

## CHAPTER 5

*Private Lawyers, Public Lawsuits:  
Plaintiffs' Attorneys in  
Municipal Gun Litigation*

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One of the most telling details about modern mass tort litigation is this: the leading group of lawyers representing municipalities in their gun lawsuits was not a law firm but rather an ad hoc coalition of plaintiffs' lawyers who forged an alliance a decade ago for the sole purpose of suing the tobacco industry.

The group that represented New Orleans in the first municipal gun lawsuit, and subsequently filed suits on behalf of Atlanta, Cleveland, Cincinnati, Newark, and Wilmington, goes by the name Castano Safe Gun Litigation Group. "Castano" is not the name of one of the group's lawyers, nor is it the name of a handgun victim. Peter Castano was a smoker who died of lung cancer in 1993 at the age of forty-seven. His friend Wendell Gauthier, a prominent mass tort lawyer, vowed to pursue the cigarette makers with a force never before seen on the plaintiffs' side. Gauthier gathered over sixty of the nation's top plaintiffs' firms into a coalition to pursue a nationwide class action on behalf of Peter Castano's widow and some sixty million other nicotine-addicted persons or their families. The Castano Group, as the coalition came to be known, amassed a huge war chest and a wealth of legal talent and nearly succeeded in its efforts to obtain a nationwide class action or to negotiate a nationwide settlement. In 1996, a federal court of appeals decertified the nationwide class action, and the Castano Group turned its efforts to statewide tobacco class actions in a number of state courts. As the tobacco work faded, Gauthier became interested in pursuing another industry—guns. He persuaded about half of the coalition to join him in

the new venture. Thus began the Castano Safe Gun Litigation Group, operating out of the same office space the group had established in downtown New Orleans as the headquarters for its tobacco operations. The fact that an ad hoc alliance of plaintiffs' lawyers formed for a particular class action should have continuing vitality for a subsequent mass tort speaks volumes about the business of mass tort practice and the role of plaintiffs' lawyers in generating and sustaining new mass tort litigation.

It ought to seem odd, perhaps, to focus on the role of private plaintiffs' lawyers in the gun litigation. The gun suits are, after all, public policy litigation at heart; the key plaintiffs in the recent wave of litigation were not individuals or class representatives but government entities seeking regulatory reform through injunctive relief and the threat of damages. When municipalities file suits casting blame on the firearms industry for the scourge of handgun violence on city streets, one reasonably might think that it is a story about the government's use of lawsuits for achieving policy goals, a story of social change litigation pursued by political actors. One would not necessarily think that it is a story of entrepreneurial initiatives by contingent fee trial lawyers. But the course of mass tort litigation in the past decade leaves no doubt about the importance of considering the role of private plaintiffs' lawyers and monetary incentives.

Without contingent fee plaintiffs' lawyers, the recent wave of gun litigation might not have materialized. It was private lawyers who drove the discussions that led to the filing of the first public entity lawsuit in New Orleans. It was, in part, private lawyers who encouraged other municipalities to join the fray. And it was private lawyers who poured their own resources into the litigation, laying millions of dollars on the line in a risky investment. Examining the role of plaintiffs' lawyers in the gun suits not only offers a richer story than simply one of political actors pursuing policy aims but also highlights the investment mentality that increasingly brings public policy debates to the courtroom.

We must be careful, however, not to exaggerate the centrality of trial lawyers' involvement in the gun litigation or to assume too neat a distinction between the strategic positions of contingent fee lawyers and political actors. Too many have mistakenly assumed that the gun litigation can be explained almost entirely as a sequel to the tobacco litigation, where mass tort lawyers played an indispensable role and where some of them earned fees of unprecedented proportions. While the gun litigation

resonates with echoes of the tobacco litigation, each mass tort ultimately must be understood on its own terms.

A look at the role of plaintiffs' lawyers in the gun litigation suggests a more complex story than the now familiar refrain that trial lawyers, driven by greed, have co-opted legislative and regulatory power in order to soak money from one industry after another. The gun litigation is a story of mixed motives—moral, political, and financial—by diverse actors on the plaintiffs' side. Like tobacco, it involved several sets of players whose interests converged in the pursuit of an injurious industry. Like tobacco, it involved public entities that turned to elite mass tort plaintiffs' lawyers to supply the resources and litigation experience to pursue difficult tort litigation. And like tobacco, it involved mass tort lawyers who, frustrated in their attempts to use class actions to magnify the claims against their target, turned to government lawsuits as an alternative means to aggregate the litigation. But the gun litigation presented a unique set of alliances and rifts, in which gun control advocates faced fundamental disagreements among themselves concerning trial strategy, mayors with different political ambitions pursued different litigation paths, and the private mass tort lawyers found themselves embraced by some municipal plaintiffs and eschewed by others.

### Activists, Politicians, and Trial Lawyers

The cast of characters in any public policy mass tort litigation includes three loosely defined groups of players on the plaintiffs' side: the activists, the politicians, and the trial lawyers. It is not difficult to place most of the leading players into one or another of the three categories, based in part on the extent to which their work is driven by policy, politics, or money. In the firearms litigation, the activists included Dennis Henigan of the Brady Center's Legal Action Project, Joshua Horwitz of the Educational Fund to Stop Gun Violence, and Professor David Kairys of Temple Law School. The politicians included Mayors Edward Rendell of Philadelphia, Marc Morial of New Orleans, and Richard Daley of Chicago, as well as New York State Attorney General Eliot Spitzer and Secretary of Housing and Urban Development Andrew Cuomo. The trial lawyers included Wendell Gauthier, Daniel Abel,

John Coale, Stanley Chesley, and Elizabeth Cabraser, all of whom participated actively in the tobacco litigation and other mass torts prior to their involvement in the gun cases.

While the activists, politicians, and trial lawyers approached the litigation with somewhat different sets of motivations and a different agenda, their motives overlapped in important ways. Indeed, one of the best ways to understand what makes public policy mass tort litigation viable is to examine the extent to which the interests of the three groups converge. At the same time, each mass tort displays different coalitions and divisions, which often cut across the more obvious groupings. In the handgun cases, different motivations and incentives drove participants on the plaintiffs' side to adopt different legal theories and settlement postures.

It was not until 1998 that the elite mass tort plaintiffs' bar turned its attention to guns and that courtrooms became a focal point for the gun control debate. Prior to that, individual plaintiffs had sued the firearms industry without success, although the *Hamilton v. Accu-Tek* case,<sup>1</sup> filed in 1995 in federal court in Brooklyn, drew widespread attention and had some initial success. Interestingly, the lawyer for the *Hamilton* plaintiffs had mass tort experience in the DES and breast implant litigation.<sup>2</sup> But it was the municipal lawsuits that drew the interest of the heavy hitters of the mass tort plaintiffs' bar and that brought the handgun litigation to national prominence. The municipal gun litigation can teach us about the role of private lawyers in public lawsuits and about the ways in which plaintiffs' lawyers of different stripes see their interests converge and diverge in public policy mass tort litigation. This chapter will look at the story of the key plaintiffs' lawyers in the public gun suits, particularly in the critical early stages of the litigation, and will then turn to an analysis of several aspects of that story.

### Public Nuisance Advocates: The Philadelphia and Chicago Stories

The story of municipal gun litigation begins in earnest in 1996, when David Kairys advanced his strategy for suing the handgun industry on a public nuisance theory. Kairys, a law professor and civil rights lawyer, became immersed in the problem of handgun violence as a member of a Philadelphia task force on youth violence. Interested in reducing the

availability of cheap handguns on Philadelphia streets, Kairys turned his attention to litigation options and focused on a strategy of municipal lawsuits against manufacturers, based on the legal theory that irresponsible marketing of handguns constituted a public nuisance.<sup>3</sup>

In late 1996, Kairys urged Philadelphia mayor Edward Rendell to consider pursuing a public nuisance suit against firearms makers. Rendell hired Kairys, at an hourly rate of \$150, to draft a complaint. To learn more about suing the firearms industry, Kairys reached out to others who had been active in gun control work. He contacted Stephen Teret and Jon Vernick at the Johns Hopkins Center for Gun Policy and Research; Joshua Horwitz, a lawyer and gun control advocate who later represented the NAACP in its lawsuit against the gun industry; and attorney Elisa Barnes, who represented the plaintiffs in the *Hamilton* case. Kairys made contact with the Brady Center's Legal Action Project but avoided involving that organization as cocounsel in the lawsuit due to the mayor's concern that the gun control group's involvement would exacerbate the political tensions surrounding any lawsuit against the firearms industry.<sup>4</sup>

By the summer of 1997, Kairys was prepared to file the complaint, but the plans fell apart. Ten days before the lawsuit was to be filed, news of the lawsuit leaked to the press. Under public scrutiny and political pressure, Rendell balked at filing the complaint, and over the ensuing months Kairys came to realize that Rendell was unlikely to go forward with the nuisance claim against the gun manufacturers.<sup>5</sup> Some have speculated that Rendell, with gubernatorial aspirations, could not afford to alienate the large number of Pennsylvanians with pro-gun sentiments outside of Philadelphia.<sup>6</sup>

Frustrated with the mayor's failure to pursue the gun lawsuit, Kairys withdrew from representing Philadelphia in January 1998 and pursued the idea elsewhere. He sent copies of a paper he had written to over one hundred municipal lawyers across the country, offering his plan for lawsuits against the gun makers.<sup>7</sup> Mayor Rendell, rather than filing the suit, pursued talks with the gun industry about reforming industry practices. Rendell spoke at the U.S. Conference of Mayors in June 1998, praising efforts to bring the gun manufacturers to the negotiating table.<sup>8</sup> Kairys had failed in his initial attempt to generate a Philadelphia lawsuit, but his public nuisance strategy would take hold elsewhere.

In Chicago, the public nuisance strategy developed along a different

path. Chicago had some of the most restrictive gun control ordinances in the country and a staunch gun control advocate in Mayor Richard Daley, but the city suffered from severe gang violence as guns continued to flood into the city.<sup>9</sup> In 1997, Mayor Daley asked the city's deputy corporation counsel, Lawrence Rosenthal, whether he could fashion a legal theory to hold the gun industry liable.<sup>10</sup> Rosenthal initially considered the problem in terms of product liability law and expected to respond to the mayor that product defect claims were unlikely to succeed.<sup>11</sup> But to learn more, Rosenthal met with officers from the Chicago Police Department gun unit. From the gun unit officers, and by looking at trace data on guns that had been used in crimes, he learned that Chicago gang members obtained their guns from a relatively small number of dealers outside the city limits.<sup>12</sup> Based on this information, he began thinking less about product liability and more about public nuisance.<sup>13</sup> As Rosenthal pursued the public nuisance idea, David Kairys learned that Rosenthal was making inquiries about the theory and contacted him. Rosenthal and Kairys began working together to turn the theory into a litigation reality.<sup>14</sup>

A former federal prosecutor, Rosenthal approached the problem with a law enforcement mentality. In August 1998, Chicago launched an elaborate three-month police undercover operation to gather evidence for the planned public nuisance suit. "Operation Gunsmoke" revealed that firearms dealers in Chicago's suburbs knowingly supplied guns to purchasers for criminal uses and for illegal possession in Chicago.<sup>15</sup> Information from the undercover operation would become a centerpiece of the city's complaint.<sup>16</sup> By November 1998, Daley and Rosenthal would be ready to go forward with Chicago's lawsuit, and the city lawyers enlisted the help of two Chicago law firms that agreed to work on the case pro bono.<sup>17</sup>

### Product Liability Lawyers: The New Orleans Story

While the Philadelphia public interest lawyer-professor and the Chicago city lawyers pursued their ideas for reforming the gun industry through public nuisance litigation, a very different group of players began planning their own strategy for litigating against the gun industry. Wendell

Gauthier, the architect of the nationwide tobacco class action, was looking for a new target.

To understand Gauthier's entry into the gun litigation, we first must turn to his role in suing the tobacco companies and particularly his leadership of the Castano Group. By the time Peter Castano died of lung cancer, Gauthier already had developed a reputation as a highly successful trial lawyer with a style that combined expensive suits and down-home mannerisms, a mischievous sense of humor, and, above all, an ability to sign up clients wherever disaster struck. He had represented large numbers of plaintiffs in litigation arising out of the Continental Grain explosion, the MGM Grand Hotel fire, the Union Carbide chemical leak in Bhopal, the San Juan DuPont Plaza Hotel fire, the 1982 Pan Am air crash, and silicone gel breast implants.<sup>18</sup> With the wealth that he had accumulated from mass tort fees, Gauthier's small firm in Metairie, Louisiana, just outside New Orleans, had the resources to litigate at a top level, and Gauthier had earned a place among the nation's elite plaintiffs' lawyers.

But there was no plaintiffs' firm in the country with sufficient resources to litigate against the tobacco industry on a level playing field. For forty years, from 1954 to 1994, hundreds of plaintiffs had filed lawsuits against tobacco companies, with zero victories or settlements.<sup>19</sup> The tobacco defendants' strategy during this period involved, among other things, encouraging plaintiffs to drop their claims by making litigation intolerably expensive, and the strategy often succeeded.

Gauthier sought to level the field by creating an all-star team of plaintiffs' lawyers and amassing a sufficient war chest to allow the group to pursue the litigation without significant budgetary restraint. Each firm contributed at least one hundred thousand dollars toward litigation expenses. The group grew to include over sixty firms and many of the biggest names in the plaintiffs' bar: Peter Angelos, Melvin Belli, Elizabeth Cabraser, Stanley Chesley, John Coale, Russ Herman, Ron Motley, Dianne Nast, John O'Quinn, and many others.<sup>20</sup> The group filed a class action in federal court in Louisiana against the cigarette manufacturers on behalf of Peter Castano's widow and a class of some sixty million others. The group won certification of the *Castano v. American Tobacco Co.* nationwide class action in the district court, only to watch it get decertified by the federal court of appeals during a wave of appellate

rejections of mass tort class actions.<sup>21</sup> The Castano Group proceeded to file statewide tobacco class actions around the country, which have not, on the whole, encountered much success.<sup>22</sup> The group played a peripheral role in the multibillion-dollar settlements between the tobacco companies and the state attorneys general in 1997 and 1998, although a number of the individual lawyers who had participated in the Castano effort went on to represent the states in their lawsuits. For the most part, the Castano leadership had wagered that the breakthrough tobacco litigation would be a class action and watched from the sidelines as the state recoupment lawsuits brought the cigarette makers to the bargaining table and brought massive fees to the states' contingent fee lawyers.

By the spring of 1998, as the Castano tobacco prospects diminished, Gauthier set his sights on guns. To Gauthier, tobacco and handguns both were dangerous products, causing widespread harm that imposed costs not only on individuals but also on society as a whole and manufactured by industries that were politically difficult to regulate. He saw handguns as unreasonably dangerous and the gun industry's conduct as negligent. Suing corporations for harm caused by dangerous products and negligent conduct was precisely what he knew how to do best.

Gauthier recognized that gun litigation would require a strong coalition of plaintiffs' attorneys. Rather than create a group from scratch, he and his partner, Daniel Abel, sought to draw the Castano Group's attention to guns. In May 1998, Gauthier pitched the idea to Stanley Chesley, a veteran mass torts lawyer and Castano Group member. According to Abel, Gauthier overcame Chesley's initial skepticism with the argument that gun lawsuits "fit the Castano philosophy of the plaintiffs' bar as a de facto fourth branch of government, achieving by litigation what had failed legislatively."<sup>23</sup> Gauthier also early on persuaded core Castano member John Coale, whom Gauthier had first met competing for clients in Bhopal, to join the effort.<sup>24</sup> Ultimately, thirty-seven firms—about half of the Castano Group lawyers—agreed to participate in the gun litigation. The participating firms in the Castano Safe Gun Litigation Group each contributed fifty thousand dollars in lawyer time and cash, with only twenty-five hundred dollars up front.<sup>25</sup> This represented a significantly smaller investment than the money and time each firm put into the Castano tobacco effort.

The Castano lawyers knew mass tort litigation as well as anyone, but they needed someone on board who knew gun litigation. For that exper-

tise, they turned to Dennis Henigan of the Legal Action Project, the litigation branch of the Brady Center to Prevent Handgun Violence.<sup>26</sup> Henigan had left a partnership at the law firm of Foley & Lardner in 1989 to pursue public interest litigation through the Legal Action Project,<sup>27</sup> which offers pro bono representation to victims in suits against the gun industry. As a lawyer who had been pursuing lawsuits against gun manufacturers for years, Henigan arguably knew more about gun litigation and the gun industry than anyone else on the plaintiffs' side. Municipal lawsuits offered an opportunity for Henigan to put his knowledge of gun litigation to work with perhaps a greater chance of success than individual suits, which had proved difficult to win. Unlike those involved in the Philadelphia case, which avoided overt involvement by Henigan due to political concerns over the appearance of a gun control group in the case, the Castano Group welcomed Henigan's assistance.

Gauthier's gun litigation team took shape without a client. Soon, however, his hometown would give him the opportunity to fire the first shot in the municipal gun litigation. The October 1998 murder of New Orleans gospel legend Raymond Myles—shot with his own handgun—set the political stage for action against handgun makers. Mayor Marc Morial, who had known Myles since childhood, felt that the death could have been prevented by “smart gun” technology that would allow guns to be fired only by their owners. As a state senator, Morial unsuccessfully had sought to introduce anti-gun legislation. Now, as mayor, he considered litigation as an alternative means to achieve the same end. Morial was aware that a number of other municipalities were contemplating lawsuits against the gun industry; he saw this as an appealing option in a state where gun control legislation would be impossible to pass. Ten days after the Myles murder, Morial met with Gauthier to discuss the possibility of a lawsuit.<sup>28</sup> New Orleans retained the Castano Group to represent the city on a contingent fee basis: the attorneys would get 20 percent of the recovery if the case settled and 30 percent if it went to trial verdict. When asked later why he turned to top private plaintiffs' lawyers to handle the city's lawsuit, Mayor Morial responded, “You want lawyers who can take on giants.”<sup>29</sup>

On October 31, 1998, Gauthier filed suit on behalf of the City of New Orleans against fifteen gun manufacturers. Abel and Henigan drafted the New Orleans complaint in terms of product liability, alleging that the manufacturers had failed to incorporate sufficient safety devices in their

weapons, thereby making them unreasonably dangerous.<sup>30</sup> Gauthier signed the complaint with perhaps the oddest signature line in the annals of mass tort litigation: Wendell H. Gauthier, “Personally and for All Participating Castano Tobacco Attorneys.”

Less than two weeks after the New Orleans complaint, Chicago filed its own lawsuit against the gun industry.<sup>31</sup> The two suits’ temporal proximity makes it tempting to view them as a coordinated one-two punch by the plaintiffs. But, in fact, the contrast between the New Orleans and Chicago suits—in terms of the lawyering on the plaintiffs’ side—could hardly be sharper. New Orleans turned to nationally prominent mass tort lawyers working on a contingent fee basis. Those lawyers conceived the lawsuit in familiar mass tort terms—as a claim about a defective product based on inadequate safety features. Chicago, by contrast, eschewed the private plaintiffs’ bar. Deputy corporation counsel Lawrence Rosenthal emphasized that Chicago avoided using contingent fee lawyers to ensure that the lawsuit would be driven by public policy issues.<sup>32</sup> Instead, Chicago relied on its own city lawyers, aided by the investigatory work of the police department and with input from Professor Kairys. After it had developed its theory of the case and was ready to go forward, Chicago brought in two law firms on a pro bono basis. In contrast to the product liability theory pursued by the mass tort lawyers in New Orleans, Chicago’s city lawyers favored a public nuisance theory. Whereas the New Orleans complaint looks like a mass tort case, the Chicago complaint resonates with the language of law enforcement.

After New Orleans and Chicago, other municipalities joined the fray. In January 1999, Bridgeport and Miami filed suit. Bridgeport, represented by a Connecticut law firm with assistance from the Legal Action Project, asserted both product defect and public nuisance claims, as well as a deceptive advertising claim.<sup>33</sup> Miami, also assisted by the Legal Action Project, focused on product defect claims, like the New Orleans complaint.<sup>34</sup> In the succeeding months, the Castano lawyers filed suits for Atlanta, Cleveland, Cincinnati, Newark, and Wilmington.<sup>35</sup> The benefits of the nationwide alliance were evident as the Castano Group sought to interest various cities in their services. In Cleveland, local Castano member John Climaco called the mayor to discuss the possibility of a firearms suit.<sup>36</sup> Prominent Cincinnati mass tort lawyer Stanley Chesley, also of the Castano Group, persuaded his city’s Justice Committee to go forward with the lawsuit.<sup>37</sup>

As the municipal suits multiplied, more mass tort plaintiffs' lawyers jumped in. When San Francisco and Los Angeles filed their lawsuits in May 1999, they were represented by the nation's two leading class action law firms, Milberg, Weiss, Bershad, Hayes & Lerach and Lief, Cabraser, Heimann & Bernstein. Elizabeth Cabraser, of the latter firm, had been an executive committee member of the Castano Group for the tobacco nationwide class action and had argued that group's motion for class certification. Subsequent tobacco work by Cabraser and her firm had created a rift between her and the other Castano members, however. When Cabraser's firm entered the gun litigation on behalf of thirteen California municipalities and counties, it did so independently rather than with the Castano Safe Gun Litigation Group. The Lief Cabraser firm also served as co-counsel in gun suits brought by Boston and Camden, and when Philadelphia finally filed its lawsuit in April 2000—after Edward Rendell had left the mayor's office—Lief Cabraser was on the complaint along with Philadelphia plaintiffs' firm Kohn, Swift & Graf. The firm of Cohen, Milstein, Hausfeld & Toll, which specializes in plaintiff class actions, served as co-counsel in the Camden, Los Angeles, and Philadelphia cases.

Within two years after Wendell Gauthier broached the gun idea with his Castano colleagues, many of the nation's leading mass tort plaintiffs' lawyers had entered the municipal gun litigation. Because of the gun litigation's strong public policy element, those private contingent fee lawyers found themselves working alongside other lawyers whose orientation was not that of trial lawyers but rather of activists or politicians. In most of the cases, Dennis Henigan and his public interest law colleagues at the Legal Action Project served as co-counsel with the private lawyers. Professor David Kairys worked on a number of the suits as well.

On the political side, the mayors and their city lawyers naturally were central figures in the municipal lawsuits, especially in Chicago, where the city handled its own litigation, did not retain contingent fee lawyers, and brought in pro bono counsel only after the city had already prepared its suit. But the gun litigation involved political figures beyond the municipalities. New York became the first state to sue the gun industry when state attorney general Eliot Spitzer saw the litigation as an opportunity to impose a code of conduct on the industry.<sup>38</sup> At the federal level, President Clinton and Secretary of Housing and Urban Development Andrew Cuomo considered a possible federal lawsuit against the gun

industry;<sup>39</sup> Cuomo was instrumental in a March 2000 settlement with Smith & Wesson.<sup>40</sup>

While a number of the lawsuits were dismissed by judges, the more interesting fact for our examination of the role of plaintiffs' lawyers is that two of the lawsuits were voluntarily dismissed by the plaintiffs. Boston dropped its suit in March 2002, and Cincinnati abandoned its suit in May 2003. In Boston, the court had rejected defendants' motion to dismiss, but its other legal rulings had rendered the plaintiffs' case difficult to prove. The city, represented by the Lief Cabraser firm and other private mass tort lawyers, dropped the suit as litigation costs mounted and the chance of recovery became slimmer.<sup>41</sup> Cincinnati's voluntary dismissal was surprising, coming less than a year after the Ohio Supreme Court's ruling in the plaintiffs' favor, a ruling that the Legal Action Project had acclaimed as the "greatest victory yet against the gun industry." Stanley Chesley, the city's Castano Group lawyer, recommended that the city drop the case, telling the city council that success was unlikely. Chesley's firm reportedly had spent \$425,551 in billable hours and \$136,296 in expenses; he waived his right to collect the \$100,000 that the city council had set aside for expenses.<sup>42</sup> The Legal Action Project, Chesley's co-counsel in the case, expressed disappointment about the decision to drop the case.<sup>43</sup>

The picture that emerges from the story of the municipal gun litigation is one in which activists, politicians, and trial lawyers all played essential roles and in which the tensions between and within these groups played out differently in different cities, as the municipalities decided whether to file lawsuits, which claims to assert, and whether to persist in the face of mounting expenses and long odds. The story sheds light on public lawsuits as aggregation mechanisms and as investment opportunities. It also sheds light on the different mind-sets of trial lawyers, activists, and politicians with regard to public policy mass tort litigation. But perhaps more significant, it demonstrates the importance of understanding each mass tort on its own terms.

### Public Litigation as an Aggregation Mechanism

What makes public policy mass torts an appealing opportunity for private plaintiffs' lawyers? The private lawyers involved in the gun litigation—like those involved in the state tobacco lawsuits and lead paint

lawsuits—were largely either personal injury trial lawyers or class action specialists who handled securities and antitrust class actions as well as mass torts. These were not, by most people’s definition, public interest lawyers. They were drawn, however, to suits by public entities seeking to hold industries accountable for widespread harm.

For successful mass tort plaintiffs’ lawyers, the business model generally relies upon representing large numbers of injured persons with similar claims. In litigation involving widespread harm, defendants view the litigation in terms of the risk of massive liability and invest in their defense accordingly. To present a viable challenge to such high-stakes defense, plaintiffs’ lawyers must invest heavily in discovery, experts, trial preparation, and other resource-intensive litigation work. Individual client representation ordinarily cannot justify the resources required to litigate such cases. By aggregating the claims of many injured plaintiffs, firms take advantage of economies of scale to reduce the per-plaintiff cost of pursuing claims. By presenting stakes on the plaintiffs’ side in line with those seen by the defendants, aggregation encourages plaintiffs’ firms to invest in the litigation.

The standard approach to aggregating claims is through procedural joinder mechanisms, most notably class actions. Even without a class action or other formal judicial aggregation, mass tort claims increasingly are informally aggregated by mass collective representation—the representation of many similarly situated individual plaintiffs by a firm. By representing large numbers of plaintiffs, either through class action or mass collective representation, a law firm can achieve scale economies, higher stakes, and enhanced bargaining leverage.

Lawyers pursuing gun litigation, however, found themselves unable to use either class actions or mass collective representation. Those who sought class certification in gun cases failed on the grounds that common questions do not predominate over individual issues in the claims of various gun victims or on the grounds that a class action would not be a superior method for resolving the dispute.<sup>44</sup> The gun litigation did not lend itself to mass collective representation, either. Unlike plaintiffs in pharmaceutical product liability cases and certain other mass torts, victims of handgun violence and accidents are not so numerous as to enable any law firm to sign up hundreds or thousands of individual clients, nor are they so similar as to permit an assembly-line litigation process for a large inventory of claims.

Plaintiffs’ lawyers who find themselves unable to aggregate litigation

by obtaining class certification, or by representing a mass of individual clients, devise other means to the same ends. Government entity clients present a perfect opportunity for plaintiffs' lawyers to achieve the effect of aggregation without the need for class action or any other judicial joinder and without the need for signing up numerous clients.

When a government entity sues an injurious industry to recoup money spent by the government to address a problem of widespread harm, the lawsuit has the effect of combining damages related to a large number of injured persons. This creates the economies of scale and increased stakes that plaintiffs' lawyers need in order to invest sufficient resources in the litigation. The state lawsuits against the tobacco industry created extremely high stakes because the states sought to recover for medical and other costs paid for millions of smokers. Likewise, the municipal firearms lawsuits sought to recover for municipal expenditures involving masses of gun victims.

In this sense, lawsuits by government entities function as a kind of representative litigation. The class action device permits the most explicit form of representative litigation, in which class representatives sue on behalf of themselves and on behalf of a class of all others similarly situated. In government lawsuits, the government in essence sues as a representative of its citizens. While the nature of the litigative representation differs significantly in the two types of cases, both magnify the stakes sufficiently to attract top plaintiffs' lawyers and to permit them to invest heavily in the litigation.

Government lawsuits hold an additional appeal for plaintiffs' lawyers. Not only do public entity lawsuits accomplish an indirect form of aggregation, but they also help plaintiffs' lawyers circumvent defenses that have proved successful against individual plaintiffs in both tobacco and gun cases. In tobacco cases, juries often blame the smoker and have proved unwilling in most cases to reward smokers for self-imposed harm. The strength of the state lawsuits came, in part, from the fact that the plaintiffs were not the smokers themselves. It is much more difficult to blame the state for the lung cancer of many of its citizens. In gun lawsuits brought by individual victims, the defense may blame victims and gun owners for carelessness in cases involving accidental shootings, and in cases involving intentional shootings, a key defense is that the gun maker should not be liable for another's criminal wrongdoing. As David Kairys realized early on, "when you focus attention on particular shoot-

ings, there's always that person pulling the trigger who is more immediately to blame for the bloodshed.”<sup>45</sup> As a matter of causation, plaintiffs in individual gun cases have difficulty proving that different industry conduct would have prevented a particular victim's shooting. Municipal gun lawsuits, by treating the harm on an aggregate level in terms of the cost to the municipality, remove attention from any individual shooting and thus diminish the power of defense arguments that focus on blameworthy victims, owners, or shooters. Thus, the public entity plaintiff in tobacco litigation is less vulnerable to the defendants' "blame the smoker" argument for contributory negligence, comparative fault, or assumption of risk, while the public entity plaintiff in gun litigation is less vulnerable to the defendants' "blame the shooter" argument for superseding cause or for challenging actual causation. In sum, for the plaintiffs' lawyers, pursuing aggregate damages through government lawsuits not only provides a more viable business model than individual lawsuits for cases of widespread harm but also reduces substantive vulnerabilities.

### Public Litigation as an Investment Opportunity

The previous discussion concerning the appeal of public lawsuits to private lawyers presumes a certain mind-set on the part of the plaintiffs' lawyers, in which the lawyers evaluate litigation opportunities in terms of their cost and the likely return on investment. The idea of entrepreneurial lawyering, well established in the academic literature, is one often embraced by those who support the use of money damages lawsuits to accomplish policy objectives, citing the role of plaintiffs' lawyers as "private attorneys general." In the context of the gun litigation, however, the idea of fee-driven lawyers often appears as part of a critique of the lawyers and the lawsuits.

Walter Olson, in his book *The Rule of Lawyers*, complains that "[t]he plaintiffs' bar searches out deep-pocketed institutions to sue for all varieties of human misery and woe" and that the onslaught of municipal gun litigation was simply another step in what he views as the dangerous trend of regulating through litigation. He disapprovingly notes that "it was the outside trial lawyers and not the city mayors who had provided the impetus for the suits by pitching the idea at presentations to city

officials behind closed doors.”<sup>46</sup> In Olson’s view, contingent fee trial lawyers drove the litigation and operated as simple profit maximizers: “From the trial lawyers’ point of view . . . it was at best a waste of effort to campaign against rinky-dink dealers and near-assetless individual buyers when much deeper pockets could be found among gun manufacturers.”<sup>47</sup> Similarly, Michael Krauss writes of the “unholy alliance between government and the plaintiff’s bar” and asserts that both the state tobacco suits and the municipal gun suits “were concocted by a handful of private attorneys who entered into contingency fee contracts with public officials.”<sup>48</sup> Olson and Krauss overstate the centrality of contingent fee lawyers in the municipal gun litigation and exaggerate the extent to which the litigation was driven solely by money. But the importance of entrepreneurial incentives in the gun litigation, as in other mass torts, cannot be gainsaid.

Whether one views entrepreneurial lawyering as a social good or as a betrayal of professional ideals, one can point to aspects of the municipal gun litigation that tend to show the importance of entrepreneurial incentives. A number of the lawsuits, including the first filed, were handled by private lawyers with contingent fee arrangements. Most of the private lawyers were experienced mass tort plaintiffs’ lawyers who were able to put significant resources into the litigation because of fees they had amassed from prior mass torts, especially asbestos and tobacco. It is entirely appropriate, as a general matter, to understand the litigation expenditures of mass tort plaintiffs’ firms as reinvestment of earnings. Law firms in the mass tort arena see new and emerging litigation in part as investment opportunities and choose where to invest based on the perceived strength of the investment. Involvement in an emerging mass tort offers a law firm an opportunity, in effect, to diversify the firm’s investment portfolio. For the Castano lawyers, whose tobacco class actions had largely fizzled, the gun litigation presented a chance to invest in something that might be more promising.

To say that the trial attorneys view public policy mass tort litigation as an investment opportunity is not to say that contingent fee lawyers are indispensable to such litigation. Chicago’s lawsuit went forward without contingent fee lawyers. Deputy Corporation Counsel Lawrence Rosenthal handled the case with other city lawyers and with the help of Chicago law enforcement officials. Although the Chicago complaint was filed shortly after the Castano Group’s New Orleans suit, it would be

unfair to describe the Chicago lawsuit as a follow-up to New Orleans or in any way dependent upon the earlier suit. The Chicago lawsuit developed along a separate track, including an undercover investigation that began several months before the New Orleans suit was filed.

In addition to work by city lawyers, the municipal plaintiffs in the gun litigation found substantial assistance available free of charge. Chicago's experience demonstrates the willingness of private law firms to provide pro bono work on cases with a strong public policy element. Dennis Henigan and the Legal Action Project, as part of the donor-supported Brady Center, worked as co-counsel or advisors in most of the cases, offering their legal services free of charge. The Legal Action Project's involvement, moreover, was not the only example of donor-supported gun litigation. In 1998, the Center on Crime, Communities & Culture, endowed by financier George Soros, donated three hundred thousand dollars to assist the plaintiffs in *Hamilton v. Accu-Tek*.<sup>49</sup>

Even if we focus solely on the Castano Group and other contingent fee lawyers, it is difficult to explain the gun litigation purely in entrepreneurial terms, and it would be an exaggeration to say that the lawyers were motivated solely by money. After seeing the unprecedented fees lawyers received from the state tobacco settlements, plaintiffs' lawyers may well have hoped to find another pot of gold. The plaintiffs' bar quickly realized, however, that there was no pot of gold to be found in the gun litigation. It is not simply that the claims were long shots. As of 1994, tobacco claims appeared equally unlikely to succeed. Speculative investments can be appealing if the potential return is high enough, which was the draw for the tobacco lawsuits. But the gun manufacturers lacked the deep pockets of the tobacco companies. The earnings of the gun industry, while over one billion dollars per year, was a tiny percent of the earnings of the tobacco companies.<sup>50</sup> Moreover, even before filing the New Orleans lawsuit, Wendell Gauthier had determined that the gun makers did not carry liability insurance.<sup>51</sup> In terms of sheer investment appeal, the gun suits paled in comparison to tobacco and a host of other mass torts.

If it is hard to justify the gun lawsuits purely as a rational investment in the anticipated recovery, then what explains the involvement of so many leading mass tort lawyers? One possibility is that they simply made a bad investment, but many of the difficulties with the gun lawsuits were clear from the start. A stronger possibility is that the investment in

gun litigation can be explained as long as the potential investment return is understood in broader terms than the fees generated by gun settlements or verdicts. If a gun case puts a lawyer's name in the newspaper, then the investment offers a payoff in reputational value and long-term client development, even if the case generates zero fees. The more prominent the public policy mass tort, the easier it is to explain its attractiveness to private lawyers even if the litigation looks relatively weak as an investment.

Investment, of course, need not be the only explanation for lawyer involvement in particular litigation. Indeed, the tone of the gun litigation suggests that some of the trial lawyers were committed to the litigation because they believed in the cause. While a certain amount of speechifying may be dismissed as mere rhetoric, there are hints that commitment to the anti-gun cause ran deeper. Gauthier continued to devote himself to both the gun litigation and the tobacco litigation even as he fought the cancer that claimed his life in late 2001. "I was already in the fight against tobacco and was in the early planning stages for the gun litigation," Gauthier explained in an interview reported in a book coauthored by one of his partners. "I was leading these two legal armadas, which is one reason I kept my bout with cancer a guarded secret. Few outside of my family and close associates knew. Radiation and chemotherapy would have attracted attention to the disease and would, therefore, have hindered the two big causes that meant the most to me. In any case, the odds were on my side."<sup>52</sup> The same book goes on to state that "Gauthier never counted on making a dime from the gun suits. In fact, the courtroom battle promised to cost the Castano Litigation Group millions of dollars in expenses. . . . The New Orleans attorney viewed the fight for gun control as the crowning achievement of his career; he knew he was in pursuit of something far more important than money."<sup>53</sup> This account of Gauthier's motives may be no more credible than the opposing accounts that describe the private lawyers in gun litigation as interested solely in money; the truth likely lies somewhere in between. Finally, no doubt part of the attractiveness of the gun litigation for trial lawyers was the sheer sport of it. A seemingly invulnerable industry makes an appealing conquest. As reported by Matt Labash, in his revealing account of the Castano gun lawyers, "[t]hose who know Gauthier best say litigation for him is not just about the settlements—or even the beloved children—it's about the contest."<sup>54</sup>

An appraisal of plaintiffs' lawyers' motives in public policy mass tort litigation must account for these other motives—reputation, genuine policy concerns, and the thrill of conquest—in addition to financial incentives. Self-promotion blends with self-identity as lawyers vie for the right to say, “I was there for that battle.” Even so, an investment mind-set explains much of the conduct of the private lawyers in the municipal gun litigation. It explains their willingness to invest in the gun litigation but at a significantly lower level than in the tobacco litigation, given the lower expected return. It arguably explains their focus on a product liability theory, which lends itself to money damages. And it explains the willingness of contingent fee lawyers to drop the Boston and Cincinnati suits as their expenses escalated, despite favorable judicial rulings in both of those cities' cases.

#### Public Lawsuits, Private Lawyers, and Multiple Mind-sets

The story of the municipal gun litigation shows that the motivations of the three major groups of players on the plaintiffs' side—activists, politicians, and trial lawyers—are more complex than simply policy, politics, or money. As a starting point, it is reasonable to assume that financial considerations drive contingent fee lawyers more strongly than they drive the activists and politicians. The very notion of private attorneys general relies on the salience of entrepreneurial incentives for plaintiffs' lawyers. The conduct of private lawyers in the gun litigation bears out that contingent fee lawyers' decisions are driven, in part, by an investment mentality. Investment-based litigation decisions do not always correspond to the decisions that government officials would make as a matter of policy or politics. Indeed, this difference in mind-set forms the basis for some of the legitimate concerns that have been raised concerning the use of contingent fee agreements by public entity clients.

The difference between trial lawyers and others in pursuing public policy mass torts extends to the theories they tend to emphasize and the way they approach litigation. Private lawyers naturally bring a mass tort/product liability orientation, whereas public lawyers are more likely to bring a law enforcement orientation. The Castano Group's complaints in New Orleans and other cities relied largely on traditional product liability theories and focused upon handguns as defective prod-

ucts based on missing safety features. Other than damages, the approach mirrored what might have been asserted in an individual tort lawsuit or in a class action brought by handgun victims. Chicago's complaint, by contrast, relied on a public nuisance theory and focused largely on the handgun industry's methods of distribution. Moreover, whereas the Castano Group relied on usual mass tort discovery methods to gather evidence, Chicago's city lawyers gathered much of their evidence through a three-month police undercover investigation prior to filing the complaint. Many of the most interesting tensions in the gun litigation, however, occur not between the private lawyers and public lawyers but within groups.

Among politicians, the gun litigation played out very differently at the city and state levels. Big city mayors, on the whole, found the gun lawsuits appealing. Marc Morial of New Orleans and Richard Daley of Chicago, the first two mayors to file suits against the firearms industry, both were long-standing proponents of gun control. They and their constituents bore much of the cost of handgun violence and saw litigation as a way to address the problem. At the state level, gun owners and the NRA held greater sway. The citizens of rural Louisiana, Illinois, and Pennsylvania possessed very different attitudes about gun control than did the citizens of New Orleans, Chicago, and Philadelphia. A number of the cities, after filing their lawsuits, found themselves facing new state legislation immunizing gun makers from liability. Georgia's legislature enacted a protective statute only five days after Atlanta filed its complaint. And Philadelphia, where Professor Kairys first proposed his public nuisance idea, did not even file its lawsuit until the mayor's office was no longer occupied by a gubernatorial aspirant. In New York, by contrast, Attorney General Eliot Spitzer took an active role in the gun litigation, both as *amicus curiae* in private litigation and as the driving force behind the state's own lawsuit against the gun industry.

Among activists and law enforcers, despite sharing a common agenda on gun control, important differences emerged as to how to approach the municipal gun litigation. David Kairys and Lawrence Rosenthal both preferred a public nuisance theory that focused on distribution methods that allowed illegal guns to flood into cities, while Dennis Henigan enthusiastically embraced the Castano Group and its product defect approach. The difference is no minor tactical disagreement; it goes to the heart of the litigation. Later complaints tended to include both theories,

but the decisions on how to frame the early lawsuits reveal much about the mind-sets of the decision makers. For Kairys and Rosenthal, the core problem was inner-city violence, especially handgun shootings involving drugs or gangs. The absence of trigger locks or smart gun technology had little bearing on these problems. Thus, they turned to a theory that addressed the very presence of guns in the city.

Henigan, however, was concerned not only about intentional shootings by owners but also about accidental shootings and unauthorized users. The Legal Action Project therefore threw its weight behind lawsuits that emphasized the absence of gun safety features, as well as lawsuits that also incorporated public nuisance theories. While both inner-city violence and accidental or unauthorized shootings present serious problems worthy of attention by public interest lawyers in a gun control nonprofit organization, it is plausible that, for the Brady Center's donor base, gang and drug shootings are not the most immediate concern. To many supporters of the gun control organization, the most pressing fears may concern the harm that could occur if children find an unlocked gun in a neighbor's house or if a Columbine copycat takes his father's gun to school. For constituents with these concerns, litigation that presses for trigger locks to prevent accidental shootings and for smart gun technology to prevent unauthorized use by nonowners surely resonates. For the law professor David Kairys or for the Chicago city lawyers, with no suburban donor base to satisfy, the public nuisance theory made more sense.

One can see why the product defect approach came naturally to the Castano Group and other trial lawyers, given their experience and success litigating such claims in other mass torts. One can see, as well, why it held some appeal for the Legal Action Project, given the likely concerns of some of its constituents. But what about Mayor Morial of New Orleans, who filed the first municipal gun lawsuit, which relied on the product defect theory? One might have expected the mayor to view the matter much as did Mayor Daley in Chicago. It may have been an odd factual twist that sealed the use of the product defect theory in New Orleans. Gospel singer Raymond Myles, whose murder was the catalyst for that city's gun lawsuit, was killed with his own Lorcin pistol. The murder, according to the plaintiffs, could have been prevented had the gun included the safety features they urged. Thus, Wendell Gauthier, Dennis Henigan, and Marc Morial—coming from the very different perspectives

of trial lawyer, activist, and politician—saw their interests converge around the prospect of a municipal gun lawsuit for product liability.

The story of private plaintiffs' lawyers in the public gun litigation appears at first glance to suggest several themes concerning public policy mass torts. One theme might be the convergence of activists, politicians, and trial lawyers and the different mind-sets they bring to litigation. Another theme might be the use of public entity lawsuits as an aggregation mechanism by mass tort lawyers unable to obtain class certification. Yet another theme concerns entrepreneurial incentives and the investment mind-set of mass tort lawyers. Closer examination of the gun litigation, however, reveals that several of these possible themes are too simplistic to be applied usefully across a spectrum of mass torts. True, contingent fee lawyers drive most mass tort litigation and public policy mass torts bring together three major categories of players on the plaintiffs' side, but in the gun litigation, the noteworthy fault lines appeared within these groups as often as they appeared between them. The split between politicians at the city and state level and the split between public nuisance advocates and product liability lawyers proved more significant than the differences between activists, politicians, and trial lawyers.

Investment-minded contingent fee lawyers drive much mass tort litigation, but the gun litigation is harder than most to explain in purely entrepreneurial terms, given the difficulty of the claims and the relative lack of deep-pocketed defendants. Moreover, the heightened political and moral context of the gun litigation affects the motivations of some of the trial lawyers, even as it renders those private lawyers somewhat less essential to the cause by attracting activists, politicians, and their donors and supporters.

These fault lines, particular to firearms litigation, highlight the importance of understanding each mass tort on its own terms, even as we appreciate the broader themes and patterns. The choice of emphasizing public nuisance or product defect in a public entity recoupment lawsuit may come up in other cases, but it played out in the firearms litigation in a way that was particular to guns. Those primarily concerned about gang and drug shootings focused on gun distribution channels and thus emphasized a public nuisance theory, whereas those who cared most about accidental shootings and unauthorized users focused on trigger locks and smart guns and thus emphasized a product liability theory.

Similarly, political fault lines appear in other mass torts, but differently. In the tobacco litigation, the most salient political differences do not pit cities against states but rather involve tobacco-growing states, where the industry has the most clout, and states such as California, which has a lower tolerance for smoking. On the lobbying front, the tobacco industry has long held substantial power, unlike the gun manufacturers. But whereas cigarette smokers lack organization and do not constitute a particularly powerful interest group, gun users—represented by the NRA—possess undeniable power and wield it unabashedly.

The link between the tobacco and firearms litigation, so palpably embodied in the Castano tobacco group's renewed life as a gun litigation group, suggests that public policy mass torts display certain common features and develop along similar lines. It also suggests that private contingent fee lawyers play an important if controversial role. Scratching the surface of the gun litigation, however, we see not merely contingent fee lawyers but multiple groups of players whose interests converge and diverge in ways that are particular to the gun litigation.