

CHAPTER 11

Stubborn Information Problems & the Regulatory Benefits of Gun Litigation

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By all accounts, the gun litigation has been an utter failure. Plaintiffs claim no significant courtroom victories and appear pleasantly surprised when their case survives a motion to dismiss.¹ Even more damning, the litigation has provoked a violent backlash. Gun control opponents, most notably the National Rifle Association (NRA), lobbied for broad new legislative protections with impressive success.² At the same time, those gun executives who were even slightly receptive to a settlement of the municipalities' claims found themselves either out of business or out of a job due to the gun owners' hostile reaction to their concessions of industry responsibility.³ Given this series of events, assessing the success of the gun litigation is not difficult.

The practical failure of the gun litigation does not necessarily mean that the larger project is misguided, however. Particularly since the weight of scholarly opinion seems to be turning against the litigation, this chapter adopts a deliberately sympathetic view, offering a best-case interpretation of the litigation and its results. From this vantage point and in spite of its real-world setbacks, the gun litigation can be defended as necessary to produce new information about product safety in a setting where the gun industry faces numerous, unchecked incentives to keep incriminating information regarding gun distribution and manufacture to themselves. When relevant information is asymmetrically held, both markets and the political process may be less capable than civil litigation of forcing the disclosure of relevant, internally held information. The political process offers affected parties only blunt mechanisms for

accessing private information. By contrast, the courts provide litigants with direct access to industry files and personnel, which serves to enhance industry accountability in a way that might not be possible if industry oversight were left exclusively to the political process and agency enforcers.

This chapter argues that, to the extent that important information regarding gun distribution and manufacture is privately held, the gun litigation may be the best and perhaps the only way to access and publicize privately held information relevant to gun safety. Support for this argument follows in three sections. The first section argues that, contrary to recent criticism, the gun litigation is institutionally justified due to the courts' superior ability to divulge this "stubborn" (privately held) information relevant to social problem solving. In the second section, this more abstract justification for the gun litigation is compared against reality. The section concludes that, despite its theoretical promise, the gun litigation has failed to force the disclosure of much privately held information relevant to safer gun manufacture and distribution, largely for reasons specific to the litigation itself. The final section highlights the modest informational gains that the litigation has made with respect to gun safety and discusses potential additional gains in the future.

A Defense of Regulatory Litigation

Gun litigation is part of a larger family of "regulatory litigation" that seeks to counteract the unchecked powers of industry with respect to public health and safety. Much of this regulatory litigation, which is characterized by mass litigation that seeks a regulatory objective (that is, encouraging safer products through damage awards), has been criticized by prominent commentators. Their criticisms take two forms. First, critics question the fundamental legitimacy of regulatory litigation under prevailing principles of civil and, more specifically, tort law. Second, critics argue that as compared to other institutional alternatives, the courts are an inappropriate mechanism for bringing about social regulation. In this section, the gun litigation is justified by responding to these criticisms of the larger family of regulatory litigation to which it belongs.

The Principles of Tort Law

The first set of arguments against regulatory litigation, and the gun litigation in particular, asserts that the litigation stretches tort law beyond its doctrinal boundaries. More specifically, critics argue that this form of tort litigation “represents an illicit warping of common law principles” and violates the “corrective justice” principles of tort law.⁴

While these breaches sound devastating, in truth they are not, for the simple reason that theorists currently disagree on what the underlying principles of tort law are or even whether coherent principles exist at all, including the amorphous conception of “corrective justice.”⁵ Until some consensus is reached on these core principles, then, it is impossible to say that they have been violated. Moreover, since tort law has been in a dynamic state of expansion since the turn of the twentieth century, it is also difficult to make a case that there is some static doctrinal point beyond which tort law becomes illegitimately overreaching. As Prosser noted in his treatise on the subject, tort law is composed of a disorganized set of “miscellaneous civil wrongs”⁶ that adjust swiftly to changes in times and social needs.⁷ Without a viable standard for evaluating the legitimacy of the incremental expansions and retractions of tort liability, the courts, not legal commentators, serve as the final authority for determining the legitimacy of claims brought under the common law.

The Judicial versus the Political Process

Second, some commentators have argued that the gun litigation is not legitimate or justified because there is a more appropriate institution—the legislature—to address complex regulatory issues like gun control.⁸ These commentators rightly point out that, for a number of reasons including its superior competency and representative capacity, the legislature is better situated, relative to the courts, to resolve complex social problems.

Yet these isolated attributes of the legislative process ignore *ex ante* issues of whether the political process is also capable of extracting the information needed for informed and reasoned debate, especially when the information is stubborn and resists disclosure or production. If polit-

ical institutions are incapable of generating information needed for competent problem solving, then their superior capacities in resolving the problems once the information is produced are beside the point. Analysts must account for stubborn information problems or run the risk that their institutional comparisons will be incomplete.

This section outlines the importance of accounting for stubborn information problems in comparative institutional analysis. The discussion then turns to the superiority of the courts, as compared with the political process, to divulge and publicize this stubborn information.

STUBBORN INFORMATION PROBLEMS

Stubborn information arises when information is privately held and there are no incentives or subsidies to encourage its production or sharing. As a result, the information is closely guarded and deliberately withheld from other participants in the policy-making process. Stubborn information problems arise frequently in public health and safety regulation. Actors who create risks to health and the environment amass specialized private expertise about the ways their activities or products could cause harm, but sharing this information often threatens to lead to increased liability or regulation.⁹ These actors are thus rewarded for concealing the potential adverse effects of their activities on public health and are able to maintain an advantaged position in the information-deficient debate. For example, gun manufacturers understand that investments in research on gun safety may reveal negligent past practices, which in turn could lead to increased liability and regulatory responsibilities as well as unpopularity in the marketplace. Under these circumstances gun manufacturers and dealers might be more willing to perpetuate ignorance rather than contribute to greater public knowledge regarding gun safety. In a related way, manufacturers and dealers might actively lobby against laws that require the production of new information if they believe the information will be incriminating. When these types of stubborn information problems prevail, the remaining participants in the political process are put at a severe disadvantage.¹⁰ If there is little credible information on the benefits of greater regulation of the gun industry, for example, the attentive public may decline to participate, even though they might participate vigorously were they informed.¹¹ By contrast, those who do participate despite the lack of

accurate information may be more likely to take a polarized, value-laden position. As a result, the absence of information on a social problem makes productive political discourse, and in some cases any discourse at all, difficult.

In the case of stubborn information problems, even “public interest” organizations may be unable or unlikely to encourage the generation of new, important information needed to address complex social problems. Sociologists observe that nonprofits are typically unable to motivate the public to participate in social issues when there is no “credible risk” or other documented problem.¹² To the extent that relevant information is expensive to obtain or in the superior control of private parties, interest groups in the political process will be stymied. In addition, since the new, additional information that is produced might not ultimately support the interest group’s mission, crusades to generate more information are risky propositions. Credit claiming, a feature vital to the survival of individual public interest groups, is also difficult for projects that seek only to generate new information because other nonprofits can free-ride and attempt to claim partial credit for the revelation of the new information. Perhaps because of this constellation of obstacles, at least in the area of environmental and health regulation, nonprofit groups rarely dedicate resources to producing new information, even when there are gaping holes in knowledge of adverse effects of industrial activities on health or the environment.¹³

For social problems with especially stubborn information problems, then, the political process may encounter participatory paralysis. It is in these situations that regulatory litigation finds its niche. In contrast to the political process, which provides few mechanisms for individuals to generate needed information or to pry it from secretive private parties, the courts provide a far better institutional setting in which to generate socially useful information. Armed with the threat of contempt sanctions and the authority to conduct broad discovery, litigants availing themselves of the judicial system are able to gain access to private documents and company employees to learn the extent of a defendant’s expert knowledge about the safety of its product, including whether the defendant compromised safety in order to increase sales. Even though it is fraught with compliance problems, the discovery process still provides litigants with far better access to private information than does the political process.¹⁴ Also in contrast to the political process, where nonprofits

can find it difficult to claim exclusive credit for informational discoveries, tangible benefits accrue to litigants who succeed in locating and disclosing new information in the course of litigation. Even though the information that emerges produces a public good, it also provides significant private financial benefits to the litigants if they are successful.

The fact that the judicial process excels relative to the political process at breaking through stubborn information problems is confirmed in practice. Stubborn information problems are the defining feature of the regulatory litigation over asbestos,¹⁵ the Dalkon Shield,¹⁶ DES,¹⁷ lead,¹⁸ ultra-absorbent tampons,¹⁹ Bendectin,²⁰ breast implants,²¹ and tobacco.²² In each of these cases, the defendant manufacturer was insulated from regulatory accountability because it withheld or failed to produce, often under regulatory order, private information regarding the safety of its product. This critical private information was uncovered only after the litigation proceeded through discovery.

The litigation system also has built-in protections to ensure that cases brought to uncover this superior information are socially beneficial and will generally outweigh their costs to the judicial system and society at large. As a simple economic matter, plaintiffs' attorneys invest in cases that promise to divulge privately held information only when they believe that that information exists and will support their damages claims.²³ The legal requirement that plaintiffs state a claim upon which relief can be granted and the various penalties for bringing frivolous litigation, including ethical violations, provide additional checks on the unrestricted use of litigation to address stubborn information problems.²⁴

HYBRID INSTITUTIONS

Comparative institutional critiques of regulatory litigation also suffer from limiting comparisons to single institutions that act in isolation from one another rather than considering how institutions can work together in a complementary fashion. For example, in settings where the political process is likely to falter because of stubborn information problems, the courts may emerge as the single best institution to overcome stubborn information at a preliminary stage, even though they may not be the best or only institution to resolve the larger social conundrum. Once litigants

expose critical information that private parties conceal from the political process, the information can be used in the legislative process (or even the marketplace) to reach a more sophisticated outcome than the courts could manage with their own crude, incremental rulings or settlements.²⁵ The information can also be used to catalyze the political process by alerting the broader public to problems that were previously concealed. This heightened political awareness, in turn, can stimulate legislation and regulation that uses the new, critical information to arrive at a more refined and democratic response.

This hybrid model also reflects practice. Legislatures often, although not always,²⁶ respond to controversial judicial decrees with adjustments, codifications, or even revocations. The Maryland legislature's and the Massachusetts attorney general's reactions to the Maryland Supreme Court's imposition of strict liability on the manufacturer of the "Saturday Night Special" gun provide an apt illustration. The information produced from the litigation fueled the political process. Although the Maryland state legislature overturned the doctrine of strict liability imposed by the court, it created in its place a board of experts to identify and restrict the sale of handguns most vulnerable to criminal misuse.²⁷ The attorney general of Massachusetts similarly developed more vigorous state regulation of guns in response to the Maryland litigation.²⁸

Gun Litigation: There's a Place for It

With a theoretical justification for regulatory litigation in place based on the superior ability of the courts to divulge stubborn information, it is still necessary to determine whether the current constellation of lawsuits comprising the gun litigation conforms to this theoretical niche for regulatory litigation. In this section it is argued that the gun litigation does address stubborn information problems and that, because much of this missing information is privately held, other forces such as interest groups and market pressures are unlikely to dislodge the needed information on their own. In such a system, the role of gun litigation as catalyst seems not only legitimate but necessary to jump-start discourse on an issue blocked by the absence of information that lies in significant part with the gun industry.²⁹

Stubborn Information Problems in Gun Safety

Information on the potential safety gains from alternative, safer gun designs or distribution practices is seriously deficient. Both the Harvard Injury Control Research Center³⁰ and the National Academy of Sciences³¹ have noted the alarmingly deficient information available to evaluate regulatory options for gun control. As a result, both institutions are actively engaged in collecting the available information and identifying short- and long-term research needs. Since this limited information suggests that improvements in gun design and distribution will prevent gun violence, there is reason to believe that still more research will be valuable.³²

Stubborn information problems explain some of the gaps in knowledge regarding the safety of gun design and distribution since a considerable amount of the necessary information either appears to lie with manufacturers and dealers or is most cheaply and comprehensively produced by them. Simply from their position as internal experts on the subject of gun manufacture, gun manufacturers have considerable access to information about how guns can be designed more safely to prevent accidents and are best positioned to use this information in their own technological innovations. Illustrative evidence of ways that manufacturers enjoy superior information over gun safety is provided in table 1, which presents an excerpt from an internal, “highly confidential” memorandum by Colt discovered during the gun litigation.³³

Gun manufacturers’ superior expertise and informational advantages regarding safety improvements to gun design and distribution are corroborated by more general accounts of the gun industry. Tom Diaz’s book, *Making a Killing*, dedicates much of its 250 pages to documenting the superior information and expertise that the gun industry enjoys regarding design and distribution decisions.³⁴ Other literature reinforces Diaz’s general conclusion that a large amount of privately held information regarding safety devices and distribution is held exclusively by gun manufacturers and dealers.³⁵ Still, the extent of the manufacturers’ superior information over gun safety remains illusive because manufacturers often classify safety-related information as trade-secret protected, a protection that exempts the information from public disclosure. Manufacturers also succeed in sealing some of the safety-related information

uncovered in private litigation through the use of gag settlements.³⁶ (Further complicating access to information is the fact that all but one of the gun manufacturers is a privately held corporation.)³⁷ The gun industry's effort to insert a rider into an appropriations bill exempting the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) data on dealer transactions from the Freedom of Information Act (FOIA) provides still more evidence of the industry's eagerness to conceal embarrassing information on unsafe gun distribution practices from the public.³⁸ In fact, some evidence shows that the manufacturers not only conceal privately held information on possible innovations in gun design and distribution, but they might use this information in perverse ways to make guns less safe and more available to criminals to maximize their sales in an otherwise saturated gun market.³⁹

Even when they do not have safety information in their immediate possession, evidence suggests that manufacturers and distributors are best situated to reduce the illegal flow of guns to criminals because of

TABLE 1. Excerpt from Internal, "Highly Confidential" Memorandum for iColt and Colt

Colt management has not wanted to tip its hand in terms of how close Colt is to launching its first 'Smart Gun' product. Colt's official position is that a law enforcement model of the 'smart gun' could be introduced in two to three years and a consumer model could be introduced in two to three years after that. The reasons Colt management has not kept the public informed with its recent exceptional progress, which may result in a quicker time to market, includes the following:

1. One of the complaints lodged against the industry is that the industry is deliberately delaying the introduction of the 'Smart Gun.' As Colt is perfecting the design, management does not want the press, legislators, or plaintiff lawyers influencing the launch decision as Colt is testing and evaluating its first generation models.
 2. Colt has had a limited budget to invest in 'Smart Gun' technology. Virtually the entire industry has publicly stated they are against the concept and believe it to be virtually impossible. One or two companies have the resources to start catching up if it is believed that viable 'Smart Gun' were about to be released.
 3. Colt is working in Washington to help put \$20 million to \$40 million in the federal budget for research on 'smart gun' technology. Depending how the press reports the current state of the 'smart gun,' it could be perceived by Congress that further research dollars are not needed.
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Source: Memorandum from Steven M. Silwa, CEO and president of Colt, to Zilkha Capital Partners et al., June 28, 1999, "iColt Offering Memorandum Draft," 27, <http://www.gunlaw suits.org/pdf/docket/041803.pdf>.

their superior access to this information. With the help of BATFE's data, for example, manufacturers can learn of and disenfranchise corrupt dealerships and develop internal tracking systems to improve dealership compliance.⁴⁰ Manufacturers can even "[t]race information [on guns used in crimes or other suspect circumstances] that identifies a retailer or distributor's name or FFL number[, information that] is not publicly available until the trace request is more than five years old."⁴¹ In a lengthy opinion resolving the NAACP's nuisance suit against manufacturers and distributors in New York City, Judge Weinstein concluded that "the manufacturers and distributors . . . [are peculiarly situated], through the use of handgun traces and other sources of information, [to] substantially reduce the number of firearms leaking into the illegal secondary market and ultimately in to the hands of criminals in New York." The 136-page district court opinion lists a variety of ways that the manufacturers and distributors currently are in a superior position to discourage dealerships from allowing straw purchases and illegal sales.

Despite the meaningful role that gun manufacturers could play in reducing the supply of guns to the criminal market, the political process has largely exempted manufacturers from meaningful regulatory oversight. At the federal level, manufacturers of guns are exempt from virtually all consumer safety regulation.⁴² While federal legislation has effectively banned the manufacture and civilian sale of some semiautomatic weapons and machine guns,⁴³ BATFE has no authority to regulate the design of the large, remaining set of rifles and handguns that are allowed on the market or to order their recall.⁴⁴ Manufacturers also have no legal responsibility to track or oversee the behavior of dealers or to report adverse information on their products.⁴⁵ If defects in a line of guns are discovered, litigation is the only recourse, with after-the-fact liability.⁴⁶

Federal regulation of dealers is only slightly more vigorous. Dealers must obtain a license from BATFE in order to operate, and under the terms of the license, dealers' sales to certain individuals are proscribed and the dealers are required to keep records of all sales.⁴⁷ In order to ensure compliance with these requirements, BATFE has the authority to conduct on-site inspections at dealerships, but inspections governing compliance with record-keeping requirements are limited by law to no more than one unannounced inspection per dealer per year.⁴⁸ The only penalties available to BATFE to deter corrupt dealers are to either pur-

sue a criminal prosecution or revoke a license.⁴⁹ BATFE's greatest regulatory handicap, however, is its lack of enforcement resources.⁵⁰ The agency is able to finance inspections of only a fraction of licensed dealers (roughly 10 percent as of 1993), and in these inspections BATFE routinely discovers a high rate of noncompliance (34 percent), suggesting that the dealers also consider BATFE enforcement to be lax.⁵¹

Yet without a meaningful regulatory presence, deficits in information regarding gun safety are perpetuated. Unlike manufacturers of other potentially dangerous products—including drugs, food additives, pesticides, toxic substances, polluting activities, motor vehicles, and consumer products—gun manufacturers are not required to provide any information regarding their product design or distribution or to report adverse information other than trace-relevant data to regulators or public officials under limited circumstances.⁵² Even for grandfathered products, manufacturers of potentially dangerous products other than guns must disclose information on adverse effects, provide warnings, and respond to regulators' requests for information.⁵³ None of these requirements are imposed on gun manufacturers, despite the fact that firearms are second only to motor vehicles as the major cause of product-related deaths in the United States.⁵⁴ As one commentator noted, even the design of feebly regulated consumer products, such as toy guns and teddy bears, is regulated more vigorously than the design of concealed handguns and rifles.⁵⁵

Of course, forcing the disclosure of industry information on gun safety is not a panacea, and, once produced, this information will obviously not resolve all debates on gun regulation. However, additional credible information about gun design and distribution options is likely to narrow the available, plausible positions of those for and against government-imposed regulation of guns. Indeed, even Kahan, Braman, and Gastil's cultural critique of the gun litigation in chapter 4 of this volume concedes the value of credible information when it is endorsed by trusted experts on both sides of the gun debate. Thus, while it is important to recognize that additional empirical information will not answer all questions, it is a mistake to underestimate the grounding effect that credible information can have on political debate and regulatory progress. This is especially true for regulatory litigation, where experience reveals the dramatic difference that new, credible information can make to health protection.

The Failure of the Dominant Interest Groups Operating in the Political Process to Overcome Stubborn Information Problems regarding Gun Safety

Dominant interest groups on both sides of the gun control issue might attempt to remedy the dearth of information on gun safety, but as discussed earlier, these groups are generally not rewarded for efforts that have as their sole end the production of new information. Even more troubling in some settings, these groups may be inclined to actually exacerbate, rather than reduce, information deficits. Without information, interest group leaders are emboldened to advocate extreme positions that are difficult to question. Advocating extreme positions, moreover, can serve to encourage greater donations and financial support if organization leaders convey a sense of crisis. As a result, the positions of dominant interest groups may become more ideological, value laden, and irreconcilable. One of the primary causes of the cultural conflicts that Kahan, Braman, and Gastil discuss in chapter 4 may in fact be public choice behavior by interest groups on both sides of the debate strategically keeping positions polarized in order to generate a steady flow of revenues from members.

These concerns regarding the counterproductive behavior of interest groups when policy-relevant information is scarce are not merely theoretical but in fact characterize at least some of the current debate about gun regulation. The gun debate has been deadlocked for decades by interest groups who take extreme positions supported by little credible information. With limited information on the risks of the unregulated manufacture and distribution of guns, gun control proponents for their part resort to portraying the “credible risk” as the gun itself. Rather than advocate more moderate gun regulation, some groups advocate a complete gun ban. In the view of these gun control advocates, safer gun design is not even an appropriate gun control objective since it undercuts the dominant goal of banning guns.⁵⁶ As one gun control advocate conceded: “On the one hand, [safer guns] could help reduce fatal accidents, unintentional injuries. . . . On the other hand, if you make the ‘safe handgun’ are you giving the industry a whole new marketing tool? . . . I’m not really sure where I come down on it.”⁵⁷ Even Brady Center lawyers who openly embrace the need for safer guns have been portrayed by the gun industry as too ideological. One gun manufacturer, Glock vice president

Paul Jannuzzo, maintained that the Brady lawyers, as opposed to the attorneys from the Justice Department or the firms, “‘blasted what should have been a straight line to settlement’” between the gun manufacturers and some of the municipalities. Jannuzzo recounts that, after lengthy settlement discussions about the ways manufacturers could design guns to prevent accidental shootings, a Brady lawyer responded, “‘but what about suicides?’”⁵⁸

There is still more damning evidence that organizations opposing gun controls—such as the NRA and other smaller organizations⁵⁹—regularly take positions on gun control that diverge from a majority of their membership.⁶⁰ A survey of 607 gun owners by Harvard researchers Weil and Hemenway revealed that most NRA members supported types of gun control, such as registration and waiting periods, that the NRA leaders actively lobbied against.⁶¹ The authors conclude from the survey that “the leadership positions of the NRA do not represent the views of either the typical NRA member or nonmember gun owners with respect to important gun control policies.”⁶² There is also evidence that some of the NRA’s specific positions—for example, its attack against Smith & Wesson for agreeing to settle the gun litigation—diverged from the preference of the majority of its members.⁶³

The Harvard study leaves unresolved why persons might support organizations that do not represent their views. Weil and Hemenway offer some explanations, such as multiple benefits from membership and the advocacy of even more important policy positions, such as the right to bear arms, that could eclipse specific disagreements with NRA’s positions on narrower issues relating to gun control.⁶⁴ Another possibility based on the survey results, and reinforced by studies of nonprofits in other settings, is that the members are not fully aware of the leadership’s opposition to all forms of gun control.⁶⁵ For example, 90 percent of the NRA members in the study said they “agree[d] with the positions of the NRA,” yet their preferences for gun control diverged to a significant extent from the NRA’s on virtually every gun control issue.⁶⁶ Indeed, the NRA’s greatest losses in member support appear to occur when more sophisticated members become aware of the NRA’s specific lobbying positions. For example, both former president George H. W. Bush and the police associations separated from the NRA because of disagreements with its specific policy positions on gun regulation.⁶⁷ Several

insiders have also exited the NRA after divulging in depositions that the strong, small, and very extreme group in charge of the organization “silences voices for reform within the industry.”⁶⁸ In most circumstances, however, rank-and-file members may not have the time or resources to critically evaluate the NRA’s positions, especially since the information they use to evaluate issues relating to gun regulation comes largely from the NRA and its affiliates, including the gun press.⁶⁹ Distorted or incomplete education of members, especially when that education helps keep members from leaving the organization, may be a recurring problem with nonprofit representation more generally in information-deficient arenas.⁷⁰

Market Failure

At least in the sale of guns, the marketplace is also unlikely to overcome stubborn information problems. There are positive spillovers associated with safer gun design and distribution practices that may not be covered in market transactions. Gun purchasers, for example, might discount or even disregard the need to purchase guns with safety devices that guard against accidental shootings, especially if a gun is more expensive with a safety device than without.⁷¹ In any case, even if some consumers prefer safer guns with respect to either design or distribution, manufacturers might not provide these options for other reasons, for example, the fear of tipping off regulators or political constituents who might attempt to codify technological advances into industrywide regulatory requirements.⁷² In fact, market forces could actually reward manufacturers with more sales when they increase the power and concealability of their weapons and sell to corrupt dealers,⁷³ leading to what Diaz calls the spiral of lethality.⁷⁴

Evaluating the Litigation: Missed Opportunities for Overcoming Stubborn Information Problems

As discussed in the previous two sections, the most compelling justification for regulatory litigation is its potential to overcome the information asymmetries that handicap the political process. Yet

despite its theoretical appeal, as a practical matter the gun litigation has failed to divulge important, privately held information. Instead, it has provoked a powerful backlash. These disappointments are detailed in this section

Little New Information Has Been Discovered

Since judges have determined that many of the municipalities' claims fall outside the outer bounds of permissible tort law, much of the gun litigation has been dismissed before discovery can commence. Without the divulgence of industry information on gun safety, however, the litigation is able to make little headway in informing the options for gun control. But even the limited information that has been produced through discovery has not been transformative. Gun manufacturers' files are generally not filled with smoking gun memoranda and meeting notes that reveal a strategic effort to saturate the criminal gun market to increase profits. The evidence, at its most embarrassing, paints only a picture of corporate inattention to the harms that might flow from careless design and distribution practices.⁷⁵ Although this evidence is certainly unflattering, it does not begin to approach the secret industry memos uncovered in the tobacco litigation that revealed, for example, the industry's manipulation of the addictive properties of cigarettes.⁷⁶

The litigation has also failed to create incentives for significant additional research on the relationship between the design and distribution of firearms and their contribution to gun injuries and deaths. Because of the quick dismissal of most cases, no new studies have been commissioned by plaintiffs or the gun industry, as has sometimes been the case in other mass litigation.⁷⁷

Nevertheless, there has been some modest informational progress as a result of the litigation. Gun litigation, for example, does confirm that the industry enjoys a great deal of private information and expertise that it is not sharing or using in ways that optimize health and safety. For example, in deposition testimony and expert surveys of the gun industry, it has become clear that the manufacturers can equip their guns with integral locks at low costs, from two to ten dollars per gun.⁷⁸ The manufacturers' and dealers' settlement agreements (both the Smith & Wesson failed settlement⁷⁹ and the California settlement discussed later) and the

NAACP litigation also provide evidence that gun manufacturers can play an important role in safer gun design and distribution practices.

Because Stubborn Information Is Not Produced, the Political Process Has Generally Been Catalyzed in the Wrong Direction

Regulatory litigation that loses in the courts and fails to produce a significant body of information on the risks of unregulated guns is not likely to generate popular support. Without salient smoking gun evidence, the hoped-for David and Goliath image of beleaguered, crime-laden cities and victims taking on the greedy gun manufacturers that profit from crime is transformed into the opposite image. Plaintiffs' attorneys, sitting on obscenely large winnings from the tobacco litigation and portrayed as having an almost insatiable appetite for high-stakes litigation, look much more akin to Goliath than David. The quick bankruptcy of several of the smallest gun companies following the litigation,⁸⁰ coupled with a realization that even the biggest manufacturers are relatively small in relation to other tort defendants like tobacco,⁸¹ complete the flipped image. At the same time that the litigation is failing to produce significant informational gains, the NRA is churning out negative publicity and inflaming its grass roots chapters against the litigation.⁸² With the skilled organizational efforts of the NRA, a tidal wave of state legislation barring the municipal litigation was passed in thirty-two states and considered in all but four, and Congress is also debating immunity legislation at the federal level.⁸³ Public perceptions of the litigation have become so negative that the NRA was even successful in its efforts to urge gun consumers to boycott the one manufacturer, Smith & Wesson, willing to entertain settlement discussions.⁸⁴

It remains to be seen whether a different chronology of events could lead to a different outcome. Experience reveals that when regulatory litigation does produce privately held industry information that documents important public harms in the face of regulatory failure—as it has in the asbestos, DES, lead, Dalkon Shield, and tobacco cases—the litigation is reluctantly acknowledged as legitimate, in spite of the fact that its approach to solving these problems is costly. By contrast, when regulatory litigation fails to produce information on the connection between the product and social harms, as in the breast implant and Bendectin litigation, the litigation is widely regarded as abusive and unjustified.⁸⁵

The Final Chapter of the Gun Litigation:
Unexpected Advances in Gun Safety

From the standpoint of its proponents, the gun litigation is lacking the traditional markers for success. Yet scratching below this surface reveals several more subtle accomplishments of the litigation. Most important and in spite of its failure in the courts, the litigation may be causing internal changes in the industry with respect to safer design and distribution practices. Second, the litigation might be taking a more democratically responsive step toward gun control than has been accomplished in the political process. Third and finally, recent developments remind us that regulatory litigation is dynamic, making it wise to suspend a final evaluation of the gun litigation until it is finally over.

Encouraging Industry Accountability

Despite the strong backlash and rash of immunity laws, there is surprisingly positive evidence that, as a result of the litigation, the gun manufacturers have focused more attention on safer designs and the dealers have voluntarily instituted efforts to make distribution less susceptible to criminal trafficking.⁸⁶ For example, after the litigation was filed, Colt discontinued its most dangerous and inexpensive models.⁸⁷ The Brady Center reports that other manufacturers, “including Beretta, Heckler & Koch, Kimber, Remington, Sako, Smith & Wesson, Springfield Armory, and Steyr, . . . beg[a]n for the first time to sell guns with internal locks,” with other manufacturers now advertising this feature in future guns.⁸⁸ According to the *Arizona Republic*, in 2000 the annual SHOT Show featured safety as the overriding theme in “display after display” for the first time in its history.⁸⁹ The National Association of Firearms Retailers now posts on its web site the BATFE’s training video for ways that retailers can prevent straw purchasers.⁹⁰ Even product liability insurance has become costlier for the manufacturers of more dangerous guns in the wake of the gun litigation.⁹¹ Although there is still no way to assess the significance of these changes, industry behavior has moved, on its own, in the direction that the gun control litigants had hoped.

Although it seems counterintuitive that manufacturers and dealers

might change their behavior in response to the failed litigation, this increased attention to safety may simply be a rational reaction to economic realities. Prior to the litigation, manufacturers faced no probability of sanctions for careless distribution or design practices. After the litigation was filed, the manufacturers faced a probability of at least a lawsuit and the small probability of substantial sanctions. At least in rational choice terms, the change in accountability could lead manufacturers to make some investments in safety if they believed they could limit or stave off further lawsuits by doing so.⁹² There may be other reinforcing reasons for this changed behavior, including the possibility that the industry itself was unaware of the gap between its practices and the public interest or that outside investors and insurers began to pressure the industry for changes given the risk of successful litigation. Most explanations, though, are tied to the fact that, even if the litigation failed to produce useful new information to the public or the political process, it caused the industry to engage in internal self-evaluation. Others have observed similar voluntary industry changes as a result of regulatory disclosure requirements, which can bring about improvements in industry practice through greater internal and external accountability.⁹³

No matter how rational this industry behavior might seem in hindsight, the gun industry's response to the failed litigation is certainly a surprise ending to conventional thinking about deterrence. The gun litigation teaches us that the courts may have the power to bring about a swift and productive change in industry practice simply by virtue of having their jurisdiction invoked. If this industry reaction is not an anomaly (and economic modeling suggests the reaction is in fact rational), then as an institutional matter, some of the greatest gains in deterrence might be accomplished through the clear and present threat of litigation rather than judicial rulings or legislative deliberations.

Democratic Representatives: Interest Groups versus Litigants

One of the sharpest criticisms of the municipal gun litigation is that it involves "less public input and accountability than government regulation."⁹⁴ These critics argue that, by institutional design, neither the attorneys nor the judges are able to solicit or are likely to be much affected by public input. Yet, as a quirky empirical matter, it appears that

the mission of the gun litigation—to increase regulatory oversight over gun manufacturers and dealers—is actually more in keeping with majority preferences concerning gun regulation than any of the current legislation and regulation. One set of surveys, published in the *New England Journal of Medicine* and set forth in table 2, found that a majority of the public, including a solid majority of gun owners, favor greater regulation of guns.⁹⁵ Gun owners who do not join the NRA are even more amenable to gun control than the majority of NRA members, with up to 20 percent increases in support on various issues.⁹⁶ Other studies corroborate this finding.⁹⁷

Of course, the gun litigation's closer match to public preferences than existing legislation may simply be a convenient coincidence. But it also could suggest that the political process may diverge dramatically from public preferences on issues for which there is little information and, as a result, may enable nonprofit organizations to proceed with more extreme positions and become deadlocked in the information-deficient debates. In such cases, one might expect to see regulatory litigation come closer to majority preferences than existing regulation simply because the claims must be supported by some information and the merits of the claims undergo the scrutiny of the courts.

TABLE 2. Support Among Respondents for the Regulation of Guns as Consumer Products

Policy Option	Percentage Who Favored or Strongly Favored the Policy	
	All Respondents (<i>N</i> = 1,200)	Respondents Who Owned Guns (<i>N</i> = 338)
Governmental regulation of gun design	68	64
Same standards for domestic guns as for foreign guns	94	93
Childproofing of all new handguns	88	80
Personalization of all new handguns	71	59
Magazine safety for all new pistols	82	75
Loaded-chamber indicator for all new handguns	73	60

Note: All results shown are from the 1997–98 survey.

Regulatory Litigation Never Dies, It Just Fades Away

Just as the gun litigation docket is drying up, it may—in its last dying gasps—be finally producing the kind of embarrassing information and resulting political activity that justifies its existence. In the California municipal gun litigation, unlike much of the other gun litigation nationwide, the manufacturers' cases were dismissed, but the court declined to dismiss the dealers from suit. Plaintiffs were thus given the opportunity to conduct discovery. Although incriminating information came from several sources during discovery, the most devastating was the deposition testimony of longtime NRA and gun executive Robert Riker in February 2003, who testified, among other things, that “‘until faced with a serious threat of civil liability for past conduct, leaders in the [gun] industry have consistently resisted taking constructive voluntary action to prevent firearms from ending up in the illegal gun market and have sought to silence others within the industry who have advocated reform.’”⁹⁸

In textbook fashion, this incriminating evidence began to change the character of the litigation. In late August 2003, the dealers entered into a settlement to end the litigation and agreed to undertake a number of actions to prevent criminal trade in guns.⁹⁹ Presumably because this settlement worked to silence future whistle-blowers from having their testimonials recorded as deposition testimony, the NRA and other gun industries have, for the most part, refrained from denouncing the settlement.¹⁰⁰ The information also appeared to catalyze some modest legislative activity. Several weeks after the settlement was announced, the California legislature passed a law—this one addressed to manufacturers—requiring guns sold in California to be equipped with indicators that show whether there is a round of ammunition in the chamber or requiring that guns be impossible to fire if the ammunition magazine is not inserted in the gun.¹⁰¹

This turn of events, especially when compared with other regulatory litigation, serves as an important reminder of the dynamic nature of emergent information and its importance to the ultimate fate of regulatory litigation. Recall that other regulatory litigation that began with strong success, like breast implant and Bendectin litigation, ultimately failed as new information emerged showing that the harms were less than suspected.¹⁰² By contrast, regulatory litigation such as the tobacco,

lead, and asbestos suits that suffered losses in the early years, sometimes for decades, ultimately emerged as victorious as information surfaced to validate the claims. Thus, especially given this new turn of events, it is premature to reach any final conclusions about the merits of the gun litigation.

It should also be noted that, although the California developments are the first sign that the gun litigation has served to catalyze political action in favor of gun regulation, other examples of gun litigation leading to legislative action predate the municipal suits. Successful litigation against the Saturday Night Special in 1988 spurred legislative and regulatory oversight of gun manufacturers in Massachusetts and Maryland.¹⁰³ While it is certainly premature to extrapolate too broadly from the recent California experience, there is at least the possibility that California's activities could be the first of an ongoing series of sympathetic state legislative actions that, over time, could reach a "tipping point" that results in a torrent of new regulatory laws across the United States.

Conclusion

The gun litigation has produced a number of surprises. Just when it appeared that the immunity legislation advocated by the NRA provided the last, irrefutable evidence of the litigation's failure, damaging evidence produced in discovery may begin to slowly inform and catalyze political discourse on gun regulation. Given the history of other regulatory litigation, if privately held information begins to paint gun manufacturers and dealers as responsible for unnecessary social harms, the California settlement and legislation may not be the last chapter in the gun litigation but instead the first chapter in new and more vigorous legislative and perhaps voluntary efforts to make gun design and distribution safer. Much will depend on how the new and emerging information is portrayed and publicized in the months that follow.¹⁰⁴ If regulatory legislation or related developments do follow, however, the gun litigation's catalytic role will be difficult to ignore.