse the

lent criminals. They are inmates of crummy neighborhoods, unprotected by police, who resort to gun ownership as a measure of security. You see this in the striking polarization of the black community over gun control, as an article in the New York Beacon detailed a couple years ago.

You see it in the political position of former congressman Mike Espy, who broke with the black leadership and liberal orthodoxy by supporting the right of his Mississippi constituents to own guns. You see it in the career of Lt. Lowell Duckett, formerly a weapons instructor at the D.C. police academy and head of the black patrolman's caucus, who urged citizens in crime-ridden neighborhoods to buy shotguns.

You see it in the famous case of liberal Washington Post columnist Carl Rowan, an avowed gun-control supporter, who kept an illegal firearm and shot a teenager in his yard late one night.

Blacks, astonishingly, don't trust the police to protect them from crime. Rightly so: Court after court has ruled that police agencies cannot be held liable for failing to provide such protection. This doesn't pose much of a dilemma if you live in a neighborhood where violent crime is virtually non-existent and where gun ownership is an established right under law.

Where the situation is reversed, where gun ownership is illegal and the risk of becoming a victim is large anytime you step out the door, economics predicts a result: You will get a black market.

Mayors like Richard Daley of Chicago and Ed Rendell of Philadelphia see dollar signs accruing to them as a result of this unmythifying phenomenon. Their cities were largely passive in the face of the crack wars that swept through poor neighborhoods beginning in mid-1980s. Now they rouse themselves in its aftermath to squeeze some bucks out of the gun makers.

Only a minuscule percentage of demand

for guns comes from criminals. Those who lambaste the gun makers for supplying powerful, concealable weapons like the baby Glock or the cheap and popular Jensen family products must somehow confront the fact that there aren't enough crooks to sway the market.

What handgun expert Massad Ayoob has said about legal gun sales applies equally to illegal sales: "The self-defense market is the most solid and recession-proof part of the shooting industry."

The last decade has certainly proved that even children will avail themselves of

Where guns are illegal and the risk of becoming a victim is large anytime you step out the door, there will be a black market in guns.

guns if their chances of living to see the next sunrise depend on them. Despite a doubling of the number of guns owned by Americans between 1972 and 1992, the murder rate for most other demographic groups, including spousal murder, steadily declined. The exception was a tripling of the murder rate among black teenage males, starting in 1985, almost solely because of crack.

For every crack dealer or schoolyard nutcase, dozens of kids armed themselves because, sadly, they had to wade through crack dealers and schoolyard nutcases. This still has not sunk in, despite the testimony of gangsta rap, a whole musical form devoted to explaining to a community what was happening to it.

None of this will have influence on the hypocrisy of the mayors.

Florida was the first of a passel of states

to approve concealed-carry laws, making it possible for someone other than celebrities or cronies of the local police chief to get a weapons permit. In Dade County the number of permittees rose to 28,000 from 500, with a concomitant drop in violent crime directed at local citizens.

Nonetheless, here comes Miami-Dade County Mayor Alex Penelas, saying "It's time to send the bill for gun deaths and gun injuries to the gun makers."

The mayoral intention is not to prevail on the legal merits but to overwhelm the industry with the sheer cost of mounting a defense. That's the American way. One reason this might not pan out as it did in tobacco is that a large number of voters who use the industry's products will not be sitting on their hands.

Even should the mayors succeed, the gun-control cause has become a noisy corpse anyway. Some 23 states have now enacted concealed-carry laws, much to the same effect as Florida's. Gun critics have celebrated the arrival of Tom Diaz's new book slamming the industry, "Making a Killing: The Business of Guns in America." But before a National Public Radio interviewer could cut him off, Mr. Diaz let slip that he wasn't actually antigun: "I don't have a problem with shotguns as a form of home defense."

So the mayors are merely maneuvering themselves into position to claim some of the proceeds of future gun sales, and let us confess we don't believe their motive is solicitude for the taxpayer. Their motive is solicitude for the trial lawyers, particularly John Coale and Wendell Gauthier.

What these two have in common is that they backed the wrong horse in the tobacco wars, the class-action smoker suits instead of the state Medicaid suits. They missed out on a windfall but are using the mayors to retrieve their dignity vis-a-vis the new plutocrats of the tobacco bar.

Business World

By Holman W. Jenkins Jr.

industry of "oversupplying" outside jurisdictions with weak gun-control laws. Or, as the New York Times phrased a variant, "Gun makers began making more powerful handguns to make up for stagnant sales, and these guns quickly became popular among criminals."

Sales certainly would be "stagnant" if companies made only guns the public didn't want to buy, and guns are always "popular with criminals." The authors of such economic nullness overlook a crucial fact about the demand for illegal guns. Mike Wallace of CBS made the same dubious leap when he noted volleys of celebratory gunfire from the public housing barracks of Chicago's South Side on New Year's Eve. This was supposed to be somewhat dispositive of the mayor's case that gun companies are responsible for the guns illegally owned by Chicagoans, and for crime.

By any realistic notion, the vast majority of those illegal gunowners are not vio-

Legal Assault on Firms Is Armed by Foundations

By DAVID B. OTTAWAY
Washington Post Staff Writer

AI

Some of the nation's leading private foundations and philanthropists such as billionaire George Soros are pouring millions of dollars into research and support in the battle to control gun violence.

The infusion of private money has raised the wrath of the National Rifle Association, which in a publication this month named Soros and another private foundation as part of a "vast conspiracy" to bankrupt gun manufacturers with lawsuits.

But anti-gun advocates say the private money has helped "level the playing field" between gun manufacturers and shooting victims and their families, according

to Elisa Barnes, a plaintiffs' attorney in a successful Brooklyn, N.Y., lawsuit against gunmakers.

Soros's Open Society Institute became the first private group to directly help finance a lawsuit against a weapons manufacturer when it contributed \$300,000 to plaintiffs in the Brooklyn case. Barnes said Soros's contribution "made all the difference in the world" in winning the February verdict, which held nine gunmakers liable for practices that allowed criminals to obtain guns.

The Littleton, Colo., high school massacre occurred last month just as representatives of 30 private foundations were in New Orleans discussing anti-gun efforts. The tragedy left participants at the

Council of Foundations meeting "all the more determined to make a difference," said Nancy Mahon, who directs Soros's New York-based Center on Crime, Communities and Culture.

"There are clearly more foundations interested now than in the past," she said. "We think it's even more important now for private foundations to be looking for solutions."

Foundations used to shy away from gun control issues because the NRA, the powerful gun lobby, "made it so unpleasant and politically treacherous," said Mahon.

The NRA's position is made clear in this month's edition of its American Guardian magazine, which accuses Soros and other philanthropists of helping with a "brazen assault" on the firearms industry and the constitutional right of Americans to bear arms. Soros's picture is featured in a collection of "lawyers, financiers and social engineers" who are involved in the anti-gun effort. It cites his contribution to the Brooklyn lawsuit and charges that he also works to legalize marijuana and euthanasia.

Soros is among the major philanthropic givers who have recently decided to take on the gun lobby, Mahon said, because they believe gun violence is a "massive public health problem" and that the government is "paralyzed" by the NRA.

"It's really something whose time has come," said Stephen P. Teret, a gun safety litigation expert whose Center for Gun Policy and Research at Johns Hopkins University in Baltimore is supported by foundation grants.

An NRA spokesman said gun control groups are seeking foundation money as a last resort because private attorneys do not see a big payday in suing the weapons industry.

"It's unfortunate the foundations are doing this, but understandable," said NRA research director Paul H. Blackman.

Increasingly, foundations are coordinating their anti-gun efforts. Since January, Mahon's center has helped organize the Funders Collaborative for Gun Violence Prevention, a consortium that has raised \$11 million in seed money. "The strategy is to show leadership from the philanthropies and say this is an important

issue for our country," said Mahon.

The campaign is making inroads. Buoyed by successful lawsuits against the tobacco industry, five cities launched a similar strategy last year against gun manufacturers, trying to force the industry to pay the costs of gun violence.

Earlier this month, gun control advocates won a victory against the NRA in Missouri, defeating a referendum issue that would have allowed citizens to carry concealed weapons. The NRA spent \$3.75 million on the campaign—more than four times the amount raised by its opponents.

Foundations have helped drive a surge of anti-gun initiatives:

■ The Joyce Foundation, the first to target gun violence as a health issue, has handed out \$13.2 million in grants to 55 organizations working on gun issues since 1993. The Chicago-based foundation is funded by the Joyce family, whose wealth comes from lumber in the Midwest. Among the grant recipients are the Washington-based Ceasefire Inc., the Violence Policy Center, Physicians for Social Responsibility and the Educational Fund to End Handgun Violence.

"We need to see guns as a public health issue," said Deborah Leff, the foundation's former president who initiated its gun control efforts. "Nobody wants to see children being shot."

Teret, a pioneer in the use of litigation against gun companies, has received \$2 million in grants from Joyce. His Johns Hopkins center has helped provide the legal underpinning for the lawsuits brought by cities

against gunmakers. Teret and his colleagues also drafted a model handgun safety bill used for legislative proposals in New Jersey, Pennsylvania, New York and California.

■ Soros, whose wealth was built on foreign currency exchange dealings, established the Center on Crime, Communities and Culture in 1996 to fund crime prevention programs. It has dispensed \$13 million, with its most notable contribution the money put into the Brooklyn lawsuit.

"The courts are the place where David and Goliath can go at it and David can win," said Mahon. "That's why the gun industry is so spooked by this suit."

■ The California-based Wellness Foundation in 1992 launched its 10-year Violence Prevention Initiative. The group has allocated \$60 million for grants to in-state com-

munity groups working primarily on youth violence issues. With \$1 billion in assets, the foundation was endowed initially by a California health provider, Health Net.

A main goal of the Funders Collaborative is to establish gun safety standards that mirror those for other consumer products. Mahon cited as an example a bill recently introduced in Congress by Sen. Robert G. Torricelli (D-N.J.) and Rep. Patrick J. Kennedy (D-R.I.) that would give the Treasury Department authority to set standards and regulate gun design.

Despite these efforts, the gun safety movement remains a nascent force.

Legal theories used to assault the gun industry are new and largely untested in the appellate courts. The gun lobby is well-funded and politically entrenched. And gun manufacturers lack the tobacco industry's deep pockets, making guns less attractive than cigarettes as a litigation target.

The NRA's Blackman said he believes anti-gun advocates simply want foundation help to blanket gunmakers with litigation in order to pressure them to accept more regulation.

The NRA has mobilized to block gun control bills in Congress while pushing state laws that would prohibit cities from suing the gun industry. Simultaneously, the pro-gun forces are raising a war chest to fight the swelling number of lawsuits.

In November, gun manufacturers set up the Shooting Sports Heritage Fund and pledged to contribute 1 percent of their sales. Half of the funds will go to a legal research center, according to Douglas Painter, the fund's spokesman.

Painter said gunmakers, with \$2 billion in annual sales, compared with the tobacco industry's \$48 billion, are

pooling resources to defend themselves against lawsuits filed by cities.

The difference a foundation can make in such costly litigation became clear in the landmark Brooklyn case. Plaintiffs' attorney Barnes said the major foundations she initially approached for funding regarded the case as "too risky" politically. These foundations, which included some of the biggest in the country, were willing to finance research into gun violence "but never litigation," she said.

She then turned to Soros's Center on Crime. It was the only one "iconoclastic" enough to align itself with a lawsuit that cost \$1.5 million, even with lawyers working pro bono and "cutting every corner," she said.

A spokesman for Soros's group said the decision to get involved was an easy one. "Given the fact [that] youth gun violence is a priority area for us, it was a no-brainer," said Andrew J. Martin.

The Hungarian-born Soros began his philanthropic giving by funding democracy programs in Eastern Europe well before the fall of the Berlin Wall in 1989. He has developed a network of foundations in 30 countries and spent \$428 million on philanthropic activities in 1997 alone.

His flagship foundation, the New York-based Open Society Institute, has created a number of centers dealing with U.S. domestic issues. The Center on Crime annually gives \$13 million and lists curbing gun violence as a priority.

With Soros's contribution, Barnes said, the Brooklyn plaintiffs could afford to compile critical evidence and withstand the costs of "one horrible [pretrial] battle after another."

A spokesman for the Open Society Institute said it was open to other requests from lawyers like Barnes.

The Washington Post

WEDNESDAY, MAY 19, 1999

Fed Won't Hike Rates —For Now

Inflation Prompts First-Time Warning

By JOHN M. BERRY
Washington Post Staff Writer

AI

Federal Reserve policymakers, concerned that inflation could get worse if rapid U.S. economic growth doesn't slow down, announced yesterday that they had left short-term interest rates unchanged but are leaning toward raising them in the future.

The announcement doesn't necessarily mean the Fed will raise rates in the coming weeks or months. But it put investors and the rest of the public on notice that the Fed may act unless growth slows as central bank officials had predicted at the beginning of the year.

Until recently, Chairman Alan Greenspan and other Fed officials also had been worried that there could be more turmoil in world financial markets similar to that of last fall. When markets virtually seized up after Russia's default on part of its government debt, the Fed cut short-term rates by three-quarters of a percentage point in three steps to provide more cash to the system.

The Fed has left the federal funds rate, for overnight loans between banks, at 4.75 percent since then. But interest rates set by financial

markets, including those for mortgages and many business loans, have been rising for months, in part because of strong demand for credit and investor fears of a pickup in inflation. [Story, Page E1.]

The wording of yesterday's announcement by the Federal Open Market Committee, the Fed's top policymaking group, indicated officials feel that the danger of renewed global financial turbulence has receded, freeing them to concentrate on whether the U.S. economy may overheat.

"While the FOMC did not take action today to alter the stance of monetary policy, the committee was concerned about the potential for a buildup of inflationary imbalances that could undermine the favorable performance of the economy," the announcement said.

The committee "therefore adopted a directive that is tilted toward the possibility of a firming in the stance of monetary policy."

That announcement was the first of its kind ever made after a policymaking session at which the Fed did not change rates. In the past, the FOMC's decisions to lean one way or the other—as opposed to actually changing its interest rate target—were never made public until after a subsequent FOMC meeting. In December, however, the group decided to announce such shifts immediately if they represented an "important" change in Fed thinking.

Against that background, yesterday's decision to tilt toward higher rates and make that choice public underscored Fed concerns that the nation's exceptional combination of strong growth, low inflation and low unemployment may not continue indefinitely.

The committee emphasized that its members are looking ahead rather than reacting to any recent inflation news, such as last Friday's report that consumer prices jumped 0.7 percent last month, the largest monthly increase in six years. Many analysts attributed that unusually large rise to higher oil prices and other special factors and said it therefore did not signal a worsening of underlying inflation pressures.

The FOMC announcement said: "Trend increases in costs and core prices have generally remained quite subdued. But domestic financial markets have recovered and foreign economic prospects have improved since the easing of monetary policy last fall."

Finally, the FOMC said that with domestic labor markets already tight and spending by consumers and businesses increasing so rapidly, "the committee recognizes the need to be alert to developments over coming months that might indicate that financial conditions may no longer be consistent with containing inflation."

Bill Dudley, chief economist at Goldman Sachs Group Inc. in New York, called the announcement "a fairly hawkish statement" but stressed that it "in no way commits them to tightening"—that is, to a rate increase.

Between now and the next FOMC meeting at the end of June, the Fed will be watching the incoming economic data to see if there are signs growth may be slowing to what the officials regard as a more sustainable, less threatening pace. They will also be looking at the May consumer price report to see if there is another outsized increase, Dudley said.

He noted that over the past 15 years, a Fed bias toward raising rates has not resulted in a boost in rates at the following FOMC meeting, and in only half of the cases has it led to an increase in the following six months.

For example, in both 1997 and 1998, the FOMC tilted toward higher rates for several months but then moved back to a neutral stance without ever raising them.

Gun Accord In New York Could Set U.S. Standard

By BARRY MEIER

If New York's State Attorney General, Eliot L. Spitzer, sues the gun industry as he has threatened, he will simply join a long line of 23 cities and counties that have already done so.

But if Mr. Spitzer succeeds in striking a deal with some firearms producers over issues like the way they monitor gun distribution, then New York will score a first that could set a national standard.

There is no assurance that the talks Mr. Spitzer began recently with two gun makers and a trade group will succeed, and one person involved in the talks said he expected them to move ahead or to collapse quickly. And in the broadest sense, the New York talks may prove to be only another in a series of stillborn efforts to settle the growing wave of lawsuits against gun makers.

Still, officials in other cities who have sued the gun industry said yesterday they were pleased because the talks might lead to a break in that logjam of litigation.

"I think it is a positive sign that some members of the gun industry are willing to talk," said Louise Renne, the city attorney of San Francisco, which along with more than a dozen California cities sued gun makers this spring.

Most of the suits accuse gun companies of negligently marketing guns by failing to impose proper control over distributors and dealers. As a result, those lawsuits charge, guns easily fall into criminal hands. Gun makers have denied the charges.

The New York lawsuit has yet to be filed. But under discussion in the talks are a number of issues aimed at tightening how guns are marketed and sold.

One proposal long championed by some gun control advocates would involve the appointment of an independent monitor, either by a court or through an agreement between the state and the industry, who would review the distribution of guns.

That monitor would then identify companies, distributors and dealers who were failing to keep guns from being sold to people planning to resell them to criminals or other prohibited buyers like teen-agers.

Mr. Spitzer's office is also pressing makers to start test-firing their guns before they ship them, then submit the cartridge casings and bullets to the Federal Bureau of Alcohol, Tobacco and Firearms, the agency that regulates the manufacture and sale of weapons.

The agency could then use the unique markings on those casings and bullets to identify a gun used in a crime.

The talks apparently began in recent days when Mr. Spitzer's office contacted Colt's Manufacturing, one of the country's largest firearms producers. Richard Esposito, a consultant to Colt, said the "company had been invited to a meeting" with Mr. Spitzer.

From there, an industry trade group, the National Shooting Sports Foundation, was brought in because Colt's felt it was inappropriate for one company to talk separately with Mr. Spitzer, according to two people, one who took part in the talks and one who had been briefed about them. Robert Delfay, the president of the group, has declined to confirm or deny that a meeting with Mr. Spitzer took place.

A representative of Smith & Wesson, the largest gun maker in the country, also met with Mr. Spitzer's aides, said one person who had been briefed about the talks. Kenneth Jorgensen, a spokesman for the firearms producer, said he was not aware that anyone at the company had talked with Mr. Spitzer.

John Coale, a lawyer in Washington who is involved with five cities suing gun makers, including New Orleans and Bridgeport, Conn., said he believed that Mr. Spitzer's talks would be important only if they produce some agreement, since some of the issues in the New York talks have already been the subject of failed discussions between his group and gun industry representatives.

As recently as 10 days ago, for example, Mr. Coale said he met with Mr. Delfay, the president of the industry trade group, to discuss settlement-related issues.

"We have been looking at the issue of global talks and how to get everybody in the same room," Mr. Coale said. The agenda included issues like better distribution controls and tighter oversight on how many guns a customer can buy each day.

Mr. Coale also said one gun maker, Glock Inc., was moving close to adopting the type of bullet tracing system that Mr. Spitzer was proposing all gun makers adopt.

In a telephone interview, Mr. Delfay acknowledged that those talks had taken place. Paul Jannuzzo, a lawyer for Glock, did not return a phone call seeking comment.

The New York Times

THURSDAY, JULY 22, 1999

A Senator's Close Tie With His Nephew

By ADAM CLYMER

WASHINGTON, July 21 — Since 1968 Senator Edward M. Kennedy has been the patriarch of his family, the one many nieces and nephews called for advice or help. But his connection to John F. Kennedy Jr. had many special qualities.

It was bracketed by moments of sadness. On the day John saluted his father's coffin on the way to Arlington National Cemetery, he also celebrated his third birthday at the White House. As the foreign leaders left, his Uncle Ted was there to sing "Happy Birthday."

Today, with the support of his own sons, Edward M. Kennedy Jr. and Representative Patrick J. Kennedy of Rhode Island, the uncle went to sea with the Navy as the bodies of Mr. Kennedy, his wife, Carolyn Bessette Kennedy, and her sister, Lauren G. Bessette, were being recovered.

In between, there were happier times. On July 19, 1988, John introduced his uncle at the Democratic National Convention in Atlanta, saying: "I owe a special debt to the man his nephews and nieces call Teddy, not just because of what he means to me personally but because of the causes he has carried on. He has shown that an unwavering commitment to the poor, to the elderly, to those without hope, regardless of fashion or convention, is the greatest reward of public service."

Senator Kennedy never had to get John and his sister, Caroline, out of trouble, and so there have been few headlines about their ties.

But one friend, who agreed to speak only if he were not identified, called the Senator's connections to the first 2 of 13 Kennedys made fatherless by assassins "unbelievably close." He said Caroline's children treated their uncle, who has a repertory of animal sounds to amuse small children, "as their grandfather."

The friend said the Senator was weathering his latest loss but sug-



Associated Press

Senator Edward M. Kennedy and his son Patrick on a Navy tender.

gested that the Senator had been angry when helicopters with television cameras flew over his niece Caroline's house on Long Island to take pictures when he went to console her on Sunday.

The Senator worked with his niece on matters relating to the John F. Kennedy Library on Dorchester Bay in Boston. One former aide said the Senator usually deferred to her. And he encouraged her and her brother to visit President Ronald Reagan at the White House in 1985 to ask him to attend a fund-raiser for the library. Mr. Reagan agreed.

The Senator encouraged his nephew to take on the leadership of an institution dear to the family, the Institute of Politics at the John F. Kennedy School of Government at

Harvard.

For some years, the younger Mr. Kennedy seemed bored at institute meetings. But in recent years he had taken a greater interest, hoping to broaden its definition of politics beyond running for office or holding positions in government. He wanted a focus on service, as explained in the verse from St. Luke that his grandmother, Rose Fitzgerald Kennedy, taught his father: "Of every one to whom much has been given, much will be required."

As his uncle encouraged his nephew's desire to assume the chairmanship of the institute board — Senator Kennedy's college friend former Senator John Culver of Iowa was stepping down — the connection was like that of a senior partner promoting a young protégé. And it was agreed that the younger Mr. Kennedy would take the position this fall.

Kenneth M. Duberstein, an official who served in the Nixon, Ford and Reagan Administrations and also serves on the institute board, today described the Senator's manner over many board meetings: "He was a gentle guide to John when it came to the I.O.P. He gave John space, gave him encouragement, gave him the experience of his years. This was a mission John thrived on. It was really a labor of love between an uncle and a favorite nephew."

Senator Kennedy had been looking forward to last weekend and the wedding of Rory Kennedy, Robert F. Kennedy's youngest child. He told a reporter that after the January 1998 funeral of Michael Kennedy, one of Rory's older brothers, that he wanted to bring the family together for a less formal, happier occasion. But the wedding was canceled when the family learned that John F. Kennedy Jr.'s plane had disappeared.

This Friday, at St. Thomas More Church in New York, the church where Jacqueline Kennedy Onassis worshiped, the Senator, Caroline Kennedy Schlossberg and the rest of the family will assemble again for a Mass to mourn lost life.

Gunmakers Discuss Possible Deal With New York to Avert Lawsuits

By BARBARA VOBEJDA
and DAVID B. OTTAWAY
Washington Post Staff Writers

A handful of gun manufacturers have recently held secret talks with New York's attorney general to discuss concessions they could make to avoid being named in a lawsuit the state is considering against the industry.

Colt's Manufacturing Co. and at least two other gunmakers have met separately with New York Attorney General Eliot Spitzer, ex-

ploring what steps the companies could take to reduce the likelihood that their products would be used in crimes, according to industry sources. The talks offer another clear signal that at least some gun manufacturers may be ready to consider a compromise in the escalating legal war over firearms.

Nearly two dozen cities and counties have sued gun manufacturers and distributors, claiming that their products are unsafe and their marketing practices irresponsibly enable firearms to fall into the

hands of criminals.

New York would be the first state to take on the industry, and its entry would immediately raise the stakes of the litigation, making the legal war against guns more closely comparable to the state lawsuits filed against the tobacco industry. Those suits ultimately led to numerous concessions last year from tobacco companies and a \$206 billion settlement with more than three dozen states.

Spitzer's office would not discuss the talks, which were first reported

in yesterday's New York Times, but spokesman Marc Violette said that "as part of an ongoing effort to keep guns out of the hands of criminals, we have sought a dialogue with responsible elements in the industry."

Spitzer has often expressed his concern over the easy access to guns, and his office has been actively involved in exploring a state lawsuit against their makers. Some industry officials said Spitzer is seeking to reach a settlement with one or more companies to increase

the legal pressure on other manufacturers to make concessions.

Among the subjects discussed in meetings with Spitzer were the possibility of contributions from gun manufacturers to a fund for crime victims, and a proposal for gunmakers to turn over to the federal government bullets that have been test-fired from their weapons to help create a database of markings that guns leave on shell casings. Such a database could improve the ability of police to identify guns used to commit crimes.

It was unclear what measures to better control the distribution of firearms were discussed.

An industry source said Spitzer has held separate meetings with representatives of Smith & Wesson and Sturm, Ruger and Co. But reflecting their sensitivity to suggestions that they are negotiating, the companies distanced themselves from the talks.

Ken Jorgensen, a spokesman for Smith & Wesson, said he was

unaware of any discussions. "No one here knows anything about this," he said.

And Sturm, Ruger spokesman Stephen Sanetti said reports of his company's involvement in negotiations were "absolutely untrue."

Richard Esposito, a Colt's spokesman, said a company representative did meet with Spitzer last week, and that Spitzer raised the subject of a settlement. But, Esposito said, the company official

told Spitzer that negotiations with an individual company were "not appropriate" and that the attorney general should meet instead with the industry's trade group, the National Shooting Sports Foundation. Colt's subsequently helped arrange such a meeting, he said.

Esposito added that Spitzer was scheduled to meet last night with Donald Silkha, who holds 85 percent of Colt's stock, but not to negotiate an individual settlement for the company.

This is not the first time that

elements in the industry have looked for common ground with gun control advocates.

After secret meetings with the White House earlier this year, two gun industry groups agreed to support several gun control proposals offered by President Clinton. And Philadelphia Mayor Edward G. Rendell has met with Smith & Wesson and other members of the industry in an effort to find solutions to gun violence that could head off a possible lawsuit by the city.

The Washington Post

THURSDAY, JULY 22, 1999

WASHINGTON IN BRIEF

Embassy Security Bill Passes

The House, fearing another terrorist attack like the twin bombings of U.S. embassies in Africa a year ago, voted yesterday to more than quadruple the Clinton administration's proposed spending to fortify America's embassies worldwide.

Congressional concern for the safety of diplomats and other Americans abroad has grown with the approach of the Aug. 7 anniversary of the bombings that killed 224 people, including 12 Americans, and injured thousands.

The House renamed its main foreign operations legislation "The American Embassy Security Act." It would allocate \$1.4 billion—60 percent of the bill's total funding—to rebuilding or remodeling American embassies around the world. The remaining \$1 billion would go to State Department programs, international agencies and refugee relief. The bill notes that security at half the 250 U.S. facilities abroad is considered inadequate.

The legislation also addresses concern over the response of U.S. law enforcement units to crises abroad. One provision would allow the FBI immediately to lease an aircraft

for sending agents to the site of a crisis, something officials say took more than 13 hours after word of the African bombings.

Seizure of Private Property

The nation's top law enforcement agencies pressed their effort to kill legislation that would curb the federal government's ability to confiscate private property by telling senators that it would weaken their ability to fight crime.

Deputy Attorney General Eric H. Holder Jr. told a Senate subcommittee that the Justice Department supports tightening the rules the federal government must follow to seize cars, cash, homes and other property linked to crime.

But a bill the House passed 375 to 48 last month "crosses the line between providing due process and giving unintended relief to drug dealers, money launderers and other criminals who victimize the elderly and the vulnerable in our society," he said.

For the Record

■ The Department of Veterans Affairs is wasting up to \$1 million a day on unneeded

medical facilities and its proposal to fix the problem is unlikely to work, according to the General Accounting Office. The wasted spending occurs in a VA hospital system that dropped from 49,000 patients a day in 1989 to 21,000 in 1998, with nearly half the decline occurring in the past three years. The use of VA hospitals should continue to plummet as the veteran population drops from 25 million to an estimated 16 million by 2020, the report said.

■ Rep. Dan Burton (R-Ind.), leading an investigation of campaign fund-raising abuses, asked two federal judges to delay sentencing of two former Democratic fund-raisers until Congress can obtain their testimony. Burton said that once Yah Lin "Charlie" Trie and John Huang are sentenced, they would have no incentive to cooperate with Congress. Trie pleaded guilty in May to campaign finance violations and agreed to cooperate in a Justice Department investigation of illegal Asian donations to the Democrats. Huang was arraigned in June on a conspiracy charge as part of a plea bargain.

—Compiled from reports by the Associated Press and Reuters

FEDERAL DIARY

Mike Causey

Agencies Stampede in Search of Buyouts

Federal workers who dreamt of taking part in a 1999 American civil service version of Spain's famed running of the bulls—in this case a mass exodus of aging government employees pursuing \$25,000 buyouts—may want to get a little more real. As in:

Focus on trying to buy the winning lottery ticket. It is one thing to build castles in the air. It is another to try living in one.

But while the idea of a you-want-it-you-got-it government-wide buyout offer is deadlier than the proverbial doornail, the hectic closing days of Congress could bring some happy surprises. A number of federal agencies are doing legislative end runs. They hope that a favorite congressional committee will disguise, then approve, buyout language in one of the many must-pass appropriations bills.

Here's the deal:

Earlier this year, the White House said it would ask Congress for permission to allow downsizing agencies to offer workers up to \$25,000 (before deductions) to retire. The idea was to preserve jobs for recent hires and nonveterans who would otherwise be subject to termination under downsizing—wrecking the administration's diversity numbers. Over the past six years, more than 130,000 federal workers received buyouts, while only about 30,000 were fired in downsizing that eliminated more than 350,000 federal jobs.

Now, however, White House and congressional insiders and federal union lobbyists agree that no government-wide buyout bill will be introduced, in part because there is little chance Congress would approve it.

Instead, either officially or otherwise, federal agencies seem to have adopted an every-agency-for-itself tactic. That is, find a friendly congressional committee and get it—somehow, someway—to authorize agency-specific buyouts. Most agencies that still have buyout authority got it through last-minute deals in House-Senate legislative conferences.

Odds are that few agencies will get special buyout authority. But that hasn't stopped many of them—including the Department of Veterans Affairs and units of the Treasury Department—from asking Congress. Of the Cabinet-level agencies, VA stands the best chance of getting buyout authority.

Buyouts and Inflation

Some bold agencies—seeking buyout authority for themselves—have told Congress that the current maximum \$25,000 payout isn't what it used to be. In terms of 1993 dollars, when the buyout program started, the same payment today is worth about \$20,000, they've told Congress. To make matters worse, the \$25,000 shrinks, after deductions, to about \$16,000 for the typical federal worker.

Computer Specialists

If you have ever wanted to work for the Internal Revenue Service, mark Saturday, July 24, on your calendar. The IRS is having a job fair—from 9 a.m. to 3:30 p.m.—at the Marriott Hotel in Greenbelt. The tax agency has 40 openings for computer specialists at the Grade 13 and 14 levels. For details, call 202-283-1727.

Regional Manager Openings

The Department of Transportation has openings—\$102,300 to \$118,400 a year—for regional managers in its Philadelphia, Atlanta, Fort Worth and San Francisco offices. For details, call 202-366-2444.

Tobias Departure

Friends and colleagues plan a sendoff celebration this evening to honor **Robert M. Tobias**, longtime president of the National Treasury Employees Union. He's largely credited with turning the once-insular (IRS-based) union into a national labor organization with members in many agencies. He also helped draft the IRS reforms that are now law.

Tobias, considered one of the best and brightest in the labor movement, probably could have been president for life. He had, as one adversary once said, "the ability to charm an IRS commissioner ... or member of Congress out of a tree."

But in his mid-fifties, he's decided to move on. Official plans include teaching at a local university and writing. Friends suspect he will be tapped for a key post in **Vice President Gore's** campaign for the Democratic presidential nomination.

Mike Causey's e-mail address is causeym@washpost.com

The Washington Post

THURSDAY, JULY 22, 1999

A Republican Seeks to Ban Suits Against Gun Makers

By LIZETTE ALVAREZ

WASHINGTON, March 9 — Opening a second front in the latest battle to protect the gun industry, Representative Bob Barr today introduced legislation that would block the lawsuits filed by cities against gun manufacturers.

Mr. Barr, a Georgia Republican who is a board member of the National Rifle Association, the country's largest gun lobbying organization, said that Federal legislation was needed to preserve free enterprise and stymie get-rich schemes by trial lawyers. The bill would bar lawsuits that seek to hold gun manufacturers and dealers liable when someone commits a crime with one of their weapons, provided that the firearm is legal and not defective and that the customer is not a known criminal.

"If these lawsuits are allowed to proceed, it will really be 'Katie bar the door,'" Mr. Barr said, "because there will be no industry in America that will be safe from these abusive and predatory lawsuits."

With cities now challenging gun manufacturers in court, the longtime struggle over gun control and the rights of gun owners has been infused with energy and importance on Capitol Hill this year.

The new strategy by local governments to recover damages from gun makers has stoked the Democrats' campaign to crack down on firearms after having failed to get any gun-control legislation passed since the Republicans won control of Congress in 1994. In the past two weeks alone, the Democrats have introduced three bills and more are expected.

Today, Senator Barbara Boxer, Democrat of California, said she planned to counteract Mr. Barr's bill by introducing legislation that would guarantee cities the right to sue gun manufacturers.

"If local governments believe the fight against crime is being hampered because of a mass proliferation of guns, I believe it is in the national interest to allow them to take action in court," Ms. Boxer said.

This morning, Senator Dianne Feinstein, Ms. Boxer's fellow California Democrat, laid out her own legislation to close a loophole that permits the import of high-capacity ammunition clips for assault weapons that cannot be manufactured in the United States.

Another Democratic proposal would require the Federal Government to regulate the design, manufacture and distribution of guns.

"The activity on the city level is sending a signal to everybody in Capitol Hill that people really do care about this," Mrs. Feinstein said. "And that this totally unregulated, produce-anything, sell-anything, kill-as-many-people sort of attitude is

just not acceptable."

Republicans, sensing a serious threat this time, have moved swiftly to try to protect the gun industry.

Surrounded by law-enforcement and gun lobbyists, Mr. Barr held up a wooden Louisville Slugger bat at a news conference to warn of the domino effect. Once trial lawyers sue one industry for liability of this sort, he said, the strategy will be used against other businesses.

These bats, Mr. Barr intoned, "are used in the commission of crimes, with some frequency unfortunately. Should the manufacturers of Louisville Sluggers, already reeling under changes in their industry, be subject to devastating, abusive lawsuits because their lawful products, none defectively manufactured, are abused by criminals? Obviously not."

His bill, Mr. Barr emphasized, would not shield manufacturers from lawsuits for selling defective firearms or selling guns to known criminals.

The legislation would serve as a stopgap for lobbyists who have been furiously working with state legislatures to halt the spate of lawsuits. Using the tobacco industry lawsuits as a model, five cities have sued the gun industry: Atlanta, Bridgeport, Conn., Chicago, Miami and New Orleans. Others, including St. Louis, are considering doing the same.

The cities seek to recover expenses from violent gun crimes, including law-enforcement and hospital costs. Most also argue that the gun industry is negligent for not including more safety features.

Gun lobbyists have taken note of a ruling last month in Federal District Court in Brooklyn. In a lawsuit filed by private citizens, a jury held 9 of 25 gun manufacturers liable for three shootings that involved illegally obtained handguns.

So far, only in Georgia has the Legislature enacted a law to block a lawsuit, Atlanta's in this case, although similar legislation is being considered in at least 12 other states. The Florida Legislature is considering a bill that would make it a felony for a local official to file a lawsuit against the gun industry.

But tackling the offensive state-by-state is expensive and time-consuming. Mr. Barr's bill would accomplish the same feat all at once, but its prospects are uncertain.

The proposal puts Republican lawmakers in a bit of a philosophical bind. They could wind up defending a law that undermines local governments and leaves them open to the question of whether they defend local governments or the gun industry.

Mr. Barr said the decision was simple: they will defend the status quo. "There is nothing more conservative than maintaining the status quo," he said.



Senator Dianne Feinstein of California holding a modified AK-47 rifle to emphasize her call for a ban on high-capacity ammunition clips.

New York Times
3/10/99

PHOTOCOPY
PRESERVATION

For Immediate Release
Friday, October 30, 1998

NEW ORLEANS FIRST CITY TO SUE GUN MANUFACTURERS: CENTER TO PREVENT HANDGUN VIOLENCE CO-COUNSEL IN LANDMARK LAWSUIT

(New Orleans, LA.) New Orleans Mayor Marc Morial today announced that the City of New Orleans has filed the first-ever lawsuit by a city or other government against the gun industry. The suit names fifteen gun manufacturers, three trade associations and several local pawnshops and gun dealers, and seeks to recover the damage to the City from the gun industry's sale of guns that are not "personalized" to incorporate safety designs to prevent their use by children and other unauthorized users. The Legal Action Project of the Center to Prevent Handgun Violence, which for five years has been bringing innovative lawsuits against the gun industry, has agreed to serve as co-counsel for the City's lawsuit. Louisiana attorney Wendell H. Gauthier, an architect of the legal strategy used against the tobacco industry, will also represent the City in its suit.

"We have been so focused here in New Orleans on fighting crime, getting guns off the street and protecting our citizens," said Mayor Morial. "We have already reduced crime in New Orleans by 40% since 1994. This lawsuit is the next step in making New Orleans the safest city in America."

"This lawsuit is a turning point in our efforts to force the gun industry to make a safer, childproof, 'personalized' product," said Dennis Henigan, Director of the Center's Legal Action Project and a national expert on the application of product liability law to the firearms industry. "Mayor Morial is showing great courage in becoming the first mayor to take the gun industry to court, and we expect that other big-city mayors may well follow his lead. It's time for the gun industry to be held accountable for the cost of the thousands of tragedies and millions of dollars gun violence inflicts on our nation's cities."

This year, several urban mayors including Mayor Ed Rendell of Philadelphia, Mayor Alex Penelas of Miami-Dade County, and Mayor Richard Daley of Chicago have expressed interest in following the tobacco example in recovering costs from the gun industry. In the last six months, the gun industry's most powerful trade group, the American Shooting Sports Council, has repeatedly met with big-city mayors to deny responsibility for the design of its manufacturers' products in an attempt to ward off the type of lawsuit now filed by New Orleans. The American Shooting Sports Council is named as a defendant in the New Orleans lawsuit, along with leading gun manufacturers including Smith & Wesson, Sturm Ruger, Beretta U.S.A., Colt, Glock, Lorcin, Bryco, Jennings and Navegar.

"The gun industry has hid behind its mouthpieces at the NRA for many years, but those days are now over," Henigan said. "The money that manufacturers spent on pro-gun propaganda and misleading advertising could have been used to make guns that can only be fired by authorized owners, sparing us thousands of homicides, suicides and accidents."

"Under the Louisiana product liability statute, a manufacturer can be held liable for damage caused by a product that is unreasonably dangerous in design. In this lawsuit, the City is alleging that guns that fail to incorporate safety systems that prevent their use by children and other unauthorized users are unreasonably dangerous in design. Just as car manufacturers have been held liable for failing to install seat belts and air bags, gun makers should be liable for failing to install feasible safety systems to prevent serious injuries and deaths."

Coincidentally, Center attorneys are also in trial in Oakland, CA representing the parents of a child accidentally killed by a gun that lacked any safety features that could have prevented the accident. In *Dix v. Beretta*, the Center's lawyers ask that Beretta U.S.A. be held responsible for the death of Kenzo Dix, who was killed by a close friend who believed he had unloaded the gun he had found. Kenzo was killed by a bullet that remained in the gun's chamber, and the Center is asking for damages for failing to implement feasible design changes that would have prevented the gun from being fired by children. The *Dix* case is expected to go to the jury in early November.

"Why should the innocent citizens of this City, or any other city, bear the costs of gun violence while the gun industry pays nothing?" Henigan said. "No longer must it be permitted to evade its share of the responsibility for protecting our communities and particularly our children from senseless shootings. Mayor Morial today has filed a lawsuit to save lives. We are all indebted to him."

New Orleans Suite Q+A

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The Center to Prevent Handgun Violence, chaired by Sarah Brady, was founded in 1983 to reduce gun violence through education, legal advocacy, research, and outreach to the entertainment community. Based in Washington, DC, CPHV's national initiatives include prevention programs for parents and youth on the risks associated with guns, legal representation for gun violence victims, work with the entertainment community to encourage deglamorization of guns in the media, and research of the risks associated with guns and the efficacy of gun control laws.

BACKGROUND INFORMATION ON NEW ORLEANS LAWSUIT AGAINST GUN INDUSTRY

Q: *What is the nature of this lawsuit?*

A: This is the first lawsuit ever filed by a City or other government entity against the gun industry. The suit is being brought by the City of New Orleans and the New Orleans Police Department against fifteen major handgun manufacturers, three industry trade associations, and several New Orleans gun dealers. The suit seeks to recover the damage to the City from the gun industry's sale of guns that fail to incorporate safety designs to prevent their use by children and other unauthorized users. "Personalizing" guns so that they can only be used by authorized owners would prevent thousands of unintentional shootings by children, adolescent suicides, intentional shootings by violent teenagers, and criminal violence with stolen guns.

Q: *Is it possible to manufacture "personalized" guns that can only be fired by their authorized owners?*

A: Yes. Patents for personalized guns have been granted to at least 30 individuals and groups since 1976. A personalized gun can be as simple as a combination lock or as elaborate as a radio transmitter or computer chip. The SAF-T-LOK, for example, is a basic push-button combination lock incorporated into the grip of a handgun. If the three or four-digit code is not properly entered, the gun will not fire. The SAF-T-LOK would add an estimated \$50 to the price of a gun. Another company in New Hampshire manufactures a safety system known as the Magna-Trigger. This device keeps the firing mechanism of the handgun locked unless the shooter is wearing a specialized magnetic ring that disengages the locking device when the ring touches the grip of the handgun. Fulton Arms, a Houston, Texas company has invented a handgun known as the SSR-6. A safety mechanism keeps this gun from firing unless the shooter is wearing a magnetically encoded chip in a ring. When the ring touches the pistol grip, an electrical circuit is completed and disengages the safety mechanism, allowing the gun to be fired. Colt's Manufacturing Co., Inc. also has unveiled a prototype personalized gun for law enforcement use which uses radio frequency technology.

Q: *What is the legal basis of this lawsuit?*

A: Under the Louisiana product liability statute, a manufacturer can be held liable for damage caused by a product that is unreasonably dangerous in design. In this lawsuit, the City is alleging that guns that fail to incorporate safety systems that prevent their use by children and other unauthorized users are unreasonably dangerous in design. Just as car manufacturers have been held liable for failing to install seat belts and air bags, gun makers should be liable for failing to install feasible safety systems to prevent serious injuries and deaths.

Q: *How has the City of New Orleans been damaged by the gun industry?*

A: Gun violence obviously has a profound impact on the quality of the life in New Orleans and other urban areas. But there also is a significant economic cost of gun violence. For example, it costs more than \$14,000 to treat each child wounded by gunfire - enough to pay for a full year at a private college. The average cost of a gun-related crime can be as high as \$268,000. The American College of Physicians estimates that, in the aggregate, firearms injury costs the nation more than \$4 billion annually, with \$19 billion in additional indirect costs, such as lost potential earnings. Much of the cost of gun violence is borne by the taxpayer through government payment of medical expenses, emergency services, police protection, courts, prisons, etc. Cities like New Orleans bear a substantial share of those costs.

Q: *Is this lawsuit similar to suits brought by cities and states against the tobacco industry?*

A: Although the legal theories differ to some degree, the City's suit against the gun industry is based, in part, upon the successful efforts of states to recover damages against the tobacco industry. Just as the tobacco industry's conduct increases the risk of tobacco-related disease, the gun industry's conduct in marketing unreasonably dangerous guns increases the risk of gun violence. In both cases, industry conduct imposes significant costs on the public treasury which states and cities are entitled to recover. For example, gun violence makes it necessary for the City of New Orleans to expend significant sums on additional police protection, as well as emergency and hospital services. Gun injuries and deaths, through their impact on the productivity of the citizenry, also cause the City to lose significant tax revenues.

Q: What kinds of shootings could be prevented if the gun industry were to "personalize" its guns to prevent their use by children and other unauthorized users?

A: Personalizing guns would prevent thousands of tragic unintentional shootings of children and teenagers, who find loaded guns all too accessible. A May 1997 study sponsored by the National Institute of Justice showed that 34% of handgun owners keep their handguns loaded and unlocked. The Centers for Disease Control and Prevention (CDC) estimate that nearly 1.2 million latchkey children have access to loaded and unlocked firearms. It is no surprise, therefore, that children and teenagers cause over 8700 unintentional shootings each year in which at least 600 people die. If guns were designed to prevent their use by children and teenagers, many of these shootings would be prevented.

Personalizing guns also would prevent many adolescent suicides. A youth aged 10-19 commits suicide with a gun every six hours in this country. If guns were personalized, moments of suicidal depression would less often result in fatal tragedies.

Personalizing guns also would reduce criminal violence by preventing violent juveniles from using guns they find in the home. The horrible mass shootings that have occurred in schools in Jonesboro, Arkansas and Springfield, Oregon could have been prevented if the guns found by the shooters had been operable only by their authorized owners and not by anyone who could pull the trigger.

Finally, personalizing guns also would deter gun theft from homes and gun shops, an important way guns are diverted into the illegal market. Gun trafficking would be far more

difficult if stolen guns were inoperable because the criminal lacked the proper combination or other mechanism to unlock the gun and allow it to function.

Q: *Is the filing of this suit likely to lead to suits by other cities?*

A: There is no question that other cities are investigating possible lawsuits against the gun industry. For example, Mayor Rendell of Philadelphia and Mayor Daley of Chicago both have acknowledged that they are working to develop lawsuits seeking compensation from the industry for the costs of gun violence.

Q: *Have other suits been brought against gun companies for failing to personalize guns?*

A: Yes. The Center to Prevent Handgun Violence, co-counsel for the City of New Orleans in this case, is currently representing the parents of a teenager who died in an unintentional shooting in a personalized gun case against gun maker Beretta U.S.A. Trial in the case, *Dix v Beretta U.S.A. Corp.*, began October 9 in Oakland, California and is expected to last until early November. The Center is representing the parents of Kenzo Dix, who was fatally shot in April of 1995 by his best friend Michael. Kenzo and Michael were playing at Michael's home in Berkeley. Michael had found his father's loaded Beretta pistol in a camera bag, removed the ammunition magazine, unloaded it and placed the empty magazine back in the gun. Michael did not know that a bullet was hidden in the chamber of the gun. When Michael pointed the gun at Kenzo and pulled the trigger, Kenzo was killed. The suit seeks damages from Beretta for failing to implement feasible design changes that would have prevented the gun from being fired by children.

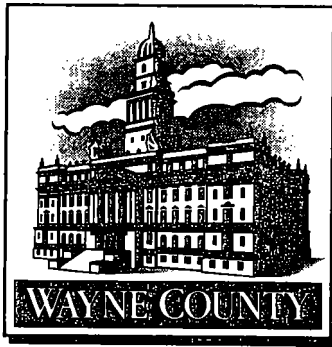
Q: *Who is representing the City of New Orleans in this suit?*

A: In this suit, lawyers from the Center to Prevent Handgun Violence, a gun violence prevention organization chaired by Sarah Brady, are collaborating with some of the lawyers who have masterminded the legal attack on the tobacco industry. Many of the same law firms that have devoted enormous resources to the fight against Big Tobacco are now prepared to take on the gun industry in the interest of public health and safety.

Legal  Project

Center to Prevent
Handgun Violence

1225 Eye St., NW, Suite 1100 Washington, D.C. 20005



Edward H. McNamara
County Executive

Bruce R.
to Richard S.
fr: Linda M.

Jose
PMI

TO: LINDA MOORE
ORSON PORTER

FROM: RON THAYER
WAYNE COUNTY, MICHIGAN

RE: PRESIDENT'S SUMMIT ON GUNS

DATE: 5/3/99

We have been heavily involved this past year, in developing a strategy to curb the use of guns by juveniles and felons. Our goal is urge gun manufactures to exercise control over the dealers who sell their products. For instance, Marriott Hotels spends more money checking on hotels to see that their employees put a chocolate on a guest's pillow than Smith & Wesson spend to insure that their weapons are not sold to kids or felons.

The attached memo will give you some background information on our "straw purchase" sting operation, where 9 of 10 dealers randomly selected sold to our undercover agents posing as felons or juveniles. The newspaper articles explain the public reaction.

Wayne County Executive Ed Mc Namara has designated Deputy County Executive Mike Duggan to be his point person on this project. Mike would like to meet with the President's point person on his gun summit to discuss what we found and our possible involvement. Mike Duggan can be reached at 313 224 -0344. I am also forwarding a short video that documents the illegal sales in a way that no written word can capture. **The video concludes with a clip of a Detroit gun dealer poking fun at the parents of children killed by guns. It made me sick.**

OFFICE OF THE COUNTY EXECUTIVE
600 RANDOLPH STREET, SUITE 349 • DETROIT, MICHIGAN 48226 • 313-224-0286

Tuesday 4/27/99
Page 1A

Wayne, Detroit sue gun makers

**County, city seek
\$800 million; local
dealers cited, too.**

By David Shepardson
and Cameron McWhirter
The Detroit News

DETROIT — The city of Detroit and Wayne County sued gun manufacturers and local gun dealers Monday for more than \$800 million for allowing guns to be sold to children and felons.

The lawsuits — the largest ever filed by municipalities against gun manufacturers and dealers — come less than a week after the Littleton, Colo., high school shooting rampage.

"Littletons can happen anywhere, any time, anyplace," said Wayne County Prosecutor John O'Hair, who proposed the effort to file the city and county suits in January.

He said the Littleton massacre shows gun violence has several social causes — and one of them is "the availability of guns to young people, old people, anybody who wants one. That's what this lawsuit is all about," the teary-eyed prosecutor said at a news conference.

At issue

■ Wayne County and the city of Detroit are seeking damages from 28 gun manufacturers and 12 local gun dealers. They argue the manufacturers and dealers are negligent in not preventing felons and juveniles from obtaining weapons.

■ Dealers say they vigorously enforce the laws and manufacturers say they aren't responsible once they sell the guns to the dealer.

■ The defendants will have two months to respond. A trial might not begin for three years.

City and county officials said the suits will have no impact on a legally qualified adult's ability to buy a gun. But critics called it back-door gun control, and an attempt to bankrupt gun companies that can't possibly control who is buying their products.

Max Bandy, a retired Detroit police officer and father of Shawn Bandy, a Detroit officer killed on duty in December, praised the suits. "This isn't about ... taking guns away from hunters," Bandy said.

Please see GUNS, Page 6A

Suing gun makers

At least seven U.S. cities, including Detroit, have filed recent suits against the gun industry.

New Orleans: Filed Oct. 30, 1998.

Argues that the guns made by manufacturers are unreasonably dangerous in design and have inadequate safety devices.

Chicago: Filed Nov. 12, 1998. Argues that the prevalence of illegal firearms in Chicago constitutes a public nuisance. Seeks \$435 million in damages.

Bridgeport, Conn.: Filed Jan. 27. Argues that guns have insufficient safety devices; illegal guns are a public nuisance.

sance; gun-makers have misled consumers on the dangers of handguns and misrepresented their benefits for home protection.

Miami: Filed Jan. 27. Argues that guns are unreasonably dangerous in design and have inadequate safety devices.

Atlanta: Filed Feb. 4. Argues that guns have inadequate safety devices.

Cleveland: Filed April 9. Argues that guns are unreasonably dangerous in design and have inadequate safety devices. Seeks up to \$150 million in damages.

Gun suit defendants

Those named as defendants Monday in a lawsuit filed by Wayne County, Detroit sue the same manufacturers, and 11 of the 12 dealers, excluding Urbanski's Gun Shop.

Manufacturers

Arms Technology, Inc.; Beretta USA Corp.; B.L. Jennings Inc.; Browning Arms Co.; Bryco Arms Inc.; Cobray Firearms; Colt's Manufacturing Company; Davis Industries; FMJ (Full Metal Jacket); Glock Inc.; H & R 1871 Inc.; MKS Supply Inc.; Kel-Tec; CNC Industries Inc.; Lorcin Engineering Comp. Inc.; O.F. Mossberg & Sons Inc.; Navegar Inc.; Phoenix Arms; Raven Arms Inc.; Smith & Wesson Corp.; Sturm Ruger & Comp. Inc.; Sundance Industries Inc.; S.W. Daniel, Inc.; Taurus

International Manufacturing Inc.

Dealers

Alexander's Sport Shop Inc., doing business as Alexander's Gun Shop at Gun Range; Dean's Gun Shop; Dick's Sporting Goods Inc.; Gander Mountain; Gibraltar Trade Center Inc.; Joel Silbe doing business as J.S. Sporting Goods; Lortz Ltd., doing business as Midwest Ordnance; General Laney, doing business as Laney's Guns & Supplies; Motor City Sports Car Ltd.; Urbanski Gun Shop, doing business as Pago's Gun shop; The Sports Authority Inc.

What Detroit's suit argues

Excerpts from the suit filed by Detroit:

■ "Firearm homicides occurring in Wayne County totaled 463 in 1998, 483 in 1997, and more than 581 as recently as 1993. So far in 1999, more than 150 have been killed by firearms in the county... For each of these shootings, there are roughly three

non-fatal shootings that require emergency room care."

■ "From 1992 through 1998, more than 1,550 youths, aged 16 and under were shot in Detroit, for an average of about 220 children per year. More than 135 of these children were killed by gunfire."

LAWSUITS AGAINST GUN MAKERS

GUNS

Continued from Page 1A

"Something's wrong when you can walk into a gun show and buy an M-16 at one table and the kit to turn it into an automatic weapon," said Max Bandy, who is now a Livonia patrolman.

"Not a day goes by I don't wonder if we made the right decision to end (Shawn's) life support. I hope Shawn didn't die in vain."

The separate civil suits, filed in Wayne Circuit Court, seek damages from 24 gun manufacturers and 12 dealers (the city sued only 11) for "willful negligence" in not stopping "straw purchases" — a gun sale where a dealer knowingly sells a weapon to someone acting as a front-man for a felon or juvenile. The county suit seeks more than \$400 million, and city attorney David Christenson said the city will seek at least that much.

"Through a calculated strategy of willful blindness, the defendants exploit, rely upon, and help to maintain an active illegitimate secondary market in firearms," according to the city's suit.

"The Marriott Corp. puts more effort into making sure that their hotels put chocolate on your pillow at night than Smith & Wesson puts into making sure their dealers are not selling to kids and felons," said Michael Duggan, Wayne County deputy executive. "That to us is outright negligence."

Makers discount suits

But Paul Jannuzzo, vice-president and general counsel of Glock Inc., one of the manufacturers sued, said the suits were baseless.

"Phillip Morris doesn't send their salesman around to see if they are selling to underage kids. They check



Wayne County Executive Ed McNamara, left, and county prosecutor John O'Hair, foreground, discuss the \$800 million lawsuit the city and county filed Monday against gun makers.

to see that the 'take a penny, leave a penny' jar promotes their product," Jannuzzo said.

He said a suit might not come to trial for at least three years. "This is a fraudulent suit that's never going to go anywhere."

Michigan gun owners agreed.

"This seems like a back door way at gun control," said Michael Reddick, president of the Redford-based Michigan Gun Owners. "They just want to bankrupt the gun industry."

To support their claim, the county and city held an elaborate press conference. In addition to tables display-

ing automatic rifles and other guns bought during undercover operations, officials showed a slickly produced video, reminiscent of a television news expose, that included black-and-white footage of undercover gun purchases from Wayne County gun dealers.

Of 10 dealers visited at random in March and April, nine sold a total of 37 guns to "straw purchasers." In each incident, the undercover agents identified one member as either a juvenile or a felon and asked if the other person could buy the gun for him.

In video from a March 24 visit to the Sports Authority in Dearborn, a salesman told undercover investigators that he would make the sale, but it was "highly illegal."

"There you go, guys," he said after handing them the gun. "Enjoy it."

Jason Tizedes, a manager at the Gander Mountain sporting goods store in Taylor, one of the store's cited, defended his store's security checks even though on April 2 an undercover sheriff's deputy posing as a felon bought three shotguns and ammunition.

"Every gun purchaser is required to fill out a form," he said. "If anything on that form throws up a red flag, we will not sell a gun to that person."

Four of the dealers cited had booths at the Gibraltar Trade Center in Taylor, which has monthly gun shows. Bob Koester, the center's president, said he was "amazed" to hear the county's claims, because the center regularly cooperates with undercover investigations by the U.S. Department of Alcohol, Tobacco and Firearms.

"ATF actively works our shows," Koester said. "Our dealers know that."

New legal tactic

While the suit is not the first by

municipalities against arms manufacturers and sellers, it is the first municipal suit using a "straw purchase" legal strategy.

Jim Manown, a spokesman for the National Rifle Association which steadfastly has opposed suits against gun manufacturers, said the group opposed this suit.

"In light of the Littleton tragedy, we're not commenting on the Detroit-Wayne County suits, except to say our position hasn't changed on opposing (all) these suits."

Gun violence and murders have been a serious crime problem in Detroit and Wayne County for years. In 1998, 429 people were murdered in the city of Detroit, giving the city the fifth highest murder rate in the country for that year behind Gary, Ind.; New Orleans; Washington, D.C.; and Baltimore.

Detroit and the county join at least six U.S. communities that have filed suit against gun manufacturers and dealers.

The county and the city put their annual combined costs from gun-related violence at more than \$80 million. Detroit Mayor Dennis Archer said the city had been contemplating some kind of action against gun manufacturers since June.

"Our lawsuit will demonstrate that the gun industry practices and encourages illegal and irresponsible sale and use of guns simply for the use of making money."

Nancy Ilwa, spokeswoman for the Center to Prevent Handgun Violence of Washington, D.C., which is advising the plaintiffs, said the gun industry is on the defensive.

"We want to hold the industry accountable for these products because they have never been held accountable."

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313-222-6400JOHN S. KNIGHT (1894-1981) LEE HILLS, *Publisher Emeritus*HEATH J MERIWETHER
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*Deputy Managing Editor/
Sports and Operations***KNIGHT RIGGER****IN OUR OPINION**

Gun Makers

Lawsuits press the case for industry accountability

Money can't raise the dead or repair all the ruined lives.

But the damage suits that Wayne County and the City of Detroit filed Monday against gun manufacturers are a long-overdue call for some accounting from an industry that is lax about the distribution of its lethal merchandise.

No corner of America has been more ravaged by guns over the years than Detroit, which for years wore the nickname "Murder City." It wasn't stabbings that drove up the toll or left so many people crippled or families devastated. With the lawsuits, Detroit and Wayne County are declaring that gun makers have to shoulder some of the blame for the fact that so many of their products end up in the wrong hands.

Gun violence often derives from illegally purchased firearms, fre-

quently a "straw purchase" in which someone with a clean record fronts for the true buyer, who may be a criminal or too young. Studies and test buys done by the city and county show a pattern described as "willful blindness" by gun dealers.

County investigators successfully made illegal purchases at 9 of 10 dealers they tried.

From 1990 to 1998, 5,264 children aged 16 and under were charged with carrying a concealed weapon in Wayne County. Detroit police confiscate 4,000 guns per year.

One expert estimates that gun crimes cost Detroit taxpayers about \$850 million a year, including medical expenses and police time.

With the horror of Littleton, Colo., still fresh, the public should understand the point of these suits: Companies can't just put their dangerous goods on the nation's streets and then just walk away.

Show site cancels big gun bazaars

*Dealers up in arms,
but cops applaud move*

By DAVID MIGOYA
FREE PRESS STAFF WRITER

The state's largest venues for gun bazaars — Gibraltar Trade Center in Taylor and in Mt. Clemens — on Thursday canceled all future firearms shows because of concerns over alleged illegal sales.

The move by Gibraltar president Robert Koester — called "ludicrous" and "drastic" by dealers who sell there but applauded by police — was prompted by lawsuits filed this week by Wayne County and Detroit officials. The suits target gun manufacturers and dealers in an effort to recoup the costs associated with gun-related violence.

Gun dealer Ray Brown, who sells about \$2 million worth of guns a year at the Gibraltar shows, predicted he would have to close his Bad Axe store and lay off all 10 employees.

"My world is over," Brown said.

Detroit Police Chief Benny Napoleon, whose officers helped

Please see SHOW, Page 2A

Inc
4-30-9
Pg 2A

SHOW | One group says no to future gun bazaars

From Page 1A

Wayne County sheriff's deputies organize the undercover buys that fueled the lawsuits, praised the gun show ban.

"This is a step in the right direction in controlling the excessive amount of firearms that exist in our communities," he said. "It's unfortunate, however, that law-abiding citizens who wish to purchase firearms in a legal manner will have to suffer as a result of the actions of a few irresponsible individuals."

Gibraltar also was named a defendant in the lawsuit. Officers alleged they made four undercover gun purchases under illegal circumstances from dealers at the Taylor center.

"We take this action because of our concern for the public welfare and the recent allegations of gun sales to either minors or felons," Koester said in a news release.

The two centers together have hosted about 24 gun shows a year, each of which attracts 50,000-90,000 people for a three-day run, Koester said. At \$2 per person admission on a Saturday or Sunday — Fridays are free admission — the dollars sacrificed are enormous, especially when gun sales are factored in. Koester said there's no way to track the amount in gun sales at each show.

For Ray Brown, however, losing the Gibraltar shows means two-thirds of his annual revenues are gone — a likely end to his business, Ray's Hunting Center in Bad Axe. He is considered the largest gun show dealer in the state and has sold at the shows for about 14 years without any difficulty with the law, he said.

He was not among dealers named in the lawsuit.

He displays about 2,000 guns at each show along table space that stretches nearly the length of a football field.

"I'm in a town of 6,000 people and I sell 12,000 guns a year at these shows; that's about \$2 million," the 38-year-old said when told the news. "I can't do that kind of business in this small town. I'm finished. We're the legal dealer and we're the ones getting hurt."

At the Trade Center, investigators say they purchased handguns ranging from a .44-caliber magnum to a semiautomatic rifle with a 30-bullet clip. Three undercover purchases were on the same day and all involved illegal sales to adults who were buying on behalf of juveniles.

Koester said that although Gibraltar has cooperated for years with federal Bureau of Alcohol, Tobacco and Firearms agents investigating gun sales and sellers, banning gun shows entirely is the only option.

"The recent allegations of four questionable sales of firearms to people who ultimately intended that the guns go to minors or felons lead us to the conclusion that the only way Gibraltar ... can effectively protect all members of our communities is to cancel all future gun shows," he said.

He added: "While the vast majority of our customers and vendors are honest, upstanding citizens, we cannot continue to provide a forum for those that are bent on illegal activity."

Proponents of gun ownership reacted bitterly.

Michael Hoban, executive director of Brass Roots, a pro-gun lobby in Hazel Park, called the decision drastic.

"I think the people trying to shut them down won," Hoban said. "They're a legal business with legitimate customers. I can't see why they'd make such a drastic move."

"It's utterly ludicrous," said Glenn Williams, a 62-year-old Dearborn resident who is executive director of the 2,000-member Michigan Big Game Hunters Association and a regular attendee of the gun shows.

"If there is somebody doing illegal stuff, turn around and prosecute them, not the place hosting an event," he said.

The nine dealers named in the lawsuit who are alleged to have made the illegal sales have not been charged with a crime, although prosecutors and police said charges are being reviewed.

The flea-market atmosphere of the trade centers will continue to thrive, Koester said, by focusing on their core business of sports collectibles, antiques, classic cars and computers.

DAVID MIGOYA can be reached at 1-313-223-4353 or by E-mail at migoya@freepress.com

SUMMARY OF UNDERCOVER STINGS: **9 OF 10 STORES TESTED SOLD TO STRAW PURCHASERS**

In investigating whether there was a basis for litigation by Wayne County or the City of Detroit against handgun manufacturers, County & City representatives interviewed former gang members. These former gang members advised the County and City that weapons were easily bought from gun dealers by convicted felons and juveniles through the use of "straw purchasers" who filled out the necessary legal paperwork. The County and City acted to verify this information through undercover sting operations, first through the use of private investigators, and then the use of the County's law enforcement personnel.

Between March 31 and April 9, 1999, undercover teams from the Wayne County Sheriff's office, Wayne County Prosecutor's office, and Wayne County Airport police teamed in undercover sting operations to buy weapons at 10 different gun dealers. In each case, the person trying to buy the weapon, explicitly advised the dealer early in the transaction he was either a convicted felon or underage, and that his friend, the "straw purchaser" would be the one whose name would be on the paperwork.

Of the 10 dealers, 8 sold the guns in an illegal straw purchase. The only two who refused to sell to the Wayne County officers were Shooters Service in Livonia and the Sports Authority in Dearborn. In the case of Sports Authority, however, a different salesman did sell to the team of private investigators on another occasion.

WAYNE COUNTY OFFICERS' STINGS

March 31, 1999: Alexander's Sport Shop, Inkster

Wayne County Sheriff's Deputy, posing as a felon, purchased a Davis N/P/P .380 Caliber handgun. The "felon" picked out the gun, paid the money, and took the gun from the dealer.

April 1, 1999: Alexander's Sport Shop, Inkster, Mi.

Videotape had failed on previous day's purchase, so same pair of Sheriff's Deputies returned the next day and repeated the purchase of a Davis N/P/P/ .380 Caliber handgun by the "felon".

April 2, 1999: Pago's Gun Shop booth at Gibraltar Trade Center, Taylor

Two undercover Sheriff's Deputies, one posing as a felon and the other as the straw purchaser with a handgun permit, purchased a .44 caliber magnum handgun. The "felon" identified himself as such to the dealer and picked out the gun. The dealer told the "felon" such a purchase was illegal. The dealer then proceeded to tell the "felon" the amount of the purchase, but directed the felon to hand the money to the straw purchaser who in turn handed it over to the dealer. The dealer then handed the gun directly to the "felon".

April 2, 1999: Gander Mountain, Taylor

Two undercover Sheriff's Deputies, one posing as a felon and the other as a qualified buyer with a handgun permit, attempted to purchase shotgun. The officer identifying himself as a felon was allowed to pick out the gun, pay the money directly, and take the Mossberg shotgun himself. The "felon" took the gun out to his car, then immediately returned and told the clerk he decided he wanted two more and was sold two more Mossberg shotguns, with the straw purchaser filling out the paperwork.

April 2, 1999: Dick's Sporting Goods, Taylor

Same two deputies as at Gander Mountain repeated the identical scenario at Dick's Sporting Goods with the same result. The officer who identified himself as a felon was allowed to pick out, pay for, and take a Marlin semiautomatic takedown Rifle. After taking the rifle to the car, the "felon" returned to the store, telling the salesman he decided he also needed a New England Firearms single shot .410/.45, which was sold to him in the same manner.

**April 6, 1999: Motor City Sports (Laney Guns and Supplies),
Detroit**

An employee of the Wayne County Prosecutor's office teamed with a Sheriff's Deputy and an officer from the Wayne County Airport Police to purchase a handgun by a juvenile. After the "juvenile" identifies himself as underage, the dealer allows the "juvenile" to handle and pick out the weapon, but makes the "juvenile" hand the money to the straw purchaser who, in turn, hands it to the dealer. The dealer then hands the straw purchaser the Jennings N/P/P 9mm handgun.

**April 9, 1999: Midwest Ordnance Gun Shop booth, Gibraltar Trade
Center, Taylor**

Prosecutor's office employee and Sheriff's Deputy purchase a Smith & Wesson B/S/P semiautomatic handgun. The "juvenile" identifies himself as underage, is allowed to pick out the gun himself, pay the dealer directly, and take the handgun.

**April 9, 1999: J. S. Sporting Goods booth, Gibraltar Trade Center,
Taylor**

Same team purchased a semiautomatic rifle and 30 clip magazine (classifying the gun as an assault rifle). The identified "juvenile" picked out the gun, but the dealer directed him to hand the money to the straw purchaser who, in turn, handed it to the dealer. The "juvenile" then asked for the larger clip, which the dealer again sold after taking the money from the straw purchaser.

**April 9, 1999: Dean's Gun Shop booth, Gibraltar Trade Center,
Taylor**

Same team purchased a Colt semiautomatic rifle. Here, after the "juvenile" picked out the gun, the dealer directed him to give the money to the straw purchaser who in turn gave it to the dealer. However, the dealer gave the change and the receipt directly to the juvenile and handed the rifle directly to the juvenile as well.

UNDERCOVER PRIVATE INVESTIGATORS' STINGS

The informational videotape also contains footage of two straw purchases made by private investigators working for the County:

March 24, 1999: Sports Authority, Dearborn

The investigator who identified himself as a felon picked out the gun, but the salesman advised him it was an illegal straw purchase and told the two what to say to the manager to effectuate the purchase. The "felon" paid for and received directly the Colt .44 caliber magnum at the cash register.

April 14, 1999: Midwest Ordnance Gun Shop, Royal Oak

The investigator who identified himself as a felon bought 10 Jennings .22 semi-automatic pistols. The "felon" picked out, paid for, and took possession of all the weapons.

QUESTIONS AND ANSWERS ON WAYNE COUNTY AND DETROIT LITIGATION AGAINST HANDGUN MANUFACTURERS

How did the lawsuit by the County and City come about?

The lawsuit was the idea of Prosecutor John O'Hair who proposed it to County Executive Edward McNamara in January, 1999.

County Executive McNamara designated Deputy County Executive Michael Duggan to head up a project to review the potential litigation. In the course of a collaborative process between the County Executive, the County Prosecutor, and the City of Detroit Police Department, that review disclosed that gun dealers were openly selling to felons and juveniles through straw purchasers.

Upon review of that investigation by County Executive McNamara and Detroit Mayor Dennis Archer, the County Executive and the Mayor decided to file companion suits on behalf of their respective taxpayers.

What is the legal theory of the case by the County and City?

Straw purchases have been identified by law enforcement personnel across the country as a major source of the guns used in the commission of crimes. A straw purchase occurs when a felon or underage person buys a gun through a partner who is a qualified purchaser.

The County and City believe that straw purchases are a major source of sales and profits to gun manufacturers nationally. As a result, gun manufacturers sell thousands of guns to dealers who they readily should have known regularly participate in "straw purchases".

In order to protect these profits, gun manufacturers have consciously adopted a policy of "willful blindness" toward their dealers. Manufacturers consciously choose to make no effort to regulate or supervise the activities of their dealers. Manufacturers deliberately avoid learning of their dealers' practices, because if they gained specific knowledge of dealers engaging in straw purchases, the manufacturers would be forced to act on that knowledge and it would cut into their sales and profits.

The County and City believe that the failure to make any effort to supervise their dealers' practice of selling to felons and juveniles through straw purchases, constitutes both negligence and nuisance on the part of the manufacturers. Since it was foreseeable that their failure to supervise the dealers would lead to extensive criminal activity, violence, and death, the manufacturers are liable to the County and City taxpayers for the damages caused.

How extensive is the practice of straw purchases?

Former gang members advised County and City investigators that straw purchases are commonplace at gun dealers throughout Wayne County.

A recent ATF study indicated that up to half of the guns used in the commission of crimes are being bought through straw purchases.

When County investigators followed up to see for themselves, they successfully made an illegal straw purchase at 9 out of the 10 dealers they tried.

How bad is the gun problem?

From 1990-1998, 5,264 children aged 16 and under were arrested and charged with carrying a concealed weapon in Wayne County.

Detroit police are now confiscating guns from the street at the rate of 4,000 per year, double the rate of just four years ago.

In 1997 and 1998, more than 100 youths aged 18 and under were killed by gunfire in Wayne County, an average of one a week.

How great are the damages?

Wayne County alone has expended \$440 million in the last 10 years on the costs of crimes committed with guns, including the jail, the criminal courts, the prosecutor's office, and the morgue.

Based on ATF estimates on the percentage of crimes committed by guns bought through straw purchases, the County believes it could realistically collect damages in excess of \$200 million.

Are the County and City being charged legal fees for bringing the suit?

No. The law firms representing the County and City are confident of success and agreed to take the case on a contingency basis. The lawyers only get paid if the County and City are awarded damages.

Is this an effort to ban handguns?

No. The County and City are not suing to try to stop the sale of guns. We are suing to force the manufacturers to make certain that their products are only being sold to truly qualified purchasers. Nothing in this litigation in any seeks to prevent or punish the sale of guns to adults without felony records.

What will happen to the dealers on the videotape who sold to straw purchasers?

Wayne County Sheriff Robert Ficano, whose deputies did most of the undercover stings, is now reviewing the evidence in those cases with Prosecutor O'Hair and decisions on criminal prosecutions will result from that review.

- In 1998, on average, one youth was killed every week as a result of a firearm shooting in Wayne County.
- As of March 8, 1999, more than 150 people in Wayne County had died this year as a result of a firearm shooting.
- Between 1994 and 1996, the Detroit Police Department confiscated approximately 7,459 guns; more than 1600 of these guns were confiscated from children aged 16 and under.
- The gun industry has cast a blind eye to the ever increasing and tragic results of illegal gun sales.

In an affidavit from Robert I. Hass, former Senior Vice President of Marketing and Sales for Smith and Wesson: "The company and the industry as a whole are fully aware of the extent of the criminal misuse of firearms. In spite of their knowledge...the industry's position has consistently been to take no independent action to ensure responsible distribution practices..."

- It is illegal for any gun dealer to sell handguns to a person under the age of 21 or to anyone with a felony conviction.
- Purchasers of long-guns, including automatic assault rifles must be at least 18 years of age with no felony convictions.
- During a four-week undercover sting operation at 10 area gun stores, undercover Wayne County Sheriffs and Wayne County Airport Police made illegal gun purchases at 9 of these stores, netting 37 weapons.

- The undercover officers worked in two-person teams, with one officer posing as either underage purchasers or as having a felony in their background. The second officer posed as a legal purchaser, there to make the buy for their partner. While many of the gun dealers explained how illegal these "straw purchases" were, they continued to make the sale by instructing the officers on how to complete the transaction.
- Wayne County has been working for the past four months to collect evidence and build its case.
- The Wayne County lawsuit is the seventh suit filed against gun manufacturers by cities or counties since last October and the first to be filed in Michigan.
- Wayne County's also is the first case to use undercover cameras to record both video and audio of illegal firearm sales.

After Tobacco Success, Lawyers Pick Gun Fight

Same Tactics Aimed at Firearms Industry

By DAVID SEGAL
Washington Post Staff Writer

For the past four years, a team of about 60 law firms from across the country has rented a suite of offices in downtown New Orleans and made it headquarters for the unprecedented legal assault against the tobacco industry. Last week the offices got a make-over for the launch of a new fight—this time against the gun industry.

Cigarette files are being warehoused. Deploying the same tactics it brought to the tobacco wars, the legal collective known as the Castano Group is re-aiming its sights, hoping to earn millions in fees by suing gunmakers on behalf of cities around the nation.

The Castano Group is the brainchild of Wendell Gauthier, a mass-injury lawyer who made the first of several fortunes representing victims of hotel fires and plane crashes. In 1994, he persuaded a group of 60 firms to contribute \$100,000 each to fund a war room to coordinate lawsuits against the tobacco industry. The suits were based on the then-novel theory that the cigarette companies should pay for the cost incurred by smokers to treat their addiction.

Gauthier is now asking the same and other firms to chip in another

\$100,000 for the gun litigation. About 40 firms have accepted so far, and others are expected to join soon, said John Coale, a District lawyer who is part of the group. The money will cover the cost of depositions and research, as well as a staff of paralegals and time logged by lawyers at Gauthier's firm.

Gun manufacturers, meanwhile, are on the verge of hiring corporate defense firms capable of fending off a carefully orchestrated legal attack on a national scale. Among the leading candidates for the job are several firms, including Washington's Covington & Burling, that have toiled for tobacco companies.

In sum, it could be déjà sue all over again. The virtually inevitable brawl over the gun business will likely feature many of the same combatants and strategies that took center stage in the epic confrontation over tobacco.

"It's uncanny," said Stanley Chesley, a Cincinnati lawyer who is part of the Castano Group, "but we just keep running into the same people in this business."

In October, New Orleans became the first city to file suit against gunmakers, demanding re-

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Smoking, Guns: Anti-Tobacco Collective Sets Legal Sights on New Target

GUNS, From A1

dress for the cost of responding to shootings and alleging that companies such as Glock Inc. and Smith & Wesson Corp. failed to install safety devices that would prevent children and unauthorized users from firing guns. Lawyers from the Castano Group, which takes its name from an early tobacco plaintiff, are handling the case on behalf of the city.

Chicago followed with its own suit in November, offering other liability theories, and more cities are expected to file soon. A variety of private actions are in the works, too.

For critics of the cigarette settlement, the tobacco lawyers' new onslaught fulfills an unhappy prophecy. Well before cigarette makers agreed in November to pay more than \$200 billion over 25 years to settle a host of suits brought by attorneys general, Wall Street analysts and others predicted that the money ultimately would fund new lunges at other industries.

The Castano team has yet to profit from the tobacco litigation, because it was not party to the actions by the attorneys general and its private class actions are still pending.

Still, Castano lawyers such as Coale expect a tobacco payday and are unabashed about what they'll do with the money.

"People kept saying that we would go after the alcohol or fast-food industries next," Coale said. "But we'd never do that. We enjoy liquor and meat too much."

Meanwhile, several lawyers who scored big in the suits filed by the attorneys general are eyeing the gun issue. For instance, Robert Kerrigan's eight-person firm in Pensacola, Fla., pocketed \$200 million for its work on the tobacco settlement, part of a record-setting \$3.4 billion in fees shared by a handful of Florida law firms. He and his partners now are considering whether to sue gunmakers, alleging that products such as assault weapons and Saturday night specials have no legitimate use.

"I know the business community considers us a bunch of vultures who just got done with one corpse and are looking for another," Kerrigan said. "But the truth is that tobacco had to pay in no small measure because of what we did."

Whether the gun litigation turns out to be the next legal gold rush is an open question. Gunmakers aren't nearly as wealthy as the cigarette makers, taking in about \$3 billion



FILE PHOTO BY DUDLEY M. BROOKS—THE WASHINGTON POST
D.C. lawyer John Coale is part of a group preparing an all-out assault on gunmakers.

to \$4 billion a year, a fraction of the big tobacco companies' yearly revenue. And Bob Ricker of the American Shooting Sports Council, a trade association for gunmakers, vowed that his members won't

be intimidated into an out-of-court settlement, regardless of how many cities line up against them.

Ricker also said the swarm of tobacco plaintiffs' lawyers suggests that the suits against the industry are frivolous, the work of an opportunistic gang of legal predators.

"We'll be able to show that what these lawyers are actually after is money," he said, a contention certain to become part of the gun manufacturers' defense.

Handgun-control advocates contend that the Castano lawyers were the logical choice to assail gunmakers. After all, they say, these lawyers have the requisite expertise, as well as a history of camaraderie in a similar war.

"I think it's a natural move on the part of these firms, because they have a great deal of experience dealing with a well-financed industry that has operated in secret for years, markets a lethal product and makes decisions which increase the risk of serious harm to the American people," said Dennis Henigan, legal director of the Center to Prevent Handgun Violence.

Though gunmakers traditionally have fought product liability suits independently, they're now awakening to the seriousness of

their predicament and discussing a more unified approach. That includes discussions with a number of established defense firms. For veteran corporate lawyers such as Keith Teel of Covington & Burling, who has worked for all four major tobacco firms, gun companies look as if they could be the Next Big Client.

"We, like a lot of firms, would be interested in getting involved with it," Teel said.

For now, plaintiffs' lawyers are meeting mayors across the country and offering them what could be an irresistible deal: allowing lawyers to sue gunmakers in the name of their city. The towns could end up with millions in settlement dollars without having to spend any money. And the mayors could get a political boost from electorates fed up with gun violence.

Castano lawyers say cities such as Tampa, Newark and Baltimore are interested. Coale said he will approach D.C. Mayor Anthony A. Williams as soon as his administration settles in.

"We're going to get as many cities as we can and sue under any product-liability theory that happens to fit that jurisdiction," Coale said.

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Courting Trouble?

As Lawsuits Loom, Gun Industry Presents A Fragmented Front

Widening Legal Threat Finds Makers, Sellers Are Split On Issues and Tactics

'Healthy Discussion' in Tampa

By PAUL M. BARRETT

Staff Reporter of THE WALL STREET JOURNAL

As the gun industry faces an extraordinary legal attack by cities around the country, recent history suggests that it might be time to circle the wagons. Threatened with a similar volley of lawsuits by states, tobacco companies for the most part banded together.

Instead, the makers and sellers of firearms are in danger of splintering over a host of issues—including the basic question of legal strategy.

The direction gun companies choose over the coming months could affect the outcome of the new wave of litigation, which began in late October, when New Orleans became the first city to sue the industry, seeking millions of dollars to cover the public cost of responding to shootings. If, as expected, dozens of mayors join the battle, the strain and cost of litigation could cripple smaller companies.

'Heads in the Sand'

That's why Richard Feldman, a trade-association strategist, is urging his constituents to mend their traditionally fractious ways, hire more high-powered lawyers and develop a more sophisticated public-relations pitch. But many of his clients, who have successfully fended off less-threatening lawsuits on their own for years, aren't yet convinced that they need a new strategy at all.

"Too many people in this industry would prefer to stick their heads in the sand and hope that this will go away," says Mr. Feldman. "It won't go away."

The gun companies have possibly potent defenses, including the notion that, unlike cigarettes, guns used properly don't harm law-abiding consumers. But it's unclear whether the industry will figure out how to voice its arguments.

The gun litigation stems directly from the legal assault on the tobacco business, which recently settled a wave of state lawsuits by agreeing to pay more than \$200 billion over 25 years. But unlike the tobacco companies, which have deep pockets and predictable cash flows, the gun business is made up of dozens of small, mostly privately held companies that have total sales of only \$2 billion to \$3 billion annually, according to analyst David Guthrie of Morgan Keegan & Co. in Memphis, Tenn.

The industry's fragmented makeup is reflected in its scattershot reaction to the legal threat. Some better-established companies that make higher-quality guns for hunters, competitive shooters and law enforcement are wary of close association with companies that make less-expensive "Saturday-night specials" often linked to crime. Some makers that eschew certain safety devices worry that they could be penalized when compared to competitors that offer the devices. And other manufacturers are already talking about trying to shift liability to retailers who allegedly violate gun-control laws. For one reason or another, few in the industry talk about compromise.

"We will fight because we cannot afford to settle," says Ronald Coburn, chairman of Savage Sports Corp., a small manufacturer in Westfield, Mass., that hasn't yet been sued but fears it will be.

The industry's turmoil is on display during a recent private meeting at a trade show in Tampa, Fla. Mr. Feldman has brought Andrew Miller, a well-known, white-haired attorney from Washington, to urge more coordination and the procurement of more legal clout. The message visibly agitates the 100 or so industry executives and their longtime lawyers in the audience. Several of the lawyers stalk out of the room, heavy metal doors slamming behind them.

Ed Shultz, chief executive officer of Smith & Wesson Corp., in Springfield, Mass., says in an interview later that he doesn't expect his company or its competitors to collaborate on a defense. "We generally go our own way," he explains.

Some of its foes depict the gun business as one that marches in lockstep behind the muscular National Rifle Association. In fact, the NRA has played little more than an observer's role in the nascent litigation. It is true that the industry for decades tacitly relied on the NRA for political representation, even though the group's official mission is representing gun users. But beginning in the late 1980s, some gun companies grew worried that the NRA's reputation for zealotry was undermining its effectiveness.

Dissatisfied manufacturers and suppliers formed the American Shooting Sports Council in 1989 and two years later hired Mr. Feldman, a former NRA staffer, to run the trade group. Trying to distinguish his group from the NRA and an alphabet soup of other industry organizations, the 46-year-old Mr. Feldman, a veteran Republican political operative, stresses a pragmatic tone. Fighting lawsuits "is not about ideology," he tells in



Richard Feldman

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Wall Street Journal

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Gun Firms Are Divided Amid Legal Threat

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dustry executives. "This is a business issue."

Before the mayors' litigation, Mr. Feldman's biggest project was brokering an October 1997 deal with the White House under which most major handgun manufacturers agreed to include child-safety locks with their products. The compromise ended efforts to legislate more-aggressive safety measures and earned the industry widespread public praise. At a news conference in the Rose Garden, a grinning Mr. Feldman sat between avid gun-control advocates Bill Clinton and Janet Reno, the attorney general.

This was too much for Wayne LaPierre, the NRA's executive vice president, who wrote a letter to companies that signed the deal, saying in part: "You have been conned into the notion of making your business 'acceptable' to a wider non-gun-owning audience."

The NRA's condemnation shook some gun companies, which fear the group's influence over consumers. But the deal held, in part because his constituents got a relentless prodding from Mr. Feldman, who knew that it made strategic sense. At the time, he says he could see that the threat of the new generation of municipal lawsuits was looming.

For 20 years, gun companies typically have been sued one at a time, and consistently have defeated individual plaintiffs' liability claims concerning the design or intrinsic dangers of firearms. In 1997, however, Philadelphia Mayor Edward Rendell turned to the tobacco model as a way to go after firearms. The idea was to change the emphasis from a particular shooting, where the person pulling the trigger can often be blamed, to the violence-afflicted city as a whole, which would seek reimbursement for the law-enforcement and medical costs of dealing with improper gun use.

Sensing that this approach might catch on with other mayors, Mr. Feldman initiated an unusual series of meetings with Mr. Rendell in the summer of 1997. The results were mixed. Philadelphia and other cities involved in the talks, including St. Louis and Gary, Ind., so far have refrained from suing. But that may not last. In an interview, Mr. Rendell excoriates Mr. Feldman for refusing to make concessions, such as restricting consumers to one gun purchase a month. Mr. Rendell says he and other mayors will decide early next year whether to coordinate a mass-filing of as many as 50 suits.

Once the new strategy was floated in Philadelphia, there wasn't much chance of containing it. Gun-control activists, who would like to see handgun production crippled, encouraged other mayors to imitate the tobacco suits. Mayor Marc Morial of New Orleans, backed by wealthy anti-tobacco lawyers, jumped to the front of the line, filing suit in late October. Two weeks later, he was followed by Chicago Mayor Richard Daley, who says his own legal staff will handle the case. Since then, officials in such cities as New York, Los Angeles, Boston, Baltimore, San Francisco and Miami have said that they, too, are considering gun suits.

Resigned to an onslaught of high-stakes municipal litigation, Mr. Feldman and his right-hand man, Robert Ricker, are scrambling on several fronts.

An early priority, they say, is finding a Republican mayor to become a spokesman for the idea that tougher law enforcement, not civil lawsuits, is the way to deal with gun crime. Mr. Feldman recently flew from his base in Atlanta to Knoxville, Tenn., aboard a corporate jet made available by gun maker Glock Inc., to lobby Knoxville Mayor Victor Ashe. The mayor says in an interview that he hasn't made up his mind about whether to aid the industry and will consult with his police chief before making a decision.

Mr. Feldman separately has hired Ed-die Mahe, a GOP political consultant, to plot public-relations strategy and draft "talking points" that traditionally media-shy firearms executives can use in dealing with inevitable press calls. A lot of coaching may be necessary. At the recent Tampa trade show, there was plenty of earnest talk about safety measures and training. But there was also a prominent poster at the U.S.A. Magazines Inc. booth, boasting that if its 10-round, .45-caliber clips were "any better, . . . they would be illegal."

Tension is inevitable among companies that manufacture very different sorts of firearms, in contrast to the cigarette makers, whose products are fairly similar. The New Orleans suit argues that manufacturers should be held liable for failing to introduce "smart" technology that would allow only authorized users to fire handguns. Some companies, including Colt's Manufacturing Co., Hartford, Conn., have researched this approach but say it isn't perfected yet. Industry insiders say that those companies may try to divert liability onto competitors, such as Smyrna, Ga.-based Glock, which are skeptical that smart technology will ever be

reliable enough. A Colt spokesman says the industry "isn't fractured" and will consider hiring common counsel, but that separate lawyers "might be appropriate" where different technology is used.

"Some companies could be at odds" over smart technology, and over even more basic safety features, such as those that disconnect a semiautomatic pistol's magazine or indicate whether its chamber is loaded, Glock's general counsel, Paul Jan-nuzzo, acknowledges. "It's no accident that the Glock doesn't have a magazine disconnect or loaded-chamber indicator," he says, because of concerns that the mechanisms could hinder quick firing by, for example, police officers in danger.

These kinds of differences, as well as a basic suspiciousness of competitors, are prompting manufacturers to spurn Mr. Feldman's call for a more-coordinated defense, led by law firms with national reputations and experience in the tobacco wars.

"That was one point of view," but it won't carry the day, predicts John Renzulli, one of the lawyers who walked out of Tampa meeting. His New York firm, Renzulli & Rutherford, has successfully represented Glock in product-liability cases and, he and the company say, will continue to do so against the mayors. Mr. Renzulli says the presentation in Tampa was part of "a healthy discussion" about legal strategy. Beretta U.S.A. Corp., based in Accokeek, Md., also intends to stick with its attorneys, says Jeffrey Reh, the company's general counsel.

"The loyalty is understandable," says Mr. Ricker. But without questioning any law firm in particular, he adds that the industry's current "product-liability lawyers may not have the horsepower to deal with national litigation." In one unusual move, he and Mr. Feldman have had a preliminary discussion with F. Lee Bailey about hiring the criminal-defense attorney to represent the ASSC. Mr. Ricker is also talking with Goodwin, Procter & Hoar, a Boston firm with tobacco experience, about defending the trade association in the New Orleans case and with Winston & Strawn, a major Chicago firm that spearheaded tobacco defenses in Texas and Washington state, about representing a group of smaller manufacturers and dealers that don't yet have counsel in the Chicago case.

But the potential Winston & Strawn engagement highlights another industry fault line between manufacturers and the dealers they could turn on. Chicago has accused the industry of "saturating" the suburban areas around the city, where retailers allegedly made illegal sales to undercover detectives posing as Chicago residents. Denying that they oversupply any markets, some manufacturers will likely argue in court that the proper target for Chicago's wrath is law-breaking retailers.

"If there have been criminal acts, go after the dealers," says Stephen Sanetti, general counsel of Sturm, Ruger & Co., Southport, Conn., who quickly adds that he doesn't know whether any such acts were committed.

This week the gun industry gave yet more evidence of its fractiousness, as rumors swirled that Mr. Feldman is in danger of being fired for his outspokenness. ASSC member companies, and Mr. Feldman, deny the rumors, but he says that "the long knives are out."

Chicago Is Suing Over Guns From Suburbs

By FOX BUTTERFIELD

The City of Chicago and Cook County filed a \$433 million lawsuit against the gun industry yesterday, saying that a three-month police undercover operation found that firearms dealers in Chicago's suburbs were flooding the city with illegal guns with the knowledge of nationwide gun manufacturers and distributors.

The suit, which names 22 manufacturers, 12 stores and 4 distributors, is based on a new legal theory, that the gun industry causes a "public nuisance" by creating excess costs for Chicago's police, fire department and public hospitals. It is expected to be the model for suits by Philadelphia, Los Angeles and San Francisco in the next few months.

Chicago's suit follows another brought against the gun industry by New Orleans two weeks ago on different legal grounds: that gun makers manufacture an unsafe product by failing to incorporate sufficient safety devices.

The lawsuits represent a new front for cities in their efforts to reduce urban violence. They incorporate legal arguments used successfully by several states in suits against the tobacco industry, and come at a time when individuals have recently stepped up lawsuits against gun makers who for years beat back product liability suits with the assertion that guns do not kill people, people do. The biggest of these suits is to go to trial in January in Federal District Court in Brooklyn.

"Gun manufacturers and retailers know exactly what they're doing," Mayor Richard M. Daley said yesterday in announcing Chicago's lawsuit. "They knowingly market and distribute their deadly weapons to criminals in Chicago and refuse to impose even the most basic controls."

"If money is the only language they understand, then money is the language we will use to make them understand that they have no business in Chicago," Mr. Daley said in announcing the suit at a police building on the city's West Side.

The building is where the police have stored 171 handguns bought from the suburban gun dealers during the undercover operation. Posing as members of street gangs, motorcycle toughs or soldiers of fortune in camouflage, the undercover police officers reported that they were able to buy guns from the suburban shops despite not having a state gun permit or even when they boasted they would use the guns for criminal acts inside Chicago.

Chicago has some of the strictest gun control ordinances in the country, essentially banning the private

ownership of handguns, and the city's police have led the nation in confiscating handguns, seizing and destroying more than 178,000 in the past 10 years, the Mayor's office said. But Chicago continues to be flooded by new guns, according to a complaint filed in Cook County Circuit Court yesterday.

"The gun manufacturers are saturating gun stores just outside Chicago's border with far more guns than the lawful gun market could possibly absorb, because they know there is a large, illegal market for guns in the city," said Brian Crowe, the city's corporation counsel.

This creates a public nuisance in Chicago comparable to a suburban industry polluting the city with poison gas, Mr. Crowe said.

Georgia Nichols, president of the American Shooting Sports Council, a

A legal argument that a flood of guns is a public nuisance.

trade group, said, "We, as an industry, really feel there is no basis for a suit against the legitimate sale of a product."

If some rogue dealers are selling guns illegally, they should be prosecuted, Ms. Nichols said, adding, "We don't want our guns used for criminal purposes."

"But," she said, "most manufacturers sell their guns legally to distributors who in turn sell to the dealers, so there is not the clear-cut chain" that the lawsuit alleges.

The solution to gun violence, Ms. Nichols said, is for Federal and local authorities to better enforce existing gun control laws.

Lawrence H. Tribe, a professor at Harvard Law School who helped prepare some of the successful state litigation against cigarette companies, said several of the state suits, including those in Mississippi, Florida and Texas, had included arguments about the tobacco industry causing a public nuisance.

"One can't know for sure how well the theory went" in winning the cases, Professor Tribe said, but he said he believed the public nuisance argument was helpful.

As for the gun makers' argument that they cannot be sued because they are several steps removed from the actual illegal sale of guns, Professor Tribe said the cigarette companies invoked that argument in vain by saying cigarettes were sold by

small local stores.

"But it is irrelevant when you are seeking to show the harm to a community in the aggregate," he said.

"You may not be able to trace the straight line from the place where the gun is manufactured to the aorta of the victim, but you can apply market share theory," Professor Tribe said, as Chicago is trying to do in calculating the gun makers' proportionate share of the market.

The public nuisance approach also sidesteps arguments based on the Second Amendment right to bear arms, Professor Tribe said, since the Constitutional guarantee does not protect gun manufacturers.

The suit in Brooklyn brought against 50 companies on behalf of victims of gun violence, is based on an argument similar to the one in Chicago, said Elisa Barnes, the lawyer representing the victims' families. Ms. Barnes argues that the gun companies negligently fail to supervise how their handguns are distributed and have oversupplied dealers in states with lax gun control laws, like Georgia, who then sell guns illegally to buyers in states with tough gun laws like New York. The suit, *Hamilton v. Accu-Tek*, will use analysis of statistics recently collected by the Bureau of Alcohol, Tobacco and Firearms to try to show that the manufacturers had to know they were selling far more guns in Georgia and other Southern states than there were legitimate local buyers.

Ms. Barnes said she drew her arguments from cases against pharmaceutical companies in which the courts allowed the argument that drug manufacturers could be sued as a group for negligence even though it was hard to trace whose products had caused harm to individuals.

"I think the tide has turned," she said. "The American public has changed and awakened to the idea that manufacturers have a responsibility for their products, even gun manufacturers."

It is impossible to tell which legal strategy would succeed, Ms. Barnes said, adding, "There are many roads to the mountain top. So I think it will be a combination of everyone pulling together."

David Kairys, a professor at Temple University Law School who helped prepare the Chicago suit, said the gun industry, which is far smaller and less profitable than the tobacco industry, might have fewer resources to defend itself against multiple lawsuits. But unlike the tobacco companies, he said, gun makers have shown no inclination to settle.

"They are going to have to get over their feeling of immunity," he said.

Marketing of Guns Is Issue in Major Suit Against the Industry

Continued From Page A1

the theory of "negligent distribution" of guns, rather than charging liability on the basis of the product's inherent harmfulness, said David Leebron, the dean of Columbia University Law School and an expert in tort litigation.

Or, as one supporter of the suit boiled down the argument, the defendants — including Smith & Wesson, the Colt's Manufacturing Company and Beretta USA — "knew or should have known that they were oversupplying the legitimate market, thereby creating a pool of weapons available for the illegitimate market."

The supporter, Joshua Horwitz, executive director of the Washington-based Educational Fund to End Handgun Violence, said past suits seeking to hold gun makers and distributors liable for intentional killings often focused on narrower issues, like whether a single gun was marketed in a way that made its producer or distributor culpable. These suits have been repeatedly defeated in court.

The trial will be closely watched not only by the gun industry and gun control advocates, but by lawyers for municipalities across the nation that have sued or are considering suing gun manufacturers.

The City of Chicago, for instance, recently filed suit against nearly 40 gun manufacturers, distributors and retailers, accusing the industry of flooding suburban stores with many more guns than the lawful market could absorb, allowing many of the weapons to supply the illegal market in Chicago, where gun control laws are among the strictest in the country.

Philadelphia, Boston, Miami, San Francisco and Los Angeles are among cities considering similar suits. And New Orleans has filed suit on different grounds, contending that gun makers failed to include enough safety devices in their weapons.

Dean Leebron of Columbia said, however, that the theory of negligent distribution "is a difficult theory to prevail." While he said the argument was not without legal foundation, the applicable laws in the case do not "particularly favor collectively imposing liability or imposing special duties on manufacturers regarding the distribution of the product."

And one of the defense lawyers in the suit, Anne G. Kimball, held in an interview on Monday that there was no evidence of any illegal or careless sale by any manufacturer or distributor in any of the shootings, and that the plaintiffs had "no facts that connect" any of the gun makers or distributors to any of the seven crimes cited in the suit.

They include the six homicides and a case in which a young man survived a brain wound in a Queens shooting. He, like the relatives of the

murder victims, is seeking to hold the firearms industry collectively responsible.

But Mr. Horwitz said he was optimistic, contending that the argument about the gun industry's marketing practices was easy to understand and likely to prove persuasive to the average juror.

The Brooklyn suit was filed in 1995. A year later, Judge Jack B. Weinstein rejected the gun companies' motions to dismiss it, saying it was possible that the plaintiffs would "be able to show that a substantial cause for the killings that are at the heart of this suit is the operation of a large-scale underground market" stemming from a handgun sales system that is "without adequate concern over the channels of distribution and possession."

Among the evidence that Elisa Barnes and the three other plaintiffs' lawyers are expected to offer are economic consultants' statistics that show, the consultants say, that handgun sales in states with weak gun control laws — like Virginia, Florida, Georgia, North Carolina and South Carolina — "are higher than can be explained by legitimate demand, suggesting that a substantial proportion of sales in such states are not for legitimate purposes but for resale to the criminal market."

But Richard Feldman, executive director of the American Shooting Sports Council, an Atlanta-based gun industry group, said in an interview that to hold makers, distributors or sellers liable "for the criminal misuse of a lawfully sold product is to turn our whole tort system upside

down."

Ms. Barnes said the suit did not state a figure for the damages being sought in the trial, in which the gun companies are represented by about a dozen lawyers and in which jury selection began Monday.

Meanwhile, the woman who helped start it all, Freddie Hamilton, said on Monday that she was "apprehensive but optimistic" as she awaited the opening arguments and testimony.

Speaking by telephone from the Brooklyn child welfare group where she is the executive director, she said that the case was "about the number of young people who get murdered by guns."

Her goal, she said, was "keeping guns out of the hands of people who shouldn't have them."

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New York Times
1/6/99



News Release

November 13, 1998

Office of the Mayor
Richard M. Daley
Mayor

Contact:

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CHICAGO MAYOR DALEY CALLS FOR FEDERAL GUN REGISTRATION LAW AND GREATER INDUSTRY RESPONSIBILITY TO PREVENT GUN RUNNING

In an effort to fight rampant gunrunning involving street gangs and other criminals, Chicago Mayor Richard M. Daley was in Washington today calling for a new federal law requiring gun dealers to report all gun purchases to the federal government. He also called for creation of a national database to help reduce illegal gun sales.

Daley also called for laws limiting handgun sales to one per month and prohibiting gun dealers from selling guns to people who intend to use them for criminal purposes or illegally resell them.

"People have to register cars, so why not require them to register guns? A national database would help us target gunrunners before a crime is committed, instead of waiting until after somebody is dead or crippled by gun violence," Daley said. The mayor was in Washington attending a conference on gun violence.

Daley's call for federal legislation follows by a day his announcement that the City of Chicago has sued 38 gun dealers, manufacturers and distributors for knowingly marketing and distributing guns to street gangs and criminals in the City of Chicago.

Daley believes the landmark lawsuit, which is the first to charge the gun industry under "public nuisance" laws instead of under product liability laws, will become a national test case in the larger effort to require the firearms industry to take greater responsibility for keeping guns away from criminals.

Daley's legislative proposal requires all gun sales to be reported to the federal Bureau of Alcohol, Tobacco and Firearms within a week. Currently, only multiple handgun sales must be reported, which means that anyone can buy 10 handguns from 10 different stores in the same day and the government will never find out.

"It's a huge loophole. This is exactly what the straw buyers do to supply the street gangs. We need federal legislation to stop it," Daley said.

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Daley also called for a national limit on handgun sales to one gun per month, adding, "If it was up to me, no one but law enforcement officers would own handguns, but I understand that's impractical. So this is better than what we have today, which is no limit, meaningless restrictions, and easy access to dangerous guns."

Finally, Daley called for a federal law prohibiting gun sales when the seller should know that the buyer intends to use the guns for criminal purposes or illegally resell them.

In the Chicago undercover investigation which led to yesterday's lawsuit, gun sellers were told the guns were being used for gang activity; that the guns were for other people; and that they were being taken into Chicago, where they are banned.

But the gun dealers went ahead with the sales anyway. Daley wants to make such sales a federal crime.

Chicago is a national leader in restricting guns. In the last 10 years, Chicago has collected and destroyed more than 170,000 illegal guns, more than any other city.

Chicago also bans private ownership of handguns. But Daley believes the gun industry must be forced to take greater responsibility for the way it markets its products.

"With more than 35,000 people killed by guns last year in America, the gun industry cannot continue to ignore its responsibility to keep guns away from criminals," Daley said, adding, "Innocent people are dying. Children are dying. And they're making money."

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NEWS RELEASE

CENTER TO PREVENT HANDGUN VIOLENCE

FOR IMMEDIATE RELEASE
November 13, 1998

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MANY PARENTS LEAVE GUNS ACCESSIBLE: PARENTS CONCERNED BUT DON'T TAKE ACTION TO PROTECT KIDS FROM GUNS, NEW STUDY SHOWS

(Washington, D.C.) More than two in five of all American households with children also have guns, and of those, about one in four keep those guns loaded and/or unlocked, according to a new study by Peter Hart Research on behalf of the Center to Prevent Handgun Violence. And, although most American parents realize that guns in the home endanger their children, they do not take active steps to protect them from accidental access. In the first national survey to query parents about their interactions with other parents about guns in the home, the research found a significant gap between what parents know about the dangers of guns, and the actions they take to ensure that their children will be safe in the homes of others.

In the survey of 806 parents, 43% of households with children have guns, and 23% of gun households keep a gun loaded. 28% keep a gun hidden and unlocked. 54% of parents said they would be highly concerned about their child's safety if they knew there was a gun in the home of their child's friend. Most understand the dangers of guns: 71% knew that at least one out of three households has a gun, and 59% that one-third of gun-owning parents keep their gun loaded and accessible at least some of the time. But the vast majority also don't see the risk to their own child: 73% believe that it is "not at all likely" that their child would find and handle a gun without permission.

Those seemingly contradictory beliefs translate into a "disconnect" between talk and action. Although 75% of parents – and 88% of gunowning parents – say they have discussed with their children what to do if they find a gun in the home of a friend or neighbor, only 30% have asked the parents of their children's friends if there is a gun in the home before allowing a visit. 61% of the parents responding *haven't even thought about asking* other parents about gun accessibility, for various reasons, including the assumption of safe storage (23%) or because it just never occurred to them to ask (25%).

(more)

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"Clearly, too many parents are just not thinking about the tragic possibilities of an innocent visit to another home," said Robert Walker, President of the Center to Prevent Handgun Violence. "We know that parents are asking each other about supervision, food allergies, and TV habits, yet they are ignoring guns -- the one factor that could mean the life or death of their child."

Although most parents are not asking each other about gun accessibility, it is not because the question is awkward or difficult. 41% of parents think it is always appropriate to ask about guns in the home, another 25% think it's appropriate to ask if they do not know the other parents well, and only 10% feel it is never appropriate to ask about guns in the home. Gunowners and non-gunowners feel similarly about this issue, meaning that the vast majority of gunowners do not find questions about their gun storage to be offensive or inappropriate.

The Center to Prevent Handgun Violence plans a major, national public education campaign to convince parents to be sensitive to gun storage issues and to encourage them to talk to each other to minimize the risk their children will be injured or killed by guns. With this in mind, parents were queried about which facts would best catalyze these conversations. 28% believed the most important message is that "55% of all accidental shootings are committed by a child or teenager," 20% that "Guns kept in the home kill family members more often than they kill in self-defense," and 18% that "Half of all handguns in the home are loaded, not locked, or both."



The poll was released at a Washington, D.C. Symposium on Guns and Children as a Public Health Issue, which featured Chicago Mayor Richard Daley, Boston Police Commissioner Paul Evans, Southern Christian Leadership Conference leader Martin Luther King, III, gun injury researcher Dr. Arthur Kellermann of Emory University, Dr. Katherine Kaufer Christoffel of the HELP Network, and Andrés Soto of the Pacific Center for Violence Prevention, as well as Peter Hart.

"We at the Center don't want to keep reading about four-year-olds shooting each other by accident, or teenagers killing each other with their parents' accessible guns," Walker said. "Only when parents are as conscientious about guns in the home as they are about lesser dangers can we protect our children from these terrible, and unnecessary, tragedies."

###

The Center to Prevent Handgun Violence, chaired by Sarah Brady, was founded in 1983 to reduce gun violence through education, legal advocacy, research, and outreach to the entertainment community. Based in Washington, DC, CPHV's national initiatives include prevention programs for parents and youth on the risks associated with guns, legal representation for gun violence victims, work with the entertainment community to encourage deglamorization of guns in the media, and research of the risks associated with guns and the efficacy of gun control laws. More information about CPHV and its affiliated organization, Handgun Control, Inc., can be found on our website at www.cphv.org.



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N.Y. Jury Finds Gun Makers Liable

By Tom Hays

The Associated Press

Thursday, February 11, 1999; 6:52 p.m. EST

NEW YORK (AP) -- A federal jury found several gun makers liable Thursday in three of seven New York City-area shootings because of negligent marketing practices. Other manufacturers were cleared.

Damages were awarded only in the case of the sole survivor of the seven shootings, Steven Fox, 19, who was seriously wounded. The jurors ordered that he be paid \$560,000.

Fox and the relatives of six homicide victims sued the gun industry in federal court in 1995. Like some of the lawsuits brought against Big Tobacco, this one accused the gun industry of negligently marketing a legal product.

During the monthlong trial, they argued handgun makers oversupply gun-friendly markets, mainly in the South, aware that the excess guns flow into criminal hands via illegal markets in New York and other states with stricter anti-gun laws.

The plaintiffs' lawyers accused the 25 defendants of dumping handguns onto the black market like "toxic waste," making no effort to identify and discipline dishonest distributors. In a deposition read to the jury, Robert Morris, head of Taurus International Manufacturing, Inc., conceded the company had "never cut off anybody, cut them off for sloppy distribution practices."

Lawyers for Taurus, Smith & Wesson Corp., Colt's Manufacturing Co., Sturm, Ruger and Co. and other defendants insisted their responsibility ends once they sell to licensed distributors. They said the job of policing traffickers should be left to the Bureau of Alcohol, Tobacco and Firearms, which has never required gun makers to track their products to the street.

Industry attorney James Dorr told the jury it was unfair to "hold the manufactures of a lawful, legitimately sold product responsible for acts of outlaws who are totally outside their control. ... The case is simply wrong."

The gun makers also asserted that in most of the shootings the plaintiffs never presented evidence conclusively linking the weapons

used to harm their relatives to specific defendants. The plaintiffs countered that the "chain of title" is irrelevant, instead accusing the entire industry of creating a widespread risk with negligent marketing -- a concept known as collective liability.

"This huge pool (of handguns) is like toxic waste," the plaintiffs' lead attorney, Elisa Barnes, said in closing arguments.

Relatives for the victims testified, and attorneys presented statistics on weapons sales, the average age of guns used in crimes, and other aspects of the gun trade.

A key plaintiff witness, former Smith & Wesson Corp. executive Robert Hass, was too ill to appear but testified by deposition that gun makers took a see-no-evil approach to criminal use of their deadly products. And an economist testified that 90 percent of the handguns used in crimes in New York City in recent years came from southern states.

Testifying for the firearms industry, Chicago-based economics consultant Gustavo "Chip" Bamberger said plaintiffs' arguments about oversupply of guns relied on insufficient data and flawed statistics.

The verdict came despite apparent disagreement in the jury room.

In recent days, jurors had sent U.S. District Court Judge Jack Weinstein several notes saying it was deadlocked over whether negligent marketing by the defendants was a factor in seven shootings in the New York City area in 1993-94 -- a claim that was considered a test case for similar anti-gun suits filed by large cities.

One note said that 10 jurors had "decided to work together to reach a verdict," but the 11th "refused because he or she feels the verdict 'will open the floodgate of lawsuits across the country.'"

Legal experts have said that it could set a precedent for cities trying to recoup the costs of battling gun violence.

Chicago, New Orleans, Bridgeport, Conn. and Miami-Dade County are suing the industry. Pro-gun groups have responded by lobbying state legislatures to pass laws prohibiting such suits.

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NAACP May Sue Gun Makers

By Paul Shepard

Associated Press Writer

Sunday, February 21, 1999; 3:13 a.m. EST

WASHINGTON (AP) -- Since gun-related crimes hit minority communities at high rates across the country, the NAACP is considering joining the growing number of cities filing lawsuits against gun makers, NAACP president Kweisi Mfume said.

"We represent a significant constituency that is disproportionately affected by gun violence. The time has come for us to look at the proliferation of handguns," Mfume said at the association's annual meeting Saturday.

Mfume said he would present to the NAACP's 64-member Board of Directors several options, ranging from issuing a resolution that voices concern about guns to joining suits that filed by cities including Chicago and New Orleans. The NAACP also could file a separate suit, he said.

"I want to put forth some legal theories we've been presented and ask the board for its consideration," Mfume said.

Meanwhile, The New York Times reported in Sunday's editions that the Bureau of Alcohol, Tobacco and Firearms is ready to report that 51 percent of the guns used in crimes by juveniles people aged 18 to 24 were purchased illegally over the last three years from licensed dealers by people acting as intermediaries for the real owners. Additionally 35 percent of guns used in crimes by juveniles and young adults were stolen. The rest were acquired from non-licensed private sellers not required to obtain identification or subject their customers to background checks.

Curtailing gun violence was among several issues presented at the 90th annual meeting of the National Association for the Advancement of Colored People.

In speeches to the 200 branch leaders and members from NAACP branches around the country, Mfume and NAACP Board Chairman Julian Bond outlined an energetic campaign for the nation's oldest and largest civil rights group to combat racism, save affirmative action, register voters and work against police brutality.

“Despite 90 years of fighting for and sometimes dying for justice and fair play, we know that all is not well in the land in which we live,” Bond said.

NAACP scrutiny of the gun industry could lend additional momentum to recent movements against the industry.

In a landmark ruling this month, gun makers were found liable for shootings in a case closely followed by cities across the nation eager to make the firearms industry pay for gun-related violence.

A federal jury in New York returned a \$4 million verdict based upon a new strategy by plaintiffs -- that the industry's negligence in marketing and distribution allowed weapons to flow illegally to states with strict anti-gun laws.

As with massive tobacco litigation that pressured cigarette companies to pay for treating sick smokers, the cities want to force gun makers to pay the costs of treating shooting victims.

Chicago, New Orleans, Bridgeport, Conn., and Miami-Dade County are suing the industry.

Pro-gun groups have fired back by lobbying state legislatures to pass laws prohibiting such suits. Georgia approved such a law and derailed the efforts of Atlanta officials to file suit against the firearms industry.

Bond, in his report on the overall health of the organization, said the fiscal picture was rosy but corrected figures he gave earlier in the week of the increase in foundation and corporate donations over the past year.

Both corporate and foundation giving is up from \$3.2 million to \$3.4 million and not the 40 to 50 percent which Bond had told reporters earlier.

“I'm not a mathematician,” Bond said. “I misinterpreted some figures I had.”

NAACP revenues outstripped its expenses by \$1,160,469 last year.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
FREDDIE HAMILTON,
Administratrix of the Goods, Chattels
and Credits of Njuzi Ray, deceased;
Freddie Hamilton, Individually

KATINA JOHNSTONE
Administratrix of the Goods, Chattels
and Credits of David Johnstone,
deceased; Katina Johnstone,
Individually

Plaintiffs,

-against-

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

★ MAY 02 1996 ★

TIME A.M. _____
P.M. _____

PRELIMINARY
MEMORANDUM AND ORDER

CV-95-0049

ACCU-TEK, AMERICAN ARMS, INC., AMERICAN
DERRINGER, A.M.T., ARMSCO DISTRIBUTING
CO., d/b/a Armsco Distributor, ARMS
CORPORATION OF AMERICA, ARMS
TECHNOLOGY, ASTRA-UNCETA Y CIA, S.A.,
BERETTA FIREARMS, BERETTA U.S.A. CORP.,
BROWNING ARMS CO., BRYCO ARMS, CALICO
INC., CASPIAN ARMS, INC., CENTURY
INTERNATIONAL ARMS, INC., CHARCO,
f/k/a Charter Arms Corp., COLT
INDUSTRIES OPERATING CORP., COLT'S MFG.
CO., INC., DAVIS INDUSTRIES, INC.,
EUROPEAN AMERICAN ARMORY, d/b/a E.A.A.
Corp., EMCO, INC., EXCAM, INC., FREEDOM
ARMS CO., FIREARMS IMPORT AND EXPORT
CORP., GLOCK, INC., GRENDDEL, INC., H&R
1871 INC., f/k/a/ Haskell Mfg. Inc.,
HARRINGTON AND RICHARDSON,
INTERNATIONAL ARMAMENT CORP., d/b/a
Interarms Industries, Inc.,
INTERNATIONAL DISTRIBUTORS, INC.,
JENNINGS FIREARMS, INC., K.B.I. INC.,
LLAMA GABILONDO Y CIA S.A., LORCIN
ENGINEERING CO., MARLIN FIREARMS INC.,
MITCHELL ARMS INC., NAVEGAR INC., NEW
ENGLAND FIREARMS INC., f/k/a
Harrington and Richardson, PARA
ORDNANCE MFG. INC., PHOENIX ARMS, INC.,
R.G. INDUSTRIES, INC., RAM-LINE CORP.,
REMINGTON ARMS CO., SAVAGE ARMS CORP.,
SEECAMP, SMITH AND WESSON, INC.,

STOSSEGER INDUSTRIES, STURM, RUGER AND
CO., INC., S.W. DANIELS INCORPORATED,
TAURUS INTERNATIONAL FIREARMS INC.,
THOMPSON/CENTER ARMS, U.S. REPEATING
ARMS, WESSON FIREARMS CO., f/k/a
Dan Wesson Arms

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I. INTRODUCTION

Defendants have moved for summary judgment. Because discovery is not fully developed and plaintiffs appear to be unsure of their substantive legal theory and its factual underpinnings, much of this memorandum must be tentative and hypothetical. Nevertheless, enough has been shown and suggested by plaintiffs to make dismissal premature.

Plaintiffs are representatives of people who were shot and killed by individuals who illegally obtained handguns. They seek compensation in tort for the killings. Defendants are manufacturers of handguns. Plaintiffs also seek certification of a class action under Rule 23(c)(4)(A) on the limited question of defendants' liability for alleged joint conduct or concerted action. Certification at this stage is not warranted.

Plaintiffs sue on a mass tort theory, analogizing handguns and their ammunition to a pathogen leading to latent injuries and the deaths of many thousands of people, much like claims associated with asbestos, agent orange, the dalkon shield, and silicone gel breast implants. See, e.g., Deborah R. Hensler, The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation, 73 Tex. L. Rev. 1587, 1595-97 (1995) (describing characteristics of mass torts); cf. Note, Absolute Liability for Ammunition Manufacturers, 108 Harv. L. Rev. 1679, 1681-82 (1995) (ammunition as pathogen). They point to statistics such as these: Each year, more than 600,000 firearm crimes are reported in the United States; the number of violent attacks involving

firearms increased 55% between 1987 and 1992; about 1.3 million Americans faced assailants armed with guns in 1993; among people aged 15-25, one of every four deaths were by firearm; and gun-related homicides by juvenile offenders more than doubled between 1984 and 1992. See United States Department of Justice, Bureau of Justice Statistics, Firearms and Crimes of Violence: Selected Findings From National Statistical Series 3, 11, 13 (1994); Alfred Blumstein, Youth Violence, Guns, and the Illicit Drug Industry, 86 J. Crim. L. & Criminology 10, 24-26 (1994); Lois A. Fingerhut, Centers for Disease Control and Prevention, Firearm Mortality Among Children, Youth, and Young Adults 1-34 Years of Age, Trends and Current Status: United States 1985-90 1 (1993); Crimes Involving Handguns Rose in 1993, report Shows: Semiautomatic Use in Juvenile Crime Is Up, N.Y. Times, Jul. 10, 1995, at A10; see also Children Carrying Weapons: Why the Recent Increase: Hearings Before the Comm. on the Judiciary, 102d Cong., 2d Sess. (1992). The medical community recognizes the problem as almost a pandemic. See, e.g., Arthur L. Kellerman, Annotation: Firearm-Related Violence--What We Don't Know Is Killing Us, 84 Am. J. Pub. Health 541 (1994) ("Firearm-related deaths are a major public health problem in the United States."); Mark L. Rosenberg, National Center for Injury Prevention and Control, Presentation: Violence Prevention (1994) ("Violence is a public health problem."); Charles S. Browning, Handguns and Homicide: A Public Health Problem, 236 JAMA 2198 (1976) (epidemiology ranking handgun homicides just below lung cancer as a cause of death for

persons under 65).

Plaintiffs point to the ease with which minors and criminals are able to obtain handguns despite restrictive state and federal laws as an indication that defendants are marketing handguns in a negligent fashion. See, e.g., Joseph P. Sheley & Victoria E. Brewer, Possession and Carrying of Firearms Among Suburban Youth, 110 Pub. Health Rep. 18 (1995) (finding significant percentage of automatic or semiautomatic handgun possession); Charles M. Callahan & Frederick P. Rivara, Urban High School Youth and Handguns: A School-Based Survey, 267 JAMA 3038 (1992) (thirty-four percent of students surveyed reported easy access to handguns); United States Department of Justice, Bureau of Justice Statistics, Firearms and Crimes of Violence: Selected Findings From National Statistical Series, supra, at 11 (showing extent to which criminals purchase guns from sources other than licensed retail dealers because of effectiveness of background checks); see also James M. McKinley, Dealer Accused of Selling Guns to Criminals, N.Y. Times, Jun. 22, 1995, at B3 (noting role of licensed gun dealers in gun sales to criminals).

By contrast, defendants point out that they are manufacturing and selling a lawful product in compliance with federal and state statutes and regulations governing the distribution of firearms. They contend that they should not be blamed for abuse of that product any more than manufacturers of cars, kitchen knives or axes are blamed when these useful and lawful instruments have been used to commit crimes.

The issues posed are novel. They are not easily resolved using well-established state substantive and procedural law. See Part VI.A, infra, on applicability of state law to plaintiffs' claims.

For the reasons stated below, defendants' motions to dismiss are granted with respect to the product liability and fraud claims, but not on the questions of collective and individual liability for possible negligence in merchandising handguns in a dangerous manner. Further factual development is required. See Part VI.C, infra, on the law of summary judgment.

II. FACTS AND PROCEDURAL HISTORY

A. Pleadings

Plaintiff Freddie Hamilton is the mother of Njuzi Ray and the administrator of his estate. Njuzi Ray was shot and killed on July 27, 1993. The gun was never recovered, but police investigators have determined, based on spent bullet cases found at the crime scene, that the gun used to kill Njuzi Ray was probably either a Beretta or Taurus 9 millimeter handgun.

Katina Johnstone is the widow of David Johnstone and the administrator of his estate. David Johnstone was shot and killed with a stolen Smith & Wesson revolver. The gun was found at the crime scene and traced to Stephen Mashney, who lawfully owned the gun and who had reported it stolen after his house had been burglarized two weeks before the shooting. The shooter has been identified and convicted. Defendants in this action have traced

a chain of lawful possession back to the original sale by Smith & Wesson to International Distributors, Inc. in Miami, Florida.

Forty-nine firearm manufacturers who sell or distribute handguns in the United States are defendants. Three firearm manufacturers who were originally named as defendants have been dismissed without prejudice by agreement of the parties. Neither those who fired the handguns nor other handgun dealers or owners in the chain of possession between the manufacturer and the shooters are sued.

Plaintiffs alleged seven causes of action in the complaint. The first four causes of action seek to hold defendants liable for negligence on the theory that defendants all market handguns in a manner that fostered the growth of a substantial underground market in handguns. The existence of this illicit gun market, it is claimed, enables youths to buy handguns easily and contributes greatly to the problem of handgun-related violence in American society. The fifth and sixth causes of action seek to hold defendants liable under theories of design defect and ultrahazardous activity. The seventh cause of action alleges that defendants defrauded federal officials to prevent more stringent regulation of handguns.

The court has granted plaintiffs leave to amend their complaint in order to add up to twenty-eight additional plaintiffs. The exact gun and the circumstances through which the shooter came to possess it will apparently be identified with regard to the shootings of only some of the individuals whose

cases will be represented.

B. Procedural History

Plaintiffs Hamilton and Johnstone filed this civil action in January 1995. A number of defendants moved jointly for summary judgment in April 1995. After oral argument in June, the court granted part of defendants' motion by dismissing plaintiffs' claims brought under theories of products liability. The reasons for that decision are explained in this opinion. Based on the argument, the court permitted plaintiffs to proceed with a negligence claim. The court granted plaintiffs limited discovery on mechanisms in place within the handgun industry for concerted activity on matters of mutual interest. Discovery thus far has been limited to industry-wide efforts to thwart legislation or regulation affecting the distribution of handguns.

Upon completion of plaintiffs' discovery, defendants filed new motions for summary judgment. They argue in effect that summary judgment is warranted because no theory of individual or collective industry-wide liability can be supported by the evidence elicited or discoverable. This memorandum is addressed primarily to these most recent motions.

In addition, plaintiffs have sought class certification under Rule 23(c)(4)(A) of the Federal Rules of Civil Procedure. Plaintiffs propose that the class consist of individuals killed through the illegal use of handguns and that it be certified only for resolution of the limited question of defendants' liability

under a concerted action or joint conduct theory. They argue that the interests of judicial economy and efficiency and fairness to the litigants are best served by class certification on this point. The reason certification is inappropriate at the present stage of the litigation is also addressed below.

Issues relating to the underlying negligence theory embodied in the first four causes of action in plaintiffs' complaint have not been subject to full discovery and have not been fully briefed. This memorandum does not, therefore, dispose of the negligence claims as part of the summary judgment motion.

C. Facts Elicited During Discovery

Pursuant to the discovery order, plaintiffs developed extensive factual material that focuses primarily on coordinated industry activities in opposing government efforts to impose more stringent controls on firearm sales and distribution. A brief summary is provided below.

1. Membership in Trade Associations

Many of the defendants are members of one or more of three professional trade associations that represent the interests of firearm manufacturers: the Sporting Arms and Ammunition Manufacturers' Institute, Inc. ("SAAMI"), the National Shooting Sports Foundation, Inc. ("NSSF"), and the American Shooting Sports Council, Inc. ("ASSC"). SAAMI and NSSF represent primarily manufacturers while ASSC also represents the interests

of distributors and dealers. All but two SAAMI members belong to NSSF, founded as an offshoot of SAAMI, and all but one SAAMI member belong to ASSC.

All three organizations lobbied in varying degrees, with the ASSC being perhaps the most aggressive of the three. Plaintiffs also present testimony showing an agreement between the ASSC and the National Rifle Association ("NRA"), a gun users' lobby, to use gun dealers to recruit new NRA members. Under the agreement, the ASSC and the local dealer each received a payment from the NRA for each new member enrolled through the recruitment program.

2. Lobbying Activity

Plaintiffs' evidence showed that some lobbying activity is coordinated between the three trade associations and the NRA, and that the purpose of most of their lobbying activity is to defeat legislation that would impose more stringent regulations on gun possession, use, and distribution. Plaintiffs assert that SAAMI took positions and lobbied against many proposed firearm regulations and successfully lobbied to keep guns and ammunition outside the regulatory purview of the Consumer Products Safety Commission.

Plaintiffs cite several instances where independent trade associations or manufacturers adopted positions that were less antagonistic to gun regulations than those maintained by the industry as a whole. In each case the industry is shown in information elicited by plaintiffs to have acted quickly and

decisively in bringing the individual manufacturer or group into line. These examples arguably demonstrated that manufacturers' positions on many issues of handgun policy are established and maintained industry-wide.

Plaintiffs cite the role of the NRA in coordinating lobbying activity and the manufacturers' reliance on the NRA's efforts against gun distribution regulations. They also cite efforts by SAAMI, NSSF, and the NRA to coordinate campaign contributions in support of candidates opposed to gun regulations.

3. Marketing and Distribution

Plaintiffs allege that the defendants, as an industry, have failed to supervise its wholesale distributors and retail dealers. A report by the United States Department of Justice estimated that in 1991 there were more than 235,000 federally licensed firearms dealers, only 30,000 of whom operated out of any kind of retail gun store or sporting goods store or department. These dealers do not appear to be closely monitored; reportedly many of these dealers introduce guns into the underground gun market.

Consonant with the magistrate judge's discovery order little of the material portrays actual marketing activity. Nevertheless some facts developed by plaintiffs suggest that there might be a prevalent understanding within the industry as to what marketing precautions need to be taken to reduce dangers of handgun sales to people in the United States.

For example, the members of SAAMI adopted a pledge "to sell our products to only legitimate retail firearms dealers." Statements by officials of several defendants suggest that defendants understood the pledge to be only a commitment not to sell handguns to anyone not licensed as a dealer by the Bureau of Alcohol Firearms and Tobacco. Representatives of several defendants stated that they do not view the pledge as requiring anything more than selling to any distributor or dealer so long as that distributor or dealer holds a federal firearms license. the pledge does not appear to be viewed as binding manufacturers to make sure that the distributors to whom they sell handguns also comply with the pledge.

III Constitutional and Statutory Limits on Plaintiffs' Claims

A. First Amendment

The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. Amend. I. Under what is known as the Noerr-Pennington doctrine, many actions under various antitrust or tort theories against businesses or individuals are prohibited where the challenged activity involves lobbying, despite the defendant's anticompetitive or otherwise injurious purpose or effect. See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). The doctrine developed in large part to protect the

First Amendment right to petition government. See Noerr, 365 U.S. at 132-33, 81 S.Ct. at 530; see also Daniel R. Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine, 45 U. Chi. L. Rev. 80, 94-104 (1977) (noting that the First Amendment, not construction of the antitrust statute, is the real basis of the doctrine). Shielded activity includes petitioning legislatures, administrative bodies, and the courts. See California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).

While the doctrine originated as a limit on antitrust liability, Noerr-Pennington has been extended by analogy to protect petitioning activity challenged under other federal statutes. See Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983) (labor law claims); Eaton v. Newport Bd. Of Educ., 975 F.2d 292 (6th Cir. 1992) (42 U.S.C. § 1983); Video Int'l Products v. Warner-Amex Cable Corp., 858 F.2d 1075 (5th Cir. 1988) (same). Noerr-Pennington has also been applied to various state law claims. See Suburban Restoration Co. v. Acmat Corp., 700 F.2d 98 (2d Cir. 1983) (Noerr-Pennington barred Connecticut antitrust and tortious interference claims based on the filing of a lawsuit); Pound Hill Corp. v. Perl, 668 A.2d 1260, 1263 (R.I. 1996) (Noerr-Pennington adds a constitutional gloss to civil actions for torts of abuse of process and interference with advantageous relations); Video Int'l Products v. Warner-Amex Cable Corp., 858 F.2d 1075 (5th

Cir. 1988) (conduct protected from antitrust litigation under Noerr-Pennington also shielded from business tort claims); see also Whelan v. Abell, 48 F.3d 1247, 1253-55 (D.C.Cir. 1995). The Whelan court noted that "it is hard to see why, as an abstract matter, the common law torts of malicious prosecution and abuse of process might not in some of their applications be found to violate the First Amendment." 48 F.3d at 1254.

The extent of Noerr-Pennington's application to state common law torts such as negligence and product liability is largely unresolved. See Whelan, 48 F.3d at 1253-55. Courts have held Noerr-Pennington to apply to product liability claims brought under a concert of action or civil conspiracy theory and under negligence. See Senart v. Mobay Chemical Corp., 597 F. Supp. 502, 505-06 (D. Minn. 1984); Anchorage Joint Venture v. Anchorage Condominium Ass'n, 670 P.2d 1249 (Colo. App. 1983). In Senart, the court rejected a concerted action claim against defendants who collectively lobbied the Occupational Safety and Health Administration to oppose more stringent standards of exposure to toxic chemicals. The court reasoned that "defendants' concerted action sought only permissible ends and acted only through permissible means" and that the activity was "clearly permissible" under the First Amendment right to petition. Senart, 597 F. Supp. at 506.

Two exceptions limit the extent of the Noerr-Pennington shield. First, efforts to influence government are not protected where they are found to be a "sham" to disguise what is otherwise

nothing more than an attempt to directly injure a competitor and the political actor has no real interest in the outcome. See Noerr, 365 U.S. at 144, 81 S.Ct. at 533; Cipollone v. Liggett Group Inc., 668 F.Supp. 408, 409 (D.N.J. 1987); Fischel, supra, at 104. The Supreme Court has recognized that, by definition, a "successful 'effort to influence government action'" cannot be considered a sham. Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 113 S.Ct. 1920, 1927, 123 L.Ed.2d. 611 (1993) (citations omitted). Second, courts have declined to invoke the protection of Noerr-Pennington where the political activity involved illegal, corrupt or unethical means. See Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n, 663 F.2d 253, 262-63 (D.C.Cir. 1981); Cipollone, 668 F.Supp. at 410.

B. Second Amendment

It is important to bear in mind that plaintiffs seek to enforce state, not federal, tort law. Thus it is not necessary to plumb the deeper meaning of the Second Amendment as it applies to Congress. The Amendment limits congressional power over the colonial analogues of our National Guard. It does not guarantee the right to kill. Nor does it inhibit state tort law. It does not protect the manufacturers of guns against the plaintiffs' charge that they must take whatever reasonable precautions are required by state tort law to prevent or limit the operation of an illegal handgun market that supplies criminals.

The Supreme Court has consistently rejected the proposition that the entire Bill of Rights has been incorporated through the 14th Amendment Due Process clause to apply to the states. See Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947), overruled on other grounds, Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), overruled on other grounds, Benton v. Maryland, 395 U.S. 784, 793-94, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969); see also Laurence H. Tribe, American Constitutional Law 772-74 (1988) (discussing jurisprudential basis of selective incorporation).

Specifically, the Supreme Court has held that the Second Amendment limits only the power of Congress. Presser v. Illinois, 116 U.S. 252, 265, 6 S.Ct. 580, 584, 29 L.Ed. 615 (1886). While many clauses contained within the first eight amendments have been incorporated to apply to the states, the Supreme Court has resisted opportunities to incorporate the Second Amendment. See Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982). Indeed, the states and their political subdivisions continue to have a substantial role under our federal system in regulating the sale and use of guns. See United States v. Lopez, --- U.S. ---, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); Quilici, 695 F.2d at 267-70; Richmond Boro Gun Club, Inc. v. City of New York, 896 F.Supp. 276, 283-84 (E.D.N.Y. 1995).

In Malloy the Supreme Court noted its willingness to incorporate through the Fourteenth Amendment certain rights guaranteed in the Bill of Rights, even where the Court had earlier rejected incorporation of the same right. See Malloy, 378 U.S. at 5, 84 S.Ct. at 1492. The Malloy Court cited Presser, however, as a specific example of a decision denying incorporation of the Second Amendment through the Fourteenth. 378 U.S. at 4 n.2, 84 S.Ct. at 1491 n.2. Thus, the Supreme Court's continued citation of Presser, and the absence of more recent contrary Supreme Court authority, indicates that Presser continues to serve as authority denying the Second Amendment's application to the states. See Quilici, 695 F.2d at 270.

In addition, the Court's jurisprudence teaches that the Amendment establishes a collective right, rather than an individual or private right. See, e.g., United States v. Warin, 530 F.2d 103 (6th Cir.) cert. denied, 426 U.S. 948, 96 S.Ct. 3168, 49 L.Ed.2d 1185 (1976); see also Tribe, supra, at 299 n.6 (Court likely to adhere to "states' rights view of Amendment"); Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 14.2 at 347-48 n.4 (1992) (same); Garry Wills, To Keep and Bear Arms, N.Y. Rev. Books, Sept. 21, 1995 at 62 (criticizing historical and theoretical basis of the individual rights view of the Second Amendment). In United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939), the Court upheld the constitutionality of the National Firearms Act which required registration of firearms and regulated firearm transfers. Id.

The Court maintained that the Second Amendment must be interpreted and applied "with the obvious purpose to assure the continuation and render possible the effectiveness of [national] forces." Id., 307 U.S. at 178, 59 S.Ct. at 818; see also Lewis v. United States, 445 U.S. 55, 65 n.8, 100 S.Ct. 915, 921 n.8, 63 L.Ed.2d 198 (1980); Warin, 530 F.2d at 106; see generally Wills, supra. As one court of appeals noted, the Second Amendment right "applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm." Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971) (quoted in Warin, 530 F.2d at 106).

If, as is the case, states can ban private possession and use of firearms absent federal preemption, see Part III.C.1, infra, a fortiori, there can be no question of the right to control sales of firearms. That power can be exercised directly by administrative or other regulation or indirectly through tort law.

C. Statutory and Regulatory Scheme

Federal statutes and regulations establish an extensive system regulating the sale of firearms. See 18 U.S.C. §§ 921-930; 27 C.F.R. § 178 (1995). Many of these provisions were adopted as part of the Gun Control Act of 1968. See Pub. L. No. 90-351, § 902, 82 Stat 226. Others were added more recently as part of the Brady Handgun Violence Protection Act and the Federal

Firearm License Reform Act of 1993, Pub. L. No. 103-159, 107 Stat. 1539, and the Public Safety and Recreational Firearms use Protection Act, Pub. L. No. 103-322, 108 Stat. 1997, 1999, 2014, 2020, 2150.

The statutes provide a system for licensing firearm dealers, prohibiting any others from dealing in firearms. See 18 U.S.C. §§ 922(a), 923; see also Frank v. United States, 78 F.3d 815 (2d Cir. 1996) (rejecting 10th Amendment challenge to provision requiring state officers perform background checks). Licensed dealers may not sell firearms to minors or to those whose possession of a firearm would violate federal, state, or local law. See, e.g., 18 U.S.C. § 922(b)(1) (sale to minors); 18 U.S.C. § 922(b)(2) (sale unlawful if buyer's possession would violate state or local law); 18 U.S.C. § 922(g) (sale unlawful to persons convicted of certain felonies, fugitives, unlawful narcotics users, persons adjudged mentally defective, and others). Also required are background checks designed to reduce the possibility that gun sales by a licensed dealers will result in violations of federal, state, or local law. See 18 U.S.C. § 922(s) (seven day waiting period and background check by law enforcement); 18 U.S.C. § 922(t) (national instant criminal background check).

Authorized are the promulgation of regulations. See 18 U.S.C. § 926. Some of those regulations further define the rules and proceedings for obtaining federal licenses. See 27 C.F.R. §§ 178.41-178.78. They also establish recordkeeping requirements

for licensees. See 27 C.F.R. §§ 178.121-178.131.

1. Preemption of State Tort Law

Under the Constitution's Supremacy Clause, federal statutes and regulations preempt conflicting state law. U.S. Const. Art. VI, cl. 2; Cipollone v. Liggett Group, Inc., 505 U.S. 504, 506, 112 S. Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). Preemption may be based upon an express statutory provision, see, e.g., Cipollone, 505 U.S. at 517-23, 112 S.Ct. at 2618-21, or implied in the statute's structure and purpose, Freightliner Corp. v. Myrick, -- U.S. ---, ---, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995); Cipollone, 505 U.S. at 516, 112 S.Ct. at 2617. Implied preemption may result either when the scope of the statute signals congressional design that the statutory or regulatory scheme exclusively occupy the entire field or when the state law "actually conflicts" with federal law. See Freightliner Corp., -- U.S. at ---, 115 S.Ct. at 1487-88 (actual conflict); Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (field preemption).

State tort law -- whether judicial or legislative in origin -- is one method by which the states exercise their police powers to protect their citizens' welfare. It may be preempted by federal law. See Cipollone, 505 U.S. at 522-23, 112 S.Ct. at 2620-21; Burke v. Dow Chemical Co., 797 F.Supp. 1128, 1136 (E.D.N.Y. 1992).

In determining whether a conflict warranting preemption

exists in a given case, a court's analysis must begin "'with the assumption that the historic police powers of the states [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1192, 91 L.Ed. 1447 (1947) (quoted in Cipollone, 505 U.S. at 516, 112 S.Ct. at 2617). "[T]he well-established presumption is against preemption of local law unless a court is 'absolutely certain' that such was Congress's intent." Richmond Boro Gun Club, Inc. v. City of New York, 896 F.Supp. 276 (E.D.N.Y. 1995) (citing inter alia Gregory v. Ashcroft, 501 U.S. 452, 464, 111 S.Ct. 2395, 2402-03, 115 L.Ed.2d 410 (1991)); see also Burke, 797 F.Supp. at 1136 (court should not infer preemption lightly in areas "of core concern to the states such as tort law") (citations omitted); cf. United States v. Lopez, --- U.S. ---, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (limiting congressional power to regulate gun sales and distribution near schools). Congressional "intent" as devised from the statutory language and structure is the "'ultimate touchstone'" of preemption analysis. Malone v. White Motors Corp., 435 U.S. 497, 504, 98 S.Ct. 1185, 1189, 55 L.Ed.2d 443 (1978) (citations omitted).

Two courts have recently considered the preemptive effect of the federal Civilian Marksmanship Program ("CMP") over state and local gun regulations. 10 U.S.C. §§ 4307-4313; See Fresno Rifle and Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723 (9th Cir. 1992); Richmond Boro Gun Club, Inc. v. City of New York, 896

F.Supp. 276 (E.D.N.Y. 1995). Congress created the CMP with the design of "creat[ing] interest in marksmanship training among men of military age." Fresno Rifle and Pistol Club, 965 F.2d at 725 (quoting General Accounting Office report). Through the CMP Congress authorized, inter alia, the sale of certain types of rifles to organized civilian clubs under the auspices of the armed forces. Id. Both courts rejected claims that the challenged state and municipal gun control regulations impeded the sale or use of guns promoted through the CMP and sold under that program. See Fresno Rifle and Pistol Ass'n, 965 F.2d at 726-27; Richmond Boro Gun Club, 896 F.Supp. at 285.

In Coalition of New Jersey Sportsmen v. Florio, 744 F.Supp. 602 (D.N.J. 1990), the court held that the provision in New Jersey's assault weapon ban defining assault weapons to include certain B-B and pellet-firing air guns was preempted as a direct conflict by a federal statute that expressly barred states from prohibiting sale (other than to minors) of such guns. Id. at 605-08; See 15 U.S.C. § 5001(g). That same court, however, found that New Jersey's law criminalizing possession of certain assault weapons was not preempted by a federal statute permitting interstate transport of unloaded guns from one state where such guns are legal to another through a state in which such guns are illegal. 744 F.Supp. at 608-10. The court upheld the state law even though the federal law expressly permitted possession, under proscribed circumstances, of guns for which the state law banned possession altogether.

The statutory scheme that is most likely to give rise to preemption questions concerning state law that would limit the manner in which handguns are marketed is that governing the licensing, sale, and distribution of firearms. See 18 U.S.C. §§ 921-930 (1995). This chapter of the federal criminal law contains a savings clause excluding a general preemptive effect. It provides that

[n]o provision of this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two laws cannot be reconciled or consistently stand together.

18 U.S.C. § 927. Nowhere does the chapter contain a clause expressly preempting state law.

Regulations promulgated pursuant to 18 U.S.C. §§ 921-930 (1995), see 27 C.F.R. § 178 (1995), are generally governed by the statutory savings clause. The regulations also state that its provisions "are in addition to, and not in lieu of, any other provision of law, or regulations, respecting commerce in firearms or ammunition." 27 C.F.R. § 178.2. Relating to licensing is a provision that further limits the potential for finding preemption:

A license issued under this part confers no right or privilege to conduct business or activity contrary to State or other law. The holder of such a license is not by reason of the rights and privileges granted by that license immune from punishment for operating a firearm or ammunition business or activity in violations of the provisions of any State

or other law.

27 C.F.R. § 178.58. Thus, absent a direct conflict between the federal statute or the federal regulations and state tort law, no preemption of state tort claims may be found to exist.

2. Effect of Statutory Scheme on Duties Under State Tort Law

Compliance with federal statutes or regulations does not prevent a court from finding that a defendant acted negligently where a reasonable person would have taken additional precautions. See Feiner v. Calvin Klein, Ltd., 157 A.D.2d 501, 549 N.Y.S.2d 692, 693 (1st Dep't 1990); Sherman v. M. Lowenstein & Sons, Inc., 28 A.D.2d 922, 282 N.Y.S.2d 142, 143 (2d Dep't 1967); Restatement (Second) of Torts § 288C (1965). Terms of a statute or a regulation are not automatically adopted by New York courts as a standard of due care in negligence litigation. See, e.g., Dance v. Town of Southampton, 95 A.D.2d 442, 446, 467 N.Y.S.2d 203, 206 (2d Dep't 1983). Adoption of a statutory requirement as a standard of care is generally a matter of judicial construction and should be based on the appropriateness of the statute for that purpose. Id. While compliance with a federal or state statute may constitute evidence that a defendant exercised due care, it does not preclude a finding of negligence. Feiner, 549 N.Y.S.2d at 693.

D. Application

1. First Amendment

Congress and regulatory agencies frequently consider proposals concerning the manufacture, distribution, sale, use, ownership, and possession of various forms of firearms and ammunition. Federal firearm policy cuts a high profile in national debate, garnering significant media attention. Advocacy groups on all sides pursue their interests with vigor in the political and regulatory arena.

Plaintiffs do not assert and have not elicited testimony to show that any of the lobbying activities undertaken by the defendants or the trade associations they support constitute a sham or involve illegal political activity. Defendants' efforts to affect federal firearm policies through lobbying activities are prime examples of the types of activity the First Amendment, through its rights of free speech and petition, sought to protect.

A core principle of the Noerr-Pennington doctrine is that lobbying alone cannot form the basis of liability, although such activity may have some evidentiary value. It is not enough to show that the defendants act in some coordinated fashion as an industry. See, e.g., Centrone v. Schmidt, 114 Misc.2d 840, 452 N.Y.S.2d 299, 302 (Sup.Ct. Nassau Co. 1982) (concert of action theory not applicable where concerted action not tortious or inherently dangerous). Lobbying before either federal or state authorities was not tortious.

2. Second Amendment

Plaintiffs rely upon state common law to further control the marketing of handguns to private individuals. Nothing in the Second Amendment prohibits this reliance. The Second Amendment does not control state tort law. It does not limit regulation of private handgun sale or use through state tort law.

3. Preemption

Congressional design could not be clearer. Its laws controlling the sale and distribution of firearms do not preempt state tort law. The statutes contains no express preemption clause. On the contrary, the key law contains an explicit savings clause.

The only way a federal law regulating the handgun market can preempt state common law is through a direct conflict making mutual compliance impossible. Defendants have not shown how any remedy sought by plaintiffs would force noncompliance with federal handgun laws governing sales, licensing, and distribution. Plaintiffs seek only to require that gun manufacturers take greater precautions than required under federal law.

4. Effect of Federal Statute on State Tort Duties

The existence of an extensive federal regulatory scheme does not, by itself, establish defendants' duty of care under New York tort law. A court may elect to affirmatively construe the

federal statute as setting the appropriate state tort standard of care. See Dance v. Town of Southampton, 95 A.D.2d 442, 446, 467 N.Y.S.2d 203, 206 (1983). Whether the New York Court of Appeals would adopt the federal statutory and regulatory scheme as the appropriate standard of care is not presented as an issue on the present motions. That issue may be briefed upon completion of discovery on the underlying negligence claim. At this stage it is sufficient to determine that the federal statute and regulations do not automatically control state tort standard of care.

IV. Law of Product Liability

Plaintiffs' complaint alleges design defect claims against defendants on the ground that the handguns they manufactured did not have anti-theft or other related safety devices that would have prevented their use by individuals other than the guns' owners. Plaintiffs also alleged that handguns are unreasonably dangerous products and that, in marketing them so that they can readily fall into the hands of children, the manufacturers are engaged in ultrahazardous activities.

A. Generally

New York product liability law trifurcates claims, setting distinct requirements for claims involving manufacturing defects, design defects, and failures to adequately warn. See, e.g., DeRosa v. Remington Arms Co., Inc., 509 F.Supp. 762 (E.D.N.Y.

1981); see also Restatement (Third) of Torts: Products Liability § 2 (Tentative Draft No. 1, 1995).

A manufacturing defect results when a mistake in manufacturing renders a product that is ordinarily safe dangerous so that it causes harm. Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 373 N.Y.S.2d 39, 335 N.E.2d 275 (1975).

A warning defect occurs when the absence or inadequacy of a warning for a reasonably foreseeable risk accompanying a product causes harm. Torrogrossa v. Towmotor Co., 44 N.Y.2d 709, 405 N.Y.S.2d 448, 376 N.E.2d 920 (1978).

A design defect occurs when the product as designed is unreasonably dangerous for its intended use. Micallef v. Miehle Co., 39 N.Y.2d 376, 384 N.Y.S.2d 115, 348 N.E.2d 571 (1976). The unreasonableness of the risk is measured in light of other design considerations. See DeRosa v. Remington Arms Co., Inc., 509 F.Supp. 762 (E.D.N.Y. 1981); Robinson v. Reed-Prentice Division, 49 N.Y.2d 471, 426 N.Y.S.2d 717, 403 N.E.2d 440 (1980). The manufacturer is liable if a reasonable alternative design, at reasonable cost, would have reduced the foreseeable risks posed by the product, and the omission of the alternative design rendered the product unreasonably safe. Restatement (Third) of Torts: Products Liability § 2 cmt c (Tentative Draft No. 1, 1995).

B. Treatment of Guns Under Product Liability

A handgun's "very purpose is to cause injury -- to kill and to wound." DeRosa v. Remington Arms Co., Inc., 509 F.Supp. 762, 767 (E.D.N.Y. 1981); see also Forni v. Ferguson, No. 132994/94, slip op. at 9 (Sup. Ct. N.Y. Co. Aug. 2, 1995) (unpublished) ("The risk of a gun lies in its function and not a defect in the product."); Note, Handguns and Product Liability, 97 Harv. L. Rev. 1912, 1918 (1984) ("[H]andguns necessarily fire bullets with deadly force."). Hazard is an inherent risk of the product. DeRosa, 509 F. Supp. at 767. As the New York Court of Appeals noted:

[S]ome products, for example knives, must by their very nature be dangerous to be functional. [A] defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use: that is, one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce.

Robinson v. Reed-Prentice Division, 49 N.Y.2d 471, 479, 426 N.Y.S.2d 717, 720, 403 N.E.2d 440, 443.

In DeRosa the alleged design defect was that a shotgun's "trigger pull force" should have been fifteen pounds instead of four-and-a-half pounds in order to prevent accidental discharges. 509 F.Supp. at 765. The plaintiff argued that the extra pressure would prevent police officers from accidentally firing under stress. Id. The claim of the alleged defect's causal relationship to the injury in that case was purely speculative. The cost of modifying the design -- measured not merely in money,

but in lost efficiency, accuracy, and uniformity -- outweighed the benefits of the modification as a matter of New York law. Id. at 769-70.

Both federal and state courts in New York have recently dismissed product liability claims against gun and ammunition manufacturers in claims brought by victims of the attack by Colin Ferguson on a Long Island Railroad commuter train. See McCarthy v. Sturm, Ruger & Co., 916 F.Supp. 366 (S.D.N.Y. 1996); Forni, supra, No. 132994/94. The grounds for dismissal were very much the same as in DeRosa. The McCarthy court rejected a claim that the design of the bullets aggravated plaintiffs injuries. McCarthy, 916 F.Supp. at 370-71. It reasoned that under plaintiffs' theory "every person injured by a bullet would be able to claim that if the bullet had been smaller, there would have been less damage and accordingly, the manufacturer should be strictly liable based on that design defect." Id. at 371.

For a viable New York tort law design defect claim against a handgun manufacturer, a plaintiff must allege that a particular model in question is unreasonably dangerous. See DeRosa, 509 F. Supp. at 769 ("[T]here must be something wrong with the product and if nothing is wrong there will be no liability"); Restatement (Third) of Torts: Products Liability § 2 cmt c (Tentative Draft No. 1, 1995) (test is availability of reasonable alternative design, not social desirability of product).

The Forni and McCarthy courts also dismissed plaintiffs' negligent marketing claims against the manufacturer. Plaintiffs

alleged in both cases that the defendant was negligent in manufacturing and marketing (i.e. selling) the gun when the likelihood of injury was foreseeable. McCarthy, 916 F.Supp. at 369; Forni, slip op. at 11. That claim, however, under the facts of those cases really amounted to an alternate pleading of the product liability theory. See McCarthy, 916 F.Supp. at 369-70 (describing theory that manufacturers' duty is established by foreseeable use of the ammunition); Forni, No. 132994/94, slip op. at 11 (describing theory as alleging moral duty to reduce killings by not designing and selling semi-automatic handguns). Such a claim would create limitless liability for any deaths caused by the use of the gun model used in the killings. See Forni, No. 132994/94, slip op. at 11. The mere act of manufacturing and selling a handgun does not give rise to liability absent a defect in the manufacture or design of the product itself.

C. Ultrahazardous Activity

The general rule in torts is that one who "carries on an abnormally dangerous activity" is strictly liable for the harm inflicted by the activity. See Spano v. Perini, 25 N.Y.2d 11, 15, 302 N.Y.S.2d 527, 529, 250 N.E.2d 31 (1969); Restatement (Second) of Torts § 519(1) (1965). Factors that courts consider in determining whether an activity is abnormally dangerous include: (1) a high degree of risk of harm to others, (2) the likelihood that the harm will be great, (3) the inability to

eliminate the risk through the exercise of reasonable care, (4) the extent to which the activity uncommon, (5) the inappropriateness of the activity to the place where it is carried out, and (6) the extent of the activity's value to the community. Id. at § 520; see also William K. Jones, Strict Liability for Hazardous Enterprises, 92 Colum. L. Rev. 1705, 1707 (1992).

Strict liability for abnormally dangerous activity generally pertains to activity carried on at a specific location. See Doundoulakis v. Town of Hempstead, 42 N.Y.2d 440, 398 N.Y.S.2d 401, 398 N.E.2d 24 (1977); Restatement (Second) of Torts § 520 cmt j. While not restricted to injuries that occur on the defendant's property, the rule is considered as imposing strict liability for "non-natural" uses of land. Id. Examples of strict liability under this theory include use of atomic energy, the manufacture, storage or use of high explosives, the operation of oil or gas wells, the use of large storage tanks for gas or other flammable materials, or the operation of high voltage power lines. See Jones, supra, at 1710 (citing Restatement (Second) of Torts § 520 cmts. g, h, i, j). As noted in the restatement, "the fact that the activity is inappropriate to the place where it carried out is a factor of importance in determining whether the danger is an important one." Restatement (Second) of Torts § 520 cmt j (emphasis added).

Consistent with this approach, the New York Supreme Court recently ruled that a manufacturer could not be held strictly

liable under an ultrahazardous activity theory for manufacturing and distributing guns. See Forni v. Ferguson, No. 132994/94, slip op. at 9-10 (Sup. Ct. N.Y. Co. Aug. 2, 1995); but see In re 101 California Street, No. 959316 (Cal. Super. Ct. 2d Dep't Apr. 10, 1995) (manufacturing and marketing assault weapon to general public constitutes ultrahazardous activity).

Abnormally dangerous activities are distinguished from dangerous instrumentalities. A dangerous instrumentality is an object or substance, such as a refrigerant, poison, pesticide, or, as in the present case, a firearm. See, e.g., Loop v. Litchfield, 42 N.Y. 351 (1870) (poisons); Mikula v. Duliba, 94 A.D.2d 503, 464 N.Y.S.2d 910 (4th Dep't 1983) (firearms). Strict liability does not attach to any injuries resulting from the use of a dangerous instrumentality. A person is not liable for such injuries if he or she uses "that degree of care which a reasonable man would exercise under the circumstances, commensurate with the apparent risk involved." Mikula, 94 A.D.2d at 506, 464 N.Y.S.2d at 912. As the Mikula court noted, the standard of care is not a more exacting one than ordinary negligence, but merely reflect the ordinary prudence required under negligence law applied to the high degree of risk involved. See id.

D. Application of Law to Facts

Plaintiffs' first product liability claim alleges that handguns are unreasonably dangerous because of the lack of an

anti-theft or related safety device. There is no valid basis for this claim. As the Robinson court noted:

A manufacturer need not incorporate safety features into its product so as to guarantee that no harm will ever come to any user [or bystander] no matter how careless or reckless [the user may be].

Robinson v. Reed-Prentice Division, 49 N.Y.2d at 481, 426 N.Y.S.2d at 721, 403 N.E.2d at 444.

Whether or not New York products liability law would require an anti-theft safety mechanism as part of the design of handguns requires a balancing of the risk and utility of incorporating such a device into the design of handguns sold by defendants. Plaintiffs have not shown that such a device is available, nor have they asserted the possibility of showing at trial that such a device would satisfy the New York risk-utility test. The hypothetical safety device relied upon by plaintiffs falls far short of even the proposed trigger pull force that was rejected as a reasonable alternative in De Rosa. See DeRosa v. Remington Arms Co., Inc., 509 F.Supp. 762, 767 (E.D.N.Y. 1981). Summary judgment must be granted to defendants on the design defect claim.

Plaintiffs also have no basis for holding defendants strictly liable under an ultrahazardous or abnormally dangerous activity theory. As discussed in Part IV.C, supra, this cause of action relates primarily to the improper use of land. Marketing, while conduct, cannot be considered "activity" within the meaning of this doctrine. Summary judgment must be granted in favor of

defendants on the abnormally dangerous activities claim.

V. Fraud

Plaintiffs' seventh cause of action advances fraud as a basis of relief. They argue that defendants' alleged deceitful misrepresentations to prospective handgun purchasers and to government officials resulted in increased sales of handguns and less stringent regulation of the handgun market.

A. Law of Fraud

Under New York law, fraud liability lies only if the claimant falls within the purview of those whom the defendant intended would act upon the representation. See, e.g., Kuelling v. Roderick Lean Mfg. Co., 183 N.Y. 78, 85, 75 N.E. 1098 (1905); see also Steinberg v. Guild, 23 A.D.2d 750, 258 N.Y.S.2d 670 (1st Dep't 1965). The elements of fraud have been succinctly identified by the Court of Appeals as consisting of representation, falsity, scienter, deception, and injury. See Kuelling, 183 N.Y. at 85. It is not necessary to review all of the elements here. For plaintiffs to succeed, they must show that any deception have been "calculated and intended" to influence the plaintiffs. Id.; see also Brackett v. Griswold, 112 N.Y. 454, 20 N.E. 376 (1889). As the Brackett court noted, a person making a representation is only accountable for its truth or honesty to those he or she seeks to influence. Id. Absence of this element is fatal to any claim for fraud. See Kuelling,

183 N.Y. at 85.

B. Application

Plaintiffs can not succeed on a fraud claim. They do not claim that they or those whom they represent were deceived by the defendants. Rather, they allege that the defendants deceived government officials and handgun purchasers. Even assuming these allegations to be true, the plaintiffs may not recover for fraud. Summary judgment on the fraud theory must be granted.

VI. Collective Liability

The critical question on this motion is whether defendants may be held collectively liable under New York law on the remaining negligence claims. Whether defendants are entitled to summary judgment on the negligence issue itself is not at issue at this time since it was not fully briefed. The question of joint liability needs to be addressed because plaintiffs are apparently joining additional plaintiffs who do not know who manufactured the gun used to kill their deceased relatives.

A. Applicable Law

Federal courts sitting in diversity apply the substantive law of the forum state on outcome-determinative issues. Erie R.R. v. Tompkins, 304 U.S. 64, 80, 58 S. Ct. 817, 823, 82 L. Ed. 1188 (1938); 28 U.S.C. § 1652 (1988). Included is the forum state's approach to choice-of-law problems. Klaxon Co. v.

Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 1021, 85 L. Ed. 1477 (1941). In determining the applicable state law, greatest weight is given to decisions of the forum state's highest court, in this case the New York Court of Appeals, the state's constitution and its statutes. Erie, 304 U.S. at 78, 58 S.Ct. at 822; Travelers Ins. Co. v. 633 Third Assocs., 14 F.3d 114, 119 (2d Cir. 1994).

Where an issue has not been decided definitively, the district court must predict how the highest state court would resolve the legal issue. DeWeerth v. Baldinger, 38 F.3d 1266, 1273 (2d Cir. 1994); Travelers Ins. Co., 14 F.3d at 119; In re E. & S. Dist. Asbestos Litig., 772 F. Supp. 1380, 1388-91 (E. & S.D.N.Y. 1991), rev'd in part on other grounds sub nom., In re Brooklyn Navy Yard Asbestos Litig. (Joint E. & S. Dist. Asbestos Litig.), 971 F.2d 831 (2d Cir. 1992). Federal district courts are not bound by lower state court precedents that they find probably would be rejected on appeal. Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465, 87 S. Ct. 1776, 1782, 18 L. Ed. 2d 886 (1967); In re E. & S. Dist. Asbestos Litig., 772 F. Supp. at 1390.

B. Choice-of-Law

1. New York's Choice of Law Principles

New York choice-of-law principles require application of the law of the state having the most significant contacts with the matter in dispute. Babcock v. Jackson, 12 N.Y.2d 473, 479, 240

N.Y.S.2d 743, 747, 191 N.E.2d 279, 282 (1963); Auten v. Auten, 308 N.Y. 155, 160, 124 N.E.2d 99, 102 (1954); see also Restatement (Second) Conflict of Laws § 188 (1971); Harold G. Korn, The Choice-of-Law Revolution: A Critique, 83 Colum. L. Rev. 772, 820-40 (1983) (reviewing New York's development of modern choice-of-law rules). The law of "which[ever] state . . . has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort" Babcock, 12 N.Y.2d at 482, 240 N.Y.S.2d at 749, 191 N.E.2d at 283-84 (quoting Restatement, Second, Conflict of Laws, § 379[1]).

2. Application

Both plaintiffs serving as the administrators of the decedents' estates are residents of New York State. Beretta and Taurus, the most likely manufacturers of the gun used to kill Mr. Ray, are located in Italy and Maryland (Beretta) and Florida (Taurus). Smith & Wesson, the manufacturer of the gun used to kill Mr. Johnstone, has its principle place of business in Massachusetts. The other defendants are located in numerous states throughout the United States, and several are located overseas.

Mr. Ray was shot within the state of New York while Mr. Johnstone was shot in California, but those states might not be found to be the site of defendants' tortious conduct. The nature of the tort alleged and the assertion of a theory of collective liability make the defendants' contacts too diffuse to serve as a

basis for anchoring the choice-of-law determination. If defendants' negligent conduct is not specific sales of specific guns, but their having collectively fostered the growth of an underground handgun market, the site of the tortious conduct may be too nebulous to pin down to a particular state.

The parties have not briefed the choice-of-law issue and have not moved to have a particular state's law apply. On the question of collective liability, however, the center of gravity is in New York where the plaintiffs are located, and not within the nebulae of defendants' locations or alleged conduct. As Professor Korn has noted, New York courts tend to give New York plaintiffs the protection of New York law. See Korn, supra, at 780 (noting courts' well-known preference for applying forum state's law). Defendants have not charged that plaintiffs acquired residence here to establish venue in this state or to provide for application of New York tort law.

If the locations of the actual shootings were found to have substantial weight, New York law would apply in Ms. Hamilton's case, while a strong case could be made for applying either New York or California law in Ms. Johnstone's case. It is worth noting that on questions of collective liability in tort, the highest court in both New York and California have been national innovators and have adopted substantially similar approaches. See Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069, cert. denied, 493 U.S. 944, 110 S.Ct. 350, 107 L.Ed.2d 338 (1989); Sindell v. Abbott Laboratories, 26 Cal.3d

588, 602, 163 Cal Rptr. 132, 139, 607 P.2d 924, 931, cert. denied, 449 U.S. 912, 101 S.Ct. 285, 66 L.Ed.2d 140 (1980). The outcome reached might well be the same.

C. Law of Summary Judgment

The moving party bears the burden on a motion for summary judgment of demonstrating that there is "no genuine issue as to any material fact" and that the movant is therefore entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 1348, 91 L.Ed.2d 538 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); see also 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 2727, at 121 (2d ed. 1983). In deciding whether to grant a motion for summary judgment, "all ambiguities and inferences to be drawn from the underlying facts should be drawn in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial should be resolved against the moving party." Henderson v. Center for Community Alternatives, 911 F. Supp. 689, 694 (S.D.N.Y. 1996) (citing Brady v. Town of Colchester, 863 F.2d 205, 210 (2d Cir. 1988); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986); Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993). Courts must act with caution in granting summary judgment. Anderson, 477 U.S. at 255, 106 S.Ct. at 2513.

Summary judgment requires development of an adequate factual basis. 10A Wright, Miller & Kane, supra, § 2725, at 85. Denial of summary judgment is, however, inappropriate if the factual issues are settled but the case involves a difficult question of law. See, e.g., Sagers v. Yellow Freight Systems, Inc., 529 F.2d 721, 728 n.13 (5th Cir. 1976); Schwartzberg v. Califano, 480 F. Supp. 569, 578 (S.D.N.Y. 1979); see also 10A Wright, Miller & Kane, supra, § 2725, at 84-85.

Resolution of new and complex questions of law frequently does require more concrete and thorough factual development. See, e.g., American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272 (2d Cir. 1967), cert. denied, 404 U.S. 1063, 92 S.Ct. 737, 30 L.Ed.2d 752 (1972); see also 10A Wright, Miller & Kane, supra, § 2725, at 85-89. As one court noted, the denial of summary judgment involves not only pure questions of law, but also the exercise of judicial discretion on the question of whether a final decision on the legal question "should be postponed until it can be founded on a more complete factual record." Jecies v. Matsuda, 503 F.Supp. 580 (S.D.N.Y. 1980) (citing Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir.) cert. denied, 425 U.S. 998, 96 S.Ct. 225, 48 L.Ed.2d. 823 (1975)).

Courts are particularly reluctant to grant summary judgment in negligence cases. See 10A Wright, Miller & Kane, supra, § 2729, at 194-97 (citing two studies demonstrating rarity of application of summary judgment in negligence). The existence of

nonexistence of negligence is determined by the "jury's application of a 'reasonable man standard', and therefore, some genuine issues of fact almost always are presented." Mertens v. Agway, Inc., 278 F. Supp. 95, 99 (S.D.N.Y. 1967) (citations omitted).

D. Law Applicable to Collective Liability

The New York State Court of Appeals has been a leading innovator in the field of product liability. As the Court noted in Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 450 N.Y.S.2d 776, 436 N.E.2d 182 (1982), "[p]roducts liability law cannot be expected to stand still where innocent victims face 'inordinately difficult problems of proof.'" Bichler, 55 N.Y. at 580-81, 450 N.Y.S.2d at 779 (quoting Caprara v. Chrysler Corp., 52 N.Y.2d 114, 123, 436 N.Y.S.2d 251, 255, 417 N.E.2d 545, 549 (1981)). New York has been at the forefront of tort law in recognizing theories of collective liability.

Four distinct theories of collective liability that relax the traditional "causation-in-fact" requirement of negligence and product liability law have been recognized or expressly adopted in New York: alternative, enterprise, concerted action, and market share. See Hall v. E. I. DuPont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) (enterprise, or industry-wide, liability); Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 450 N.Y.S.2d 776, 436 N.E.2d 182 (1982) (concert of action); Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539

N.E.2d 1069, cert. denied, 493 U.S. 944, 110 S.Ct. 350, 107 L.Ed.2d 338 (1989) (market share).

Alternative liability applies "[w]here the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it." Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948); Restatement (Second) of Torts, § 433B(3); see also Bichler, 55 N.Y.2d at 580 n.5, 450 N.Y.S.2d at 780 n.5, 436 N.E.2d at 186 n.5. The burden of proof as to causation in such a case is reversed and placed upon each actor to prove that he did not cause the harm. Alternative liability generally requires joining all possible culpable defendants in the action. See Shackil v. Lederle Laboratories, 116 N.J. 155, 166, 561 A.2d 511, 516 (1989); Sindell v. Abbott Laboratories, 26 Cal.3d 588, 602, 163 Cal Rptr. 132, 139 607 P.2d 924, 931, cert. denied, 449 U.S. 912, 101 S.Ct. 285, 66 L.Ed.2d 140 (1980).

Enterprise liability is used to hold all manufacturers in a specific industry liable where the individual manufacturer whose product caused the harm cannot be identified and where the industry jointly controlled the risk. See Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972); see also Bichler, 55 N.Y.2d at 580 n.5, 450 N.Y.S.2d at 780 n.5, 436 N.E.2d at 186 n.5. This joint control usually involves the use of a trade association or other form of agreement or custom through which industry-wide practices or safety standards are determined. See Hall, 345 F. Supp. at 374.

A theory of "concerted action" establishes collective liability where the evidence shows that all defendants had an understanding, express or tacit, to participate in a common plan to commit a tortious act. See Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069, cert. denied, 493 U.S. 944, 110 S.Ct. 350, 107 L.Ed.2d 338 (1989); see also Restatement (Second) of Torts § 876 (1965). Mere parallel activity is insufficient to establish collective liability under a concerted action theory. See Hymowitz, 73 N.Y.2d at 506-07, 541 N.Y.S.2d at 946-47.

In Bichler, the Court of Appeals upheld a jury charge allowing recovery under a concerted action theory where "although acting independently, [defendants'] acts ha[d] the effect of substantially encouraging or assisting the wrongful conduct of the other." 55 N.Y.2d at 582-84, 450 N.Y.S.2d at 781-82. As the Court noted, however, it affirmed the charge because counsel failed to adequately preserve the question for review. 55 N.Y.2d at 583-84, 450 N.Y.S.2d at 781-82. The Court did not engage in a thorough consideration of whether New York law would permit the theory of concerted action embodied in the charge. Subsequently, in Hymowitz, the Court rejected the more expansive theory of concerted action found in the Bichler charge, holding that a common agreement, tacit or otherwise, is necessary to establish liability for concerted action. Hymowitz, 73 N.Y.2d at 506-07, 541 N.Y.S.2d at 946-47. The Court of Appeals did not hold that concerted action is not a viable theory under New York law, but

only that its requirements were not met in DES cases. Id. 73 N.Y.2d at 507-08, 541 N.Y.S.2d at 948.

As the Hymowitz decision illustrates, New York law remains dynamic on the issue of collective liability. The Court of Appeals has been willing to adapt basic theories of collective liability to unique circumstances. While rejecting a concerted action theory where there was no common plan, Hymowitz adopted a market share theory for liability in DES cases. See Hymowitz, 73 N.Y.2d at 508, 541 N.Y.S.2d at 947; see also Sindell v. Abbott Laboratories, 26 Cal.3d 588, 163 Cal Rptr. 132, 607 P.2d 924, cert. denied, 449 U.S. 912, 101 S.Ct. 285, 66 L.Ed.2d 140 (1980). The Court of Appeals noted the defendants' parallel activity, the identical, generic quality of the product across all manufacturers, and the latent injuries it caused as key factors in adopting the theory. 73 N.Y.2d at 508, 541 N.Y.S.2d at 947.

In adopting market share liability, the court stressed that it was tailoring its market share theory to a unique situation. See id. ("We stress, however, that DES is a singular case . . ."). The case demonstrates, however, the Court of Appeals' inclination to fashion new bases of collective liability where the facts and circumstances demand them in protecting the reasonable expectations of safety held by the public. Given the court's history, it would be unwarranted to assume that the New York Court of Appeals would not adopt or modify New York tort theory in response to new circumstances that warrant such treatment. See Christopher J. McGuire, Note, Market-Share

Liability After Hymowitz and Conley: Exploring the Limits of Judicial Power, 24 U. Mich. L. Ref. 759, 761 (1991) (market share theory may not be limited to DES but instead encompasses a particular set of defendant identification problems).

The New York Court of Appeals continues to break new ground and refine the state's products liability law. See, e.g., Denny v. Ford Motor Co., 87 N.Y.2d 248, 639 N.Y.S.2d 250, 662 N.E.2d 730 (1995) (implied warranty is a separate and distinct cause of action from design and manufacturing defect).

In addition to these four theories that the New York Court of Appeals has either adopted or acknowledged, appellate courts in other states have adopted other variants of collective liability. See, e.g., Shackil v. Lederle Laboratories, 219 N.J. Super. 601, 530 A.2d 1287 (App.Div. 1987), rev'd, 116 N.J. 155, 561 A.2d 511 (1989) (risk-modified market share liability); Collins v. Eli Lilly & Co., 116 Wis.2d 166, 342 N.W.2d 37, cert. denied, 469 U.S. 826, 105 S.Ct. 107, 83 L.Ed.2d 51 (1984) (modified market share liability); Martin v. Abbott Laboratories, 102 Wash.2d 581, 689 P.2d 368 (1984) (same); see also McGuire, Note, supra at 765-67 (discussing Collins and Martin); Andrew M. Nace, Note, Market Share Liability: A Current Assessment of a Decade-Old Doctrine, 44 Vand. L. Rev. 395, 407-12 (discussing Collins, Martin, and other variants).

For example, a New Jersey superior court applied what it called "risk-modified market share liability" in a case involving the diphtheria, pertussis, and tetanus ("DPT") vaccine. See

Shackil v. Lederle Laboratories, 219 N.J. Super. 601, 530 A.2d 1287 (App.Div. 1987), rev'd, 116 N.J. 155, 561 A.2d 511 (1989). Under this theory, a defendant's liability for its market share is reduced not only through exculpation, but by a showing that, to the extent the product at issue is not -- unlike DES -- fungible or generic, its product created a reduced risk relative to its market share. See id. The New Jersey Supreme Court reversed not for doctrinal reasons but on the grounds that imposition of collective liability in that case would frustrate "overarching public-policy and public-health considerations" by threatening the vaccine's availability, and because an adequate statutory scheme of compensation for victims was already in place. 116 N.J. at 158, 561 A.2d at 512. The Court explicitly left open the possibility that it might adopt the theory in another case. 116 N.J. at 189, 561 A.2d at 528 ("This case, the Court's first exposure to market-share liability, may therefore come to represent the exception rather than the rule.").

As Hymowitz illustrates, New York has looked to other states for collective liability theories that best fit particular cases where no theory previously adopted in New York was deemed suitable. See Hymowitz, 73 N.Y.2d at 508-12, 541 N.Y.S.2d at 948-50 (reviewing decisions of other state courts in crafting New York's market share theory).

A number of factors are common to all theories of collective liability. First, problems unique to the case must make it impracticable to prove which defendant caused the injury. See

Hymowitz, 73 N.Y.2d at 504-07, 541 N.Y.S.2d at 945-47; see generally Symposium: The Problem of the Indeterminate Defendant: Market Share and Non-Market Share Liability, 55 Brooklyn L. Rev. 863 (1989); see also David Leebron, An Introduction to Products Liability: Origins, Issues and Trends, 1990 Ann. Surv. Am. L. 390, 428-32. Second, all defendants sought to be held collectively liable must have engaged in tortious activity that could have caused the injury. See Sheffield v. Eli Lilly & Co., 144 Cal.App.3d 583, 599, 192 Cal.Rptr. 870, 880 (1983) (rejecting market share liability in manufacturing defect case because it would be unfair to hold innocent manufacturers liable for an injury caused by one tortfeasor). Third, the problems of proof must be related to the conduct (or the product) itself. See Hymowitz, 73 N.Y.2d at 507, 541 N.Y.S.2d at 947 (noting necessity for market-share because DES' latency and generic quality creates "curtain" behind which manufacturers otherwise could hide); Sheffield, 144 Cal.App.3d at 594, 192 Cal.Rptr. at 877 (delay in discovering alleged causation not related to nature of product or act or omission of non-tortfeasor defendants). Finally, an important consideration in adopting theories of collective liability has been the absence of another effective remedy or procedure through which individual victims may be compensated. See, e.g., Shackil, 116 N.J. at 180-86, 561 A.2d at 523-27 (rejecting risk-modified market share theory because statute provides victim compensation).

At bottom, adoption by a state's highest court of a theory

of collective liability is a policy decision. As the Hymowitz court noted:

[I]t would be inconsistent with the reasonable expectations of a modern society to say to these plaintiffs that because of the [unique factors identified in the case] the cost of injury should be borne by the innocent and not the wrongdoers. . . . Consequently, the ever-evolving dictates of justice and fairness, which are at the heart of our common law system, require formation of a remedy

73 N.Y.2d at 507, 541 N.Y.S.2d at 947; see also Shackil, 116 N.J. at 158, 561 A.2d at 512 (public-policy and public-health considerations). In predicting what the New York Court of Appeals would do in the area of collective liability for negligent marketing of handguns, a federal court must look both to developed precedent and to underlying policy considerations that have motivated the state.

E. Application of Law to Facts

Collective liability provides both a basis for establishing a defendant's liability where proof of causation is impossible and a method of apportioning damages between liable codefendants. It is not necessary to consider here how the New York Court of Appeals would apportion damages if it were to apply a theory of collective liability in this case. Instead, the question posed on this motion for summary judgment is whether it is clear that the Court of Appeals would deny plaintiffs the chance to hold defendants liable under any collective liability theory.

Plaintiffs are proceeding on a theory of negligence

concerning the manner in which defendants marketed the handguns. Discovery in the present case has thus far proceeded on the limited question of collective liability, but not on the underlying negligence claim. Until discovery on that point is completed, it is difficult to determine what activity or nonactivity plaintiffs will identify as negligent. Summary judgment on this theory is not appropriate until general discovery is complete and the issues fully briefed.

It is also difficult to know what the basis will be of the alleged collective liability until the underlying negligence theory is fleshed out. It is nevertheless possible to determine that sufficient questions of material fact exist at this stage, or may likely be developed in further discovery, to deny summary judgment on the collective liability issue.

The heart of the plaintiffs' theory, apparently, is the claim that defendants' negligence in methods of marketing handguns and flooding the handgun market has fostered the development of an extensive underground economy in handguns. Through this underground market, it is suggested, youths may readily illegally obtain handguns which they then use, resulting in the deaths of individuals such as the decedents represented by the plaintiffs in this court.

No one doubts that the problem of youths and handguns is a serious one. As one observer has commented:

Part of the problem . . . [is] the sheer availability of guns. Young people in our inner cities know that there is a war going on; millions have been caught up in the many

small battles that make up the war on America's streets. Most young people are interested in surviving the war, but the price they pay is being prepared to kill or be killed almost every day.

As the number of guns available has increased so have the odds that they will be shot in a confrontation.

Geoffrey Canada, Fist Stick Knife Gun: A Personal History of Violence in America 68 (1995). As already indicated in Part I, supra, the problem of youths and firearms is widely acknowledged to be of major national concern. The Justice Department reports that weapons offenses arrest rates for teenage males have increased dramatically in comparison with the population at large, and that 23% of those arrested for weapons offenses in 1993 were under the age of 18. See Bureau of Justice Statistics, Selected Findings: Weapons Offenses and Offenders 3 (Nov. 12, 1995). Juvenile arrests for weapons offenses increased 100% between 1985 and 1993. Id.

Viewing the facts and drawing inferences in the light most favorable to the plaintiffs, it is possible that plaintiffs will be able to show that a substantial cause for the killings that are at the heart of this suit is the operation of a large-scale underground market. No one claims that defendants intended their guns to be used illegally to hurt anyone. There may, however, come a point that the market is so flooded with handguns sold without adequate concern over the channels of distribution and possession, that they become a generic hazard to the community as a whole because of the high probability that its weapons will fall into the hands of criminals or minors prohibited from

possession under state and federal law. But see Note, Handguns and Products Liability, 97 Harv. L. Rev. 1912, 1920-24 (1984) (opposing "defect in distribution" theory as basis for strict liability for handgun manufacturers). While in individual cases the exact manufacturer may be identified, plaintiffs might establish through discovery that a particular manufacturer's negligence alone would have been insufficient to foster the growth of the underground gun market to the extent that the individual shooter could obtain that manufacturer's gun. Thus, it may be argued, only the collective action of the handgun industry makes the individual shootings giving rise to this suit possible even when the manufacturer of the gun used in the shooting was known.

Plaintiffs have already produced some material through discovery that hints at support for such a theory. The SAAMI pledge adopted by many defendants, and the meaning given to that pledge by individual representatives of several of the defendants, arguably suggests a collective view within the industry that responsible sales meant only that sales to dealers had to comply with federal law, i.e., were restricted to those with licenses from the federal government.

If the underlying cause of the injuries is the unchecked growth of the underground handgun market, and not an individual negligent sale of a particular gun by a particular defendant to a particular licensed dealer, then the New York Court of Appeals might find a market share theory or some variant to be viable

even if the manufacturer of the gun used to commit the killing were known. The New York Court of Appeals well might, for policy reasons, adopt a Hymowitz-type theory, or one of the theories espoused by other state courts such as those in Sindell or Shackil that would allow for exculpation or adjustments for risk contribution at variance with actual market share. See Hymowitz v. Eli Lilly & and Co., 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069, cert. denied, 493 U.S. 944, 110 S.Ct. 350, 107 L.Ed.2d 338 (1989) (no exculpation); Shackil v. Lederle Laboratories, 219 N.J. Super. 601, 530 A.2d 1287 (App.Div. 1987), rev'd, 116 N.J. 155, 561 A.2d 511 (1989) (modification for risk contribution); Sindell v. Abbott Laboratories, 26 Cal.3d 588, 602, 163 Cal Rptr. 132, 139 607 P.2d 924, 931, cert. denied, 449 U.S. 912, 101 S.Ct. 285, 66 L.Ed.2d 140 (1980) (allowing exculpation).

If negligence lies not in the creation and fostering of the underground gun market, but in the individual sale of a handgun, market share liability might still be a viable theory where the defendant is unknown. It is the nature of illegal handgun use that the shooter is likely to dispose of the gun so as to minimize the chances of being caught. Depending upon what is available to law enforcement investigators where the gun is not retrieved, it will be possible only in some instances, and then to varying degrees, to narrow the field of possible handgun manufacturers. On much different facts and for different reasons than those in the DES cases, difficulties in defendant

identification unique to the product and to manufacturer may arise. The New York Court of Appeals might choose to adopt, for reasons of public policy, a theory of collective liability. Most appropriate might be a form of market share liability that provided for exculpation.

It does not appear that the New York Court of Appeals would make use of either concerted activity or enterprise liability theories. The former, as Hymowitz makes clear, requires evidence of a tacit agreement as to the tortious conduct. Hymowitz, 73 N.Y.2d at 506-07, 541 N.Y.S.2d at 946-47. Plaintiffs have not produced any facts suggesting the existence of an agreement among the defendants as to how to market the guns. The latter theory requires joint control of the risk through use of a trade association or some other method of standard-setting. Plaintiffs allege joint coordination of policy positions, but that relates to lobbying activities, not to actual marketing. Given the facts as thus far developed, the theories the New York Court of Appeals would most likely adopt, if it were to adopt any, are some form of either market share or alternative liability.

As the foregoing discussion illustrates, it would be premature to conclude that the New York Court of Appeals would decline to adopt any theory of collective liability in this case. Many of the elements the Court of Appeals relied upon in Hymowitz may be present in this case, some by analogy. Further factual development is required before a court can decide whether plaintiffs may maintain an action predicated on collective

liability. See American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272 (2d Cir. 1967), cert. denied, 404 U.S. 1063, 92 S.Ct. 737, 30 L.Ed.2d 752 (1972); Jecies v. Matsuda, 503 F.Supp. 580 (S.D.N.Y. 1980).

VII. Class Action Certification

Plaintiffs seek certification of a class under Rule 23(c)(4)(A) of the Federal Rules of Civil Procedure. That class would consist of persons killed or injured in unlawful handgun shootings and the representatives of such persons.

A. Requirements

The underlying purpose of the class action mechanism is to foster "judicial economy and efficiency by adjudicating, to the extent possible, issues that affect many similarly situated persons." In re Joint Eastern and Southern District Asbestos Litig., 129 B.R. 710, 802 (citing Califano v. Yamasaki, 442 U.S. 682, 700-01, 99 S.Ct. 2545, 2557-58, 61 L.Ed.2d 176 (1979)). It is universally recognized that in pursuing these goals a district court is afforded broad discretion in determining whether an action should be certified under Rule 23. See, e.g., City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969); In re Joint E. & S. Asbestos Litig., 129 B.R. at 816 (E.&S.D.N.Y. 1991); In re Tetracycline Cases, 107 F.R.D. 719, 735 (W.D.Mo. 1985) (citing cases and treatises); 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1759, at 111

(2d ed. 1986).

For a plaintiff-class action to be maintained, four prerequisites must be met: numerosity such that joinder is impractical, common questions of law or fact, typicality of claims or defenses, and the extent to which plaintiffs' are representative of the class. See Fed. R. Civ. P. Rule 23(a). In addition to these prerequisites, Rule 23(b) provides a choice of additional criteria, one of which must be applicable for a court to certify a class. See Fed. R. Civ. P. Rule 23(b). Most relevant of the criteria under 23(b) is that the court may certify a class if it finds that common questions of law or fact predominate over questions affecting individual members. Fed. R. Civ. P. Rule 23(b)(3).

Rule 23(c)(4) provides that "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues" Fed. R. Civ. P. Rule 23(c)(4)(A). Certification is not appropriate if, despite the presence of a common issue, certification would not make the case more manageable or serve the varied interests Rule 23 seeks to advance.

B. Application

Plaintiffs propose certification as a class persons killed or injured in unlawful handgun shootings and representatives of such persons. They propose class resolution of issues regarding the joint conduct or concerted action of the defendants in

marketing the handguns. They have not demonstrated that all the prerequisites have been met to permit class certification, or that interests of judicial economy and efficiency would be served by certification. Proposed classmembers stand in different positions relative to defendants' conduct.

Plaintiffs argue that issues involving joint conduct will be the same for all members of the proposed class. Whether that joint conduct caused each classmember's injury, however, is another matter. In effect they propose class certification for the questions of duty and breach under negligence, and individual treatment for causation and damages. Courts often bifurcate the liability and damages portions of litigation. See, e.g., In re Joint E. & S. Asbestos Litig., 878 F.Supp. 473, 489-90 (E.&S.D.N.Y. 1995); In re Tetracycline Cases, 107 F.R.D. at 735.

It makes little sense to bifurcate in this case. Establishing that defendants jointly breached a duty to plaintiffs in the manner the guns were marketed can be just as easily accomplished through consolidation of a small number of cases with similar fact patterns for determination of legal issues. When there are scientific issues of general causation, as in mass torts cases, certification of a class for a limited purpose may be desirable. There are no equivalent causal issues in the instant case.

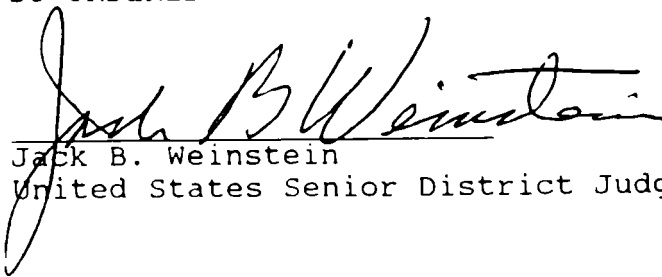
Assuming that plaintiffs can prove at trial that defendants collectively breached a duty, they must still establish that this breach caused each plaintiff's injury. Many proposed

classmembers may be injured through the illegal use of firearms by underage assailants, yet it would seem that plaintiffs must at least tie the youth's possession of the gun to the operation of the underground handgun market attributable to the defendants' mode of marketing. There has been no showing to date that resolution of the issues sought for class certification would advance the interests of judicial economy and efficiency. Certification is denied with leave to renew.

VIII. Conclusion

Defendants' motion for summary judgment dismissing plaintiffs' product liability and fraud claims is granted. Defendants' motion for summary judgment on plaintiffs' theory of collective liability for negligence is denied. The parties may renew motions upon the completion of full discovery. Plaintiffs' application for class certification is denied.

SO ORDERED.



Jack B. Weinstein
United States Senior District Judge

Dated: Brooklyn, New York
May 2, 1996

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