



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

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So Sue Them, Sue Them

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HOT ON THE HEELS OF THE CARNAGE IN Littleton, Colorado, President Clinton has proposed a grab bag of new gun-control measures-- never mind that they wouldn't have stopped the Littleton murders, whose perpetrators broke a dozen laws already on the books. An unspeakable event rocks the public, and our politicians seize on the ensuing anti-gun sentiment to advance their otherwise frustrated gun-control agenda.

Doubtless the same opportunism will spark a new round of litigation by mayors against the firearms industry. Already at least eight cities have filed suit -- Atlanta, Bridgeport (Conn.), Chicago, Cincinnati, Cleveland, Detroit, Miami, and New Orleans -- to recoup public outlays stemming from gun-related violence. Their suits are the leading edge of a novel and dangerous approach to public policy that ultimately threatens the rule of law.

When governments use the judiciary to recover "damages," the courts intrude on the regulatory and revenue responsibilities of legislatures. And when lawsuits based on tenuous legal theories impose high costs on defendants, due process gives way to a form of extortion, with public officials serving as bagmen for private contingency fee lawyers. Those lawyers, fresh from reaping billion-dollar awards representing states in their litigation against Big Tobacco, have fanned out in search of new industries to sue. Gun makers are their latest prey, and mayors their latest allies. The predictable result is growing public contempt for our legal institutions.

The eight cities suing the gun industry rely on a variety of arguments. Most of them contend that firearms are "defective and unreasonably dangerous" if sold without devices that prevent discharge by unauthorized users. These cities demand compensation for the treatment of gun-related injuries, police overtime, street cleaning after shootings, and tax revenue lost through reduced worker productivity and lower property values. Bridgeport's mayor is also contemplating a civil rights claim, on the ground that gun violence takes place in predominantly minority neighborhoods. (While 80 percent of homicide victims in Bridgeport are minorities, so are 90 percent of homicide defendants.)

The theory underlying Chicago's novel lawsuit is more radical still. The Windy City charges that the gun industry's "negligent marketing" and sales tactics create a "public nuisance" jeopardizing the health and safety of Chicagoans. Manufacturers allegedly "saturate" markets in jurisdictions whose gun laws are less restrictive

than Chicago's, knowing full well that some purchasers will take their weapons into the city.

Chicago seeks damages and court orders that amount to judge-imposed gun control: an injunction forbidding sales to people who have purchased guns in the last 30 days, sales in excess of "lawful demand" (whatever that means), and sales of "firearms that by their design are unreasonably attractive to criminals." Usually, plaintiffs in lawsuits ask that defendants obey existing laws. But no existing law contains the requirements Chicago seeks to enforce. (Ironically, by the logic of "negligent marketing," New Orleans could become a defendant in Chicago's suit: Mayor Marc Morial recently approved a deal to sell 8,000 confiscated guns to commercial dealers, who in turn resell them throughout the Midwest, from Abilene to -- you guessed it -- the suburbs of Chicago.)

But simple economics puts the lie to the negligent-marketing claim. If gun makers reduce the supply of firearms sold to suburban dealers, the market price of guns will rise. Consumers with the most "elastic" demand -- those who are most sensitive to price changes -- will reduce or eliminate their purchases. And the evidence is clear: Price-sensitive consumers tend to be law-abiding citizens. By contrast, criminals' demand for firearms is highly "inelastic": Crooks are willing to pay inflated black-market prices for their guns. Perversely, by restricting the legal supply of guns and raising their price, plaintiffs would put more weapons in criminals' hands and fewer in the hands of honest citizens.

Perhaps most important, liability for "saturating the market" is unheard of in tort law and incompatible with a legal system based on individual responsibility. Is General Motors liable when the market for cars is "saturated" in Southern California, resulting in traffic jams and accidents? Or do motorists bear the burden of their voluntary consumption decisions, constrained only by their obligation to drive carefully?

All eight cities' gun suits share an important characteristic of the tobacco settlements: They claim damages for indirect harm. The plaintiff cities do not argue that their property was hit by gunfire, only that they lost revenue when gunfire harmed others. Tort law, however, is classically based on direct harm. Suing for indirect damage flies in the face of 150 years of tort law.

The rule against indirect recovery is fundamental. Last year, in *Seafarers' Welfare Plan v. Philip Morris*, a federal judge held that "the long-standing rule [against recovery for indirect harm] bars Plaintiffs' claims in this case, notwithstanding Plaintiffs' artful re-characterization of them" as direct. On this threshold issue alone, the cities' suits against gun makers are losers. But there's more.

To hold gun makers liable for selling an unsafe product, tort law requires that the product be truly defective, not merely dangerous. American case law has consistently rejected claims that firearms are inherently defective. Indeed, empirical data gathered by Gary Kleck, professor of criminology at Florida State University, and by John R. Lott Jr., law professor at the University of Chicago, reveal that handguns, far from being defective, in fact deter and substantially reduce violent crime when they are carried by non-felons. The lead plaintiff's counsel in the New Orleans case, Wendell Gauthier, himself carries a gun -- presumably because he assigns to it greater utility than risk.

Then there is the public-nuisance argument. The American Law Institute, in its authoritative Restatement of the Law Second, Torts, defines a public nuisance as "an unreasonable interference with a right common to the general public." David Kairys of Temple University Law School, co-counsel in the Chicago case, has urged the adoption of that doctrine in gun cases. But Kairys has it backwards. It is Chicago's lawsuit that constitutes a public nuisance. The sale of guns does not violate any right common to the general public.

On the contrary, individuals have a right to protect themselves against criminal conduct. Gun ownership, by facilitating selfdefense, helps secure that right. Wrongful behavior, not an inanimate object, is the cause of gunshot injuries. Legitimate ownership of firearms, which are present in almost 50 percent of American homes, cannot be a predictor of violent behavior.

The manufacture, sale, and ownership of hand-guns are highly regulated. Statutes ban certain guns. It's federal crime for felons or drug users to purchase or possess any firearm. It's illegal for retailers to sell handguns to minors. Sales of more than one firearm must be reported to authorities. Background checks of purchasers are federally mandated. Handguns are the only consumer products for which manufacturers, wholesalers, and retailers are all required to have federal licenses. Handguns are also the only products that may not be purchased outside one's state of residence. The design of every new model must be inspected and approved by the Bureau of Alcohol, Tobacco and Firearms.

If a gun dealer knowingly condones "straw purchases" on behalf of criminals, that dealer can be prosecuted. Curiously, not one of the retailers targeted by Chicago's undercover stings has been charged. If their behavior was as egregious as the city's complaint suggests, why have they not been held criminally liable?

If the cases against gun manufacturers are so insubstantial, why is the litigation so threatening to the industry and to the rule of law? A number of factors conspire to transform weak legal cases into effective means of accomplishing a shakedown: the use of juries in civil cases, procedural rules that make it difficult to have even lame cases dismissed prior to extensive litigation, huge potential damages, and the perverse incentives that drive lawsuits when public officials hire private attorneys on a contingency fee basis.

Alone among Western democracies, the United States provides for juries in civil cases. That turns out to be a costly practice. Because juries more than judges are willing to overlook legal niceties when an injured plaintiff seeks damages from an unpopular corporate defendant, jury verdicts tend to favor plaintiffs. Not only are plaintiffs more likely to prevail if the case is heard by a jury, but they are likely to recover a larger sum as well. Indeed, jurors can reduce their own taxes by holding defendants liable for public outlays. The effect is to make defendants more amenable to settlement.

Procedural rules also push defendants toward settlement, even when their case is strong on the merits. In many jurisdictions, courts are reluctant to dismiss a case prior to far-reaching discovery. Thus, plaintiffs can engage in fishing expeditions for documents that might support their case or embarrass the defendants. Even after discovery is complete, a case typically is not dismissed without trial if there is any potentially significant factual dispute.

Yet another intimidating factor, which played a major role in the state tobacco suits, is the enormous award that could flow from an adverse verdict. When government sues a private firm to recover public expenditures, the plaintiff is not a single individual but a large class of allegedly injured parties. While a defendant might risk going to trial when a few private claimants demand relatively small sums, the stakes are greatly magnified when government is the claimant and the litigation is effectively a class action.

Last, gun makers and other industries have reason to be concerned about the unholy alliance between government and the private bar. Although the gun suits are based on different legal theories than the tobacco suits, they enjoy a common lineage. Both series of suits were concocted by a handful of private attorneys who entered into contingency fee contracts with public officials. In effect, members of the private bar were hired as government subcontractors, but with a huge financial interest in the outcome. Imagine a state attorney general corraling criminals on a contingency-fee basis, or state troopers paid per traffic stop. The potential for corruption is enormous. Most of the tobacco-suit contracts were awarded without competitive bidding to lawyers who often bankrolled state political campaigns -- some of the same lawyers now vying for largesse from the mayors who are suing the gun industry.

Government is the sole entity authorized to wield coercive power against private citizens. When government functions as prosecutor or plaintiff in a legal proceeding in which it also dispenses punishment, safeguards against state misbehavior are essential. That is why we need the protection of the Fourth, Fifth, Sixth, and Eighth Amendments. That is why we demand proof beyond a reasonable doubt in criminal proceedings. That is why in civil litigation we rely primarily on private remedies, with redress sought by directly injured parties,

not the state.

Contingency fee contracts between governments and private attorneys should be illegal. Free societies should not condone private lawyers' enforcing public law when those lawyers have a personal stake in securing severe penalties. Legislatures or the courts should shut down this plunder by the plaintiffs' bar.

In the quest to exact damages from gun makers, fairness and equity are not the overriding objective. Philadelphia mayor Edward G. Rendell, who first proposed simultaneous court filings by as many as 100 cities, put it this way: "The impact of so many cities' filing suit all at once would be monumental for gun manufacturers. . . . They don't have the deep pockets of the tobacco industry, and it could bring them to the negotiating table a lot sooner." Evidently the merits of the litigation are secondary to Mayor Rendell. Even frivolous litigation can bring an industry to its knees. It worked against Big Tobacco; it will work against small gun manufacturers. The Center to Prevent Handgun Violence is open and candid about its ultimate goal: "Guns must now become the next tobacco."

By the way, Mayor Rendell also claimed that cities are not after big bucks, only improved safety features and changes in distribution practices. Other mayors, however, were busily soliciting private lawyers to work for a percentage of money damages. Rendell's statement came one day after Miami filed suit seeking hundreds of millions of dollars in police, paramedic, and hospital expenses; one day after Bridgeport filed, asking \$ 100 million in expenses stemming from gun-fire; and not long after Chicago entered its claim for a whopping \$ 433 million.

Where will it end? More kids are killed by bicycles than by guns. Will our mayors be stalking those industries? If gun manufacturers are responsible for violence, why not sue the makers of the steel used in the guns? Why not sue match and knife manufacturers for the damage caused by arson and stabbing? Why not sue Ford when one of its dealers sells a car involved in a drunk driving fatality? If anything, gun dealers are less culpable than automobile and knife retailers, who make no effort at all to ensure that their customers are not criminals.

What we have here is a legal system run amok -- social engineering without restraint and without concern for personal responsibility. Yesterday tobacco, today guns, tomorrow who knows what. The reforms of the civil justice system that would put a stop to this litigation tyranny are well established: Adopt a "loser pays" rule for legal fees, at least in civil cases where the plaintiff is the government; ban contingency fee contracts between the government and private attorneys; and bar tort suits by persons who have suffered injuries while criminally using a firearm. At a more basic level, we must stop misusing our legal machinery to strike out at bogeymen. If we don't, someday when we need it, we'll find that our legal system has been damaged beyond repair.

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