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### Another Victory

I'm sure that by now you have seen the news coverage of the California Supreme Court decision. It was another victory for gun manufacturers, and in this case, a victory for gun owners as well. Over the last few years, gun prohibitionists have come up with a new strategy for disarming law-abiding citizens: suits against manufacturers for "negligent marketing." What is "negligent marketing" and how does that differ from a conventional firearms product liability suit?

At least since the 1920s, there have been lawsuits against gun manufacturers for injuries caused by defective guns. Some of these were metallurgical defects: a gun exploded, and the shooter was injured or killed. Most gun owners can see the merit of such suits. If a gun maker uses poor quality steel, it won't be obvious to the buyer, until the gun explodes, and fragments of metal take out your eye.

Other liability suits have involved safety mechanisms that didn't work right. Some of these cases seem clear-cut, while others are a bit more arguable. One of the arguable sets of suits involved the older Ruger Single Action Army replicas. While human error certainly played a significant role in these tragic accidents, there was at least a plausible claim that selling a modern replica of the SAA design was irresponsible. Even in the nineteenth century, the SAA design was widely recognized as dangerous if you carried it with the hammer over a live round.

The current round of lawsuits against gun makers, however, have not been about defective materials, or unsafe gun designs. Pretty typical was *Shipman v. Jennings Firearms, Inc.* (1986), where the plaintiff admitted "that the pistol had no design defects

and performed exactly as intended.”<sup>1</sup> These lawsuits attempt to hold manufacturers responsible for deaths and injuries caused by criminal misuse.

One of the theories under which these lawsuits have been filed is that handguns are “ultrahazardous,” and therefore so dangerous that the manufacturer is obligated to control every step of the distribution chain, rather like high explosives. As the suit in New York described it, “Plaintiffs asserted that defendants distributed their products negligently so as to create and bolster an illegal, underground market in handguns, one that furnished weapons to minors and criminals....”<sup>2</sup> The manufacturers are somehow supposed to be responsible for unlawful transfers done by their customers’s customers’s customers.

This argument is so absurd that back in April, New York’s high court ruled unanimously that gun manufacturers *were* not obligated to exercise this level of oversight over how their products are distributed. Handguns are not “ultrahazardous.” *Even New York’s courts won’t buy this nonsense.*

This month’s victory was in another unlikely place: the California Supreme Court. The lawsuit here was *Merrill v. Navegar*. Back in 1993, a deranged man named Gian Luigi Ferri went on a rampage at 101 California Street in San Francisco. When it became apparent that he would not escape the building alive, he killed himself. In his briefcase he had “the names and addresses of more than a dozen TV shows, including ‘Oprah Winfrey,’ ‘Phil Donahue’ and even ‘Washington Week in Review.’” He apparently believed that this infamous crime would provide him a platform from which to describe

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<sup>1</sup> *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1533 (11<sup>th</sup> Cir 1986).

<sup>2</sup> *Hamilton, et. al. v. Beretta, et.al.*, 2001 NY Int. 40 (2001), at [http://www.law.cornell.edu/ny/ctap/I01\\_0040.htm](http://www.law.cornell.edu/ny/ctap/I01_0040.htm).

his “victimization” by lawyers, real estate firms, and the manufacturers of monosodium glutamate (the food additive often used in Chinese food).<sup>3</sup>

Because this was a law office, some of the dead were lawyers, and their next of kin were lawyers. Unsurprisingly, in their grief, the next of kin looked for someone to hold responsible for this horrible loss. They couldn’t sue Ferri; he had gone to a place that, contrary to popular opinion, even lawyers may not enter and leave with impunity. Who would they sue?

Ferri carried two TEC DC9 “assault pistols” with him, and a Norinco M1911A1,<sup>4</sup> so the survivors sued Navegar, the maker of the TEC DC9s. (Before you get too angry at the next of kin who filed this lawsuit—imagine yourself in their shoes, desperately looking for someone to blame for the loss of wives and husbands. Grief can make smart people take stupid actions.)

I have been told by those with informants involved in the investigation that the TEC DC9s, equipped with Hellfire trigger activators, jammed early on in Ferri’s bloody rampage, and that most of the deaths were caused by the M1911A1. So why was the suit aimed at the TEC DC9s? Probably because they are “assault weapons,” and a lawsuit that tried to prohibit a widely owned pistol like the M1911A1 would impact a lot more people than aiming at the TEC DC9.

The suit against Navegar claims that “given their particular characteristics, the benefits of making them available to the general public—which were nonexistent—did

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<sup>3</sup> E. Brazil, S. Rosenfeld, & L. Williams, “Gunman's goal: Kill, then tell all on 'Oprah',” *San Francisco Examiner*, July 4, 1993, A1.

<sup>4</sup> *Merrill v. Navegar*, slip opinion S083466 (Cal. 2001), 1.

not outweigh the risk they might inflict serious injury or death when discharged.”<sup>5</sup> This is essentially the “ultrahazardous” argument again—that the risks are so high, and the legitimate uses so rare, that there is no social value to such a product. Therefore, the manufacturer should be held responsible for all injuries.

This suit also claimed that, regardless of whether a gun is “ultrahazardous,” a gun maker should be held responsible for injuries as a matter of product liability. Even though California Civil Code § 1714.4 specifically states, “The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design,” the gun prohibitionists argued that Navegar should still be held liable for injuries. Why? Because the gun wasn’t defective; Navegar’s marketing practices were defective.

After several pages of legal mumbo-jumbo, the California Supreme Court pointed out, politely, that the gun prohibitionists were trying to have it both ways:<sup>6</sup>

1. The prohibitionists insisted that Navegar should be held responsible for designing a defective product, because the TEC DC9 killed people.
2. California Civil Code § 1714.4 says that a gun isn’t defective if it worked as designed, even if that meant that it killed people.
3. So the prohibitionists insisted their suit wasn’t about a defective product at all, but about “negligent marketing.”

That’s the important point, and it’s probably the beginning of the end of these “negligent marketing” lawsuits, whose goal is simply to bankrupt gun makers, and

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<sup>5</sup> *Ibid.*, 1-2.

<sup>6</sup> *Ibid.*, 12-15.

prevent them from selling guns to anyone but the government. There are a couple of other important points that need to be made, however, about this suit.

Quite a bit of nonsense appeared in California newspapers after this decision was released that show that journalists are mostly in the business of rewriting press releases. Unfortunately, they rewrite gun prohibitionist press releases, and don't bother to check the facts first. Some of this nonsense is going to be appearing for years to come, so be prepared to deal with it.

The plaintiffs in this suit against Navegar have made the claim—repeatedly—that Navegar advertised that the DC9 was fingerprint resistant, as part of Navegar's effort to sell guns to criminals. (After all, who else would be concerned about fingerprints on a gun?) As the California Supreme Court decision pointed out, when quoting Navegar's advertising, the finish had “excellent resistance to finger prints, sweat rust, petroleum distillates of all types, gun solvents, gun cleaners, and all powder residues. Salt spray corrosion resistance, expansion and contraction of the metal will not result in peeling of finish.”<sup>7</sup> The “resistance to finger prints” is important because it reduces the chances that oils from your skin (which is what makes a fingerprint) will start corrosion of the finish—not because of the benefits to a criminal.

Another of the bizarre claims that gun prohibitionists make is that Navegar's advertising played some role in causing Ferri to either pick the DC9 for his crime, or encouraged him to commit that crime. But before the California Supreme Court, the

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<sup>7</sup> *Ibid.*, 3.

plaintiffs directly admitted, “Plaintiffs are not alleging that Ferri was induced to purchase the TEC-DC9’s or to commit the 101 massacre by any particular advertisements.”<sup>8</sup>

It’s probably a good idea, if you are in the gun business, to think about how your advertisements are going to look in court if someone gets killed. Even Auto-Ordnance’s “pinstripe gangsters” ads, clearly intended as parody of Auto-Ordnance’s Roaring Twenties history, were used by the gun prohibitionists in *Casillas v. Auto-Ordnance Corp.* (N.D.Cal. 1996) a few years ago. What you see and your customers see as parody or satirical is going to look a lot different to a judge or a jury who are looking at autopsy pictures alongside your “cute” ad.

Finally, the most bizarre claim is that the DC9 is easily converted to full auto fire. The local paper carried a wire service story the day after the decision making this claim, and their editorial the day after that repeated that it was “easily converted to fully automatic fire.”<sup>9</sup> If so, the Clinton Administration—no friend of gun makers—failed to enforce the existing federal laws on this subject.

Contrary to popular myth (and more than a few deceptive ads in some gun magazines), “readily restored” isn't something that you can do with a screwdriver and a couple of parts, even for so-called “assault weapons.” The federal law is very clear: “The term 'machinegun' means any weapon which shoots, is designed to shoot, or *can be readily restored* to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.”<sup>10</sup> [emphasis added]

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<sup>8</sup> *Ibid.*, 25.

<sup>9</sup> “Editorial: Gun residue,” *Santa Rosa Press-Democrat*, August 8, 2001, B5.

<sup>10</sup> 26 USC 5845(b)

This law is enforced. On a number of occasions during the Reagan Administration—but not at all during the Clinton Administration, apparently—the federal government ruled certain guns and gun parts to be “machineguns” (ATF Rul. 81-4, 82-3, 82-8, 83-5), thereby bringing them under the very strict federal machine gun licensing and transfer requirements. The Navegar guns cannot be “readily restored” to shoot full automatic, or they could not have been sold over the counter to the 101 California murderer.

Why do reporters (and editorial writers) keep repeating this myth that semiautomatic guns like the Navegar DC9 can be “easily converted to fully automatic fire”? Because the gun control groups—which know better, or at least should know better—keep repeating it, and journalists that would never take the NRA's word for anything, trust everything that comes out of a gun control group's press release.

We have won another important battle—and on an unfriendly battlefield—but the gun prohibitionists won't stop in their effort to ban all guns. We can't stop our efforts either.

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