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Denise Dunleavy

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Transcript from *Beyond Tobacco* Symposium, Comments on *Hamilton v. Accu-Tek*

Denise Dunleavy

I remember taking writing courses in high school, and the teachers always told you, only write about what you know from your own experience. The same theory must also work for litigators: I'm a former smoker; I still drink; and I actually have shot a gun on more than one occasion.

The Brooklyn case is one that was started by a solo practitioner who is not here, Elisa Barnes. I want to give credit to this fabulous attorney who started the case of *Hamilton v. Accu-Tek* some years ago. She was troubled by the constant headlines in the New York press following tragedies where children were shooting children with guns that were illegally acquired. She was so saddened by the harm to children in New York that she thought something should, and perhaps could, be done. So, on behalf of a number of families injured by handgun violence, she brought suit against as many handgun manufacturers as she could identify, as well as some of their distributors. Years later, when the case was submitted to the jury under a market-share theory of liability against the manufacturers, the presiding Judge, the Honorable Hack B. Weinstein dismissed the case against the distributors, as only 25 percent of the distributors had been sued. For a legal analysis of the theory of the case, you should read Judge Weinstein's decision denying the defense motion for summary judgment.¹ This decision is really where the theory of the negligent marketing was born in this type of litigation (although certainly it is not the first time this theory has been used).

In a case against blasting cap distributors, *Hall v. E.I. de Nemours and Company*,² Judge Weinstein had earlier applied the same liability theory where manufacturers of this product with such potential for harm were held responsible as an industry for their general failure to use due care. However, Judge Weinstein declined to charge an enterprise theory of liability, and chose instead to permit plaintiffs to proceed on a market-share theory of liability, a theory previously approved for the DES litigation in New York, by the Court of Appeals. In the DES

1. 935 F.Supp. 1307 (E.D.N.Y. 1996).

2. 345 F.Supp. 353 (E.D.N.Y. 1996).

litigation, New York adopted a theory of market-share liability as appropriate against the drug industry. DES was a drug that was given to pregnant women that unfortunately led to catastrophic injuries in a truly innocent set of victims—the children of the women who had taken the drugs. It was both the generic nature of the defective product, its fungibility or interchangeability, and the fact that product identification was often impossible, due to the two decade latency before the DES administration and the time when the dangerous injuries were discovered, that were the criteria the New York Court of Appeals decided would be the basis for invocation of a market-share liability across the DES industry. Market-share liability permits recovery absent specific proof of product identification or proof of manufacturer identification where such identification is unknown and unknowable.

The same sort of situation exists in the handgun litigation. Here you have a product that is inherently dangerous. It is designed to inflict harm. Whether it's harm to property for target shooting, harm to the life of an animal from hunting, or to humans for self-protection or police protection, the handgun is designed to inflict harm. It is an intrinsically lethal product, not because of any product defect, but just because the product is working as it was intended.

Handgun litigation is analogous in many ways to DES litigation: the plaintiffs are either innocent bystanders, victims of crime, or perhaps survivors of an accidental discharge by a friend. The seven plaintiffs in *Hamilton* were all of these. What they had in common, besides the severity of their injuries caused by a very dangerous product, was the fact that none of the victims knew the identity of the company who had manufactured the gun the injured or killed them. Unless the handgun is recovered following a shooting, the only identification a victim can make with certainty is the caliber of the handgun.

The handgun industry manufactures many types of specific handguns for many types of specific purposes—there's a handgun for every reason, every season. For hunting bears there's one type, for self-protection, another. For skeet or Olympic target shooting, there are also different types of guns. In addition, there are different types of calibers. There are also different makes and models for every imaginable sport or activity. The *Hamilton* plaintiffs' position, however, was when a criminal chooses a handgun to conduct criminal conduct such as subduing a victim, stealing money, or hijacking a car, a criminal does not choose a handgun as a normal consumer would choose a handgun. For the criminal, a gun is a gun. For the criminal, a handgun is no more than a delivery system. Although not a fungible product when used for lawful purposes, a crime gun is indeed fungible. Because of the inability of most shooting victims to identify the type of gun or the manufacturer of the gun that was used to inflict harm, Judge Weinstein ruled that the market-share liability would, in fact, be appropriate to allocate liability among any defendant found negligent. However, Judge Weinstein required that the plaintiffs show a particular defendant had made and sold the generic class of guns—guns of the same caliber.

In *Hamilton*, the evidence of negligent marketing and negligent distribution

was evidence that the plaintiffs obtained from the federal government, through the Bureau of Alcohol, Tobacco, and Firearms (BATF). For the past two decades, the BATF has maintained a database where every gun that is recovered in a crime can be, and now is, traced back to its last lawful sale at retail. One can tell by analyzing the database where the guns that are being used in crime in any one particular state, such as New York, originated.

In New York, despite the fact that our legislators have decided to have strict handgun rules enforced in our city, the statistical evidence from the BATF trace database revealed that of the total number of handguns used in crimes in New York, ninety percent came from out of state. Ninety percent of New York crime guns had first been sold in other states. These guns found their way quickly to New York before being used in crime. The BATF database showed that the “time to crime,” that is, the time from the last lawful sale to use in crime, is a mere two to three years.

Of the ninety percent of guns that were purchased out of state and brought to New York State for use in the underground market, half of them came from five states, all with weak handgun laws: Florida, Georgia, North Carolina, Virginia, and Ohio. The evidence revealed a substantial interstate smuggling of handguns from the states where the laws on sale are relatively weak to New York. This statistical proof of trafficking patterns provided the framework in *Hamilton* for plaintiffs to prove their negligent marketing, “oversupply theory” against the handgun industry. The manufacturers certainly know they can’t sell guns in states with strict laws. They are prohibited from doing that at retail. Those states have a very low sales potential. Yet, the states with the weak laws have a very strong sales potential. The industry has more distributors, many more retail outlets, and many, many more sales in those weak-law states than even their own data would suggest exists to supply the legitimate demand for handguns.

The premise of liability in the *Hamilton* case was the fact that handguns are over sold in weak-law states and quickly trafficked underground to other states. In an article appearing in *The Journal of the American Medical Association*, Douglas S. Weil and Rebecca C. Know explain:

Interstate gun trafficking occurs, in part, because of the disparity in state laws governing gun sales. As a result, the illegal market price of firearms in localities with restrictive gun laws is significantly greater than the retail price for the same types of guns purchased in states in which laws are less stringent. The ability to buy many guns at a retail price to be sold elsewhere at a higher illegal market price suggests that the purchase of multiple firearms in a single transaction is an important

aspect of the profit motive that supports the illegal gun market.³

The above study found that change in Virginia law, (once a weak-law state) limiting handgun purchases to one a month, was an effective means of disrupting the illegal interstate transfer of firearms.

Another important aspect in handgun litigation is that handguns are reputed to have an extremely long life-expectancy; with a minimum of care, it is anticipated in the industry that handguns will last 50-100 years or more. Handguns as such are not consumable. Lawful purchasers and owners of handguns do not have a need to replace their handguns each year. The NRA and the handgun industry advise that owners of firearms tend to own more than one, and in fact, own generally five or six firearms, whether they be long-arms or handguns. Even though the lawful market for handguns increases each year with the addition of new adults into the handgun market, the question still arises as to how the legitimate lawful market for firearms can account for the United States production average of 1.5 million new handguns per year. Additionally, over 2 million long-arms, rifles and shotguns are manufactured in the United States on average per year.

However, there is a constant market for new weapons, the underground market. Criminals are consumers who treat handguns as consumable or disposable-s, preferring to use a new handgun for the commission of crimes.

Weapon trace records maintained by the BATF confirm that the relatively new weapons are more frequently used in the commission of crimes than are older handguns. This short interval of time between a purchase and commission of a crime (time to crime), is an indication of the strong connection between the primary legal retail market and the illegal market.

In *Hamilton*, the plaintiffs contended that the handgun industry consciously sold to the underground market. The legitimate market of hunters, sportsmen and self-protection advocates can not absorb new handguns at the rate of production—over 1.5 million new handguns each year.

On the question of whether the manufacturers knowingly oversupply more guns to weak-law states, we relied on Smith and Wesson's survey figures. Smith and Wesson sell its product with a warranty registration card; they expect legitimate purchasers to return their warranty cards. The criminal market probably doesn't send back a warranty card, but the legitimate market does and the industry relies on warranty data for marketing analysis. We also analyzed the data from the General Social Survey (GSS) which is used universally across this country as a gauge of many different markets, including handguns. The numbers were almost identical. Based on the GSS survey, we found that Florida's legitimate demand—the market for legitimate consumers for hunting, sports, self-protection—was 6.5 percent of the United States total sales. Then we looked to see how many guns

3. Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 JAMA 1759-61 (1996).

were actually sold in Florida as a percentage of the United States' market and found almost a doubling—13.3 percent of the handguns sold in the United States are sold in Florida, even though the “legitimate market” is 6.5 percent. Now that is clearly an oversupply.

We found the same to be true on a national level. There are over 2.5 million handguns sold at retail each year in the United States. According to the Smith and Wesson market survey data, the legitimate market for those handguns on a national basis in the United States is approximately 1.4 million, indicating that an oversupply of 1.1 million handguns go into the market each and every year. And who is it that purchases those guns on the oversupply? It is the underground market. If the lawful market is supplied by the 1.4 million handguns, then 1.1 million handguns a year are getting into the underground market.

Criminologist, Dr. Jeffrey Fagan discussed how handgun violence is a virus, a contagious disease. His studies in New York have shown that when handguns are used by youths in one neighborhood in one year, in the next year, in the next neighboring community, there will be handgun violence. It is the knowledge by youths in the city that other people have guns, and the feeling that they need to be armed because everybody else in the neighborhood is armed, which fuels the underground market. Although in the past five years, the national statistics for handgun violence have decreased, the handgun injuries to our youth have not diminished or decreased in the same proportion. Our children have handguns. They have extremely easy access to handguns in the underground market. And it's children, very often, killing children. Of the seven consolidated cases in the *Hamilton* case, each and every shooter, except one, was a youth. The only adult shooter was a prior felon. Not one of the shooters in the *Hamilton* case could have lawfully possessed a handgun in New York State. Yet the testimony from the shooters confirmed how easy it was to get a handgun, even in New York, a strong-law state.

Once oversupplied, handguns wind up in the underground market quickly. We found that there were certain types of handguns that were used more frequently in crime than others. The 9mm is very popular, with .380s right after that. We found a Smith and Wesson document that acknowledged that by the 1990s the handgun market for the 9mm gun was glutted. Yet, the 9mm production increased exponentially in the 1990s. Certainly, the police departments across the country were also arming the police departments with 9mm handguns, but it's no small coincidence, I think, that it's the handgun of choice for criminals.

In addition to the oversupplied premise, we proved negligent marketing and distribution. The system of distribution and the channels of distribution in the industry are such that the manufacturers set up a system whether by design or fortuity, to insulate themselves from any contact with the guns being sold at the retail level. Manufacturers sell only to distributors. The distributors, in turn, sell

to retailers whether the retailers have stores or licenses to sell without a store. Since June of 1994, the Brady Act has decreased some of the problems, but our cases involved shootings between 1992 and 1994, so we didn't experience the impact from the Brady law on the distribution practices in our cases. Currently, a retailer must have a retail store in order to sell except for gun shows, which are exempt from the provision. Before 1994, anybody with a federal firearms license or an FFL could sell at retail with or without a store. And even by restricting sales today to retailers with a retail store, the problems isn't solved. One of the problems is that the retailers can have any type of store, it doesn't have to be a gun store. For instance, the store could be a neighborhood barbershop. Or, it could be a neighborhood hardware store that can legitimately sell guns at retail even today, following the Brady Act. It is our contention that the manufacturers, by insulating themselves from any contact with the retailers, prevent safe sales practices from being standard, and not the exception at retail.

If you have retailers selling without a vested interest, without being solely a gun store, without having certain minimum sale requirements each year, the manufacturers have absolutely no ability to police the safe sales at retail. Thus, the retail practices can be against the law. They can evade the law that requires no multiple sales. They can evade a law that requires waiting periods. We suggested that there were types of procedures that this industry could do to police itself. Franchising retail stores would give the manufacturers control over safe sales practices at the retail level, because they could yank sales rights away from franchisers who violate distribution laws. Distribution contracts could also restrict sales at retail. In fact, the contracts are what the jury in our case based their decision of liability on. There were over 25 defendants in this case, representing about 79 percent of the United States' market of handguns, and the jury apparently, in its attempt to find some sort of measure of liability for this industry, looked at the distribution agreements between the manufacturers and their distributors. If the contracts had any restrictions at all—whether or not their were only a few—the jury exonerated the defendants. A manufacturer such as Smith and Wesson that had a provision in its contract to the distributors that “you may only sell to retailers that have a retail store,” were exonerated. However, there were about 10 companies, 10 manufacturers that didn't even have a basic written agreement. They just sold their guns to distributors willy-nilly and unfortunately—or just the way the jury system is—the jury in our case believed that there was no evidence of negligence because they didn't see a contract. Therefore, the jury exonerated that class of defendants as well.

Lastly, a major defense is that, you can't hold a manufacturer of guns responsible for what happens at the hands of criminals. The phrase “it's the criminal stupid” is a phrase that we've seen frequently in the press. It is the criminal that fires the gun in this class of cases. However, there is another class of cases—the accidental discharge cases—where the design defect, the personalized handguns theory, being pursued by the states and cities is really in effect. However, for accidental discharge cases, the concept that this manufacturer should

or could be held responsible for the criminal acts of third persons is not without precedence across the country. Although there are problems with causation in these types of cases because it is a criminal who fires the trigger, these cases can be won under basic negligence premises.

