

INVESTIGATING

GUN

DEFECT

CASES

By || **THOMAS SCOLARO**

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Gun manufacturers vigorously defend gun defect cases, but with careful investigation and intake, you can determine whether products liability or negligence claims apply.

As of 2017, there were more than 393 million civilian-owned firearms in the United States.¹ Much like the hundreds of millions of cars on the road, some contain defects, especially when dealing with such large-scale numbers. A gun should never fire unless the trigger is deliberately pulled. And one that fires without a trigger pull—for example, when dropped to the ground or adjusted in a waistband—is a defective mechanical device no different from a car that accelerates without the operator stepping on the gas pedal.

The 2005 passage of the Protection of Lawful Commerce in Arms Act (PLCAA) limited gun manufacturers' civil liability for harm caused by the "criminal or unlawful misuse" of firearms or ammunition.² But even when defective guns cause injuries outside of this context, gun manufacturers often try to avoid responsibility by arguing that the gun operator is the responsible, negligent agent. Today, people injured by gun defects that lead to unintended discharge typically must use ordinary principles of products liability and negligence to hold manufacturers accountable.



Recognizing Gun Defects

In a defective gun, these firing mechanisms can initiate without a deliberate trigger pull. This article focuses on unintended discharge caused by two specific issues: trigger defects and de-cocker mechanism defects. It is important to note that only seven states and the District of Columbia have passed laws regulating gun safety and design standards.³ Among them, only California, Massachusetts, and New York require specific safety features and that handguns pass a drop test and a firing test.⁴ There are no federal standards for firearm design.⁵

Lack of trigger safety. A trigger safety is a small lever that protrudes from the trigger lever. It blocks the movement of the trigger unless the safety is pressed as the trigger is being pulled. This addresses a common defect among pistols: that inertia can cause the trigger to move when the pistol is dropped. In other words, without a trigger safety, when a dropped pistol hits the ground, its internal parts keep moving backward when it lands, and this can cause the trigger to pull itself due to inertia. Picture something similar to whiplash caused by a car crash. The inertia pull of the trigger eliminates the firing pin block feature intended to keep the gun from firing when dropped and allows the sear fully or partially to move to release the striker.

A similar potential defect exists among certain hammer-fire revolvers. If the revolver is not designed and manufactured with a “transfer bar safety” (which mechanically aligns itself with the hammer’s travel, acting like a firing pin block) or a “hammer block safety” (similar to a firing pin block when the trigger is pulled), then the gun can discharge when dropped on the external hammer. Because the external hammer rests on the back of the firing pin, which rests on the back of the cartridge, any

To start, it is essential to understand how a gun works and can misfire. When a round is fired, the primer (responsible for initiating the propellant combustion that will push the projectile out of the gun barrel) located at the back of the round must be hit by a “striker” or a firing pin, depending on the gun. Semiautomatic pistols use a cylinder mechanism as a striker, which discharges a round using a spring-loaded rod. When a striker-fired pistol is cocked, the striker is pulled back against the spring pressure and held back by a fire-control component called a “sear.” When the trigger is pulled, the sear releases the striker, allowing it to spring forward, impact the cartridge’s

primer, and fire the cartridge. The bullet then separates from the cartridge and is discharged through the gun’s barrel. A firing pin block is a mechanical block that obstructs forward travel of the firing pin. The firing pin block clears the obstruction to the pin as the hammer or striker is released.

In contrast to semiautomatic guns, revolvers use a spring-loaded hammer mechanism, which discharges a round through contact with a loaded cartridge or a firing pin driven into the cartridge primer. Some revolvers do not have an intervening firing pin: Upon pulling the trigger, the spring-loaded hammer impacts the primer directly.

abrupt contact with the external hammer can cause the gun to discharge without a deliberate trigger pull.

Poor striker and sear contact. Certain manufacturers produce their pistols by metal injection molding, which causes rounded, lumpy surfaces that can be seen under microscopic examination. These surfaces can result in poor contact so that the connection between the striker and the sear is easily jarred off if the pistol drops and does not have a good safety.

De-cocker mechanism defects. The concept is simple: To fire a cartridge, the primer located at the back of the round must be hit by the striker or the firing pin, depending on the type of gun. When a gun is cocked, the striker or firing pin is held against an active spring that is released by pulling the trigger. In other words, pulling the trigger will release the spring, which in turns releases the hammer or striker, which moves forward and hits the primer. Commonly found in pistols, a de-cocker mechanism allows the gun user to release the spring tension on a cocked striker or hammer without reaching into the chamber and impacting the round. This is accomplished by the firing pin block. Pistols that feature this safety mechanism have a small button usually located above the trigger that, when pressed, de-cocks the gun without firing.

Over the years, guns firing without a trigger pull due to de-cocker mechanism failures have prompted lawsuits and recalls.⁶ The most common problem occurs when the user pulls the de-cocking lever and when the hammer is lowered, the firing pin block fails to engage completely, allowing the firing pin to release forward and fire the chambered round.

Case Intake and Evaluation

When facing unintended discharge cases, manufacturers typically argue that your client is at fault and that the claims against them are without merit. To



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dissipate this doubt about what caused the gun to fire, investigate thoroughly early in your case evaluation.

Question a potential client on his or her familiarity and experience with guns and on the sequence of events that led to the discharge. Ask detailed questions such as:

- Was there a round in the chamber?
- Was the safety on?
- Was the gun holstered? Was it an after-market holster?⁷
- What was his or her hand position? Finger position?
- How was the gun being carried?
- When was the last time the gun was cleaned? How was it cleaned?
- How was the gun stored?
- How was it maintained? Ever repaired? Ever disassembled? Ever dropped?
- What was the injury pattern? (You will want to determine this was consistent with an unintended discharge event.)

Run through the answers until you are clear on the sequence of events. Having a good factual understanding of what happened will help you better vet the case.

Review evidence. Corroborate your intake with all available police reports, interview transcripts, photographs, 911

recordings, and fire rescue reports. Talk to available witnesses in person or via video. Many times, the discharge incident happens without independent witnesses, so corroborating police reports are critical. The interview transcript of your client is the most crucial piece of evidence. It will confirm or deny whether his or her description of the sequence of events to officers matches the description given to you during intake. You must find every inconsistency as early as possible. Request the results of any gunshot residue tests and the complete medical examiner's report if someone was killed.

Acquire the gun. This is a must. Usually, the gun remains in the responding police department's possession until its investigation is completed.

Make sure the gun comes with a documented and video chain of custody.⁸ Expect the defense to attack how the gun was stored after it was released to you and to argue that the lack of a verified chain of custody caused the defect.

Research the manufacturer and model. This is a major part of your evaluation. Start with the internet and gun blogs, learn about the defective product at issue, and read or watch gun reviews.⁹

Many manufacturers have issued after-market warnings for and even

recalls of certain gun models.¹⁰ Taurus and Sig Sauer are facing multiple products liability lawsuits stemming from drop-fires involving several of their pistol models.¹¹

If the manufacturer issued a warning or recall on the gun at issue in your case, it's likely that one or multiple adverse events preceded it, even if the recall notice states that no adverse event was reported. Researching those adverse events will uncover additional facts to investigate, more witnesses to interview, and potentially more guns with similar defects to inspect. This evidence can help alleviate issues that might arise from not having an independent witness.

Experts


Make sure your expert has a comprehensive mechanical engineering and metallurgical background. This expertise is critically useful so that the microscopic

inspection of the firearm can shed light on sear marks, contact marks, relative distances between parts, or quality and durability of components chosen by the manufacturer. Before the pistol is disassembled, the expert should have access to X-ray and CT scan machines and an electron microscope as part of any sound examination. A complete inspection should consist of function testing, including a trigger pull force test; a safety button force actuation test; a field strip; and disassembling the slide and frame internal components for microscopic examination.¹² Your expert can draft an inspection protocol based on the areas you should focus on during the inspection.

Never conduct an inspection of the pistol, not even a basic field strip, without defense counsel present. The inspection should be done pursuant to a clear joint protocol agreed on before

the pistol is disassembled and examined.

A ballistics expert also should be part of any litigation team to handle reconstruction of the discharge. The defense will counter each defect claim by saying a trigger pull—whether intentional or negligent on the plaintiff's part—caused the discharge. You must forensically establish that the blood spatter pattern, gunshot residue analysis, and point of entry angles all support that a defective gun caused the unintended discharge.

Knowing how firearms work, how to recognize different types of defects, and what evidence you need during the intake stage will help you ask the right questions when a potential gun defect case comes across your desk. 

Thomas Scolaro is a partner at *Leesfield Scolaro* in Miami. He can be reached at scolaro@leesfield.com.

A STEP FORWARD IN GUN MANUFACTURER LIABILITY

By Kate Halloran

The increasing use of semiautomatic firearms in mass shootings has raised questions and led to intense debate about whether gun makers and sellers should be held accountable for their role in placing these weapons into the market. The Protection of Lawful Commerce in Arms Act (PLCAA) immunizes firearms manufacturers, distributors, and sellers from liability when third parties use their products to commit crimes.¹ But this federal law is not a complete bar to recovery against gun makers; the PLCAA includes limited exceptions.²

After the 2012 mass shooting at Sandy Hook Elementary School in Newtown, Conn., that killed 26 people, most of them children, nine victims' families brought a wrongful death action against the manufacturer, distributor, and retailer of the Bushmaster XM15-E2S semiautomatic rifle used in the massacre. They based their claims on a novel legal theory using one of those exceptions—negligent entrustment.

The plaintiffs alleged that the defendants negligently entrusted to the public a weapon that was not suitable for mainstream commerce since it was designed for military and law enforcement use. They also alleged a violation of the Connecticut Unfair Trade Practices Act (CUTPA),³ arguing that the defendants marketed the assault rifle differently from other weapons to highlight its lethality and firepower and continued to sell it despite overwhelming evidence that the weapon was unfit for civilian use.

In 2016, the state trial court dismissed the claims, finding that the negligent entrustment exception to the PLCAA did not apply and that the plaintiffs lacked standing to bring the CUTPA claims because they were not in a direct business relationship with the defendants.⁴ The Connecticut Supreme Court affirmed 4-3 the dismissal of the negligent entrustment claim, finding that because the weapon at issue was legal at the time, the defendants could not be liable for someone committing a crime with that weapon under the state common law of negligent entrustment and the PLCAA.⁵

However, the court reversed dismissal of the CUTPA claim, concluding that the PLCAA does not override a state's police powers, of which "the regulation of advertising that

threatens the public's health, safety, and morals has long been considered a core exercise."⁶ The court found that the plaintiffs have standing to proceed on their CUTPA claims on the limited theory that the defendants marketed the XM15-E2S for violent, criminal purposes and that this marketing contributed to their injuries.

Negligent entrustment. Both courts found that this exception did not apply because the plaintiffs did not allege that the defendants knew or had reason to know that a "direct trustee"—namely, the purchaser—of the firearm was likely to use it in an unsafe manner. The plaintiffs advocated for a broader reading of negligent entrustment to account for the reasonable foreseeability that a dangerous instrument like an assault rifle could land in the hands of someone who would misuse it, but the court refused to expand the scope of negligent entrustment to include this category.

Marketing. The XM15-E2S is Remington's version of the AR-15 (which is similar to the standard-issue rifle the U.S. Army uses) and is designed to be especially efficient and lethal. Features such as rapid fire with minimal recoil, high-capacity magazines, high muzzle velocity, and lightweight portability make

NOTES

1. Aaron Karp, *Small Arms Survey—Estimating Global Civilian-Held Firearms Numbers*, 4 tbl.2 (June 2018), <http://tinyurl.com/ybw3qh9v>.
2. 15 U.S.C. §7901(b)(1) (2019); see 15 U.S.C. §7903(5)(A)(v) (prohibited civil liability actions shall not include an “action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage”).
3. Giffords Law Ctr., *Design Safety Standards* (2018), <http://tinyurl.com/y2d2xanv>. The states are California, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, and New York.
4. *Id.* Firing tests confirm that a firearm does not malfunction after repeated firing and does not have cracks or other defects after firing. *Id.* Drop tests involve dropping a firearm onto a hard surface from a specified distance to confirm that it does not fire when dropped. *Id.*
5. *Id.*
6. Because the Consumer Product Safety Act excludes firearms, no agency has the authority or mission to force a recall or even establish statistics on recalls based on defective firearms. This is why statistics pertaining to gun defects do not exist. The Violence Policy Center keeps a list of gun product safety notices on its website: <http://vpc.org/regulating-the-gun-industry/gun-product-safety-notices/>.
7. Gun manufacturers typically will offer custom-made holsters designed for their firearms. If your client’s handgun was in a one-size-fits-all holster when it unintentionally fired, the defense will point to issues such as lack of protection from the elements, unnatural and increased wear and tear created by a wrong-sized holster, or the lack of control when the plaintiff manipulated the holster or unholstered the gun. To my knowledge, gun manufacturers exclusively design and manufacture 100 percent of the parts used in their products. This has to do with trade secrets in a very competitive industry.
8. Videotape every interaction with the gun, including its wrapping, securing in a box, storing, and unboxing. You must not open the door to a chain of custody defense.
9. See The Firearm Blog, <https://www.thefirearmblog.com/blog/>; Guns America Digest, <https://www.gunsamerica.com/digest/>; Jerking the Trigger, <http://jerkthetrigger.com/>; Lucky Gunner Lounge, <https://www.luckygunner.com/lounge/>; Pistol-training, <http://pistol-training.com/>; The Truth About Guns, <https://www.thetruthaboutguns.com/>.
10. See U.S. Consumer Prod. Safety Comm’n *Recall List*, <https://www.cpsc.gov/Recalls>; Violence Policy Ctr., *Gun Product Safety Notices*, www.vpc.org/regulating-the-gun-industry/gun-product-safety-notices/.
11. Heffler Claims Grp., *Taurus Class Action* (2019), www.tauruscartersettlement.com/; Sig Sauer, *Sig Sauer Safety Warning and Recall Notice* (Sept. 15, 2017), www.sigsauer.com/press-releases/sig-sauer-safety-warning-recall-notice/.
12. Very few facilities have the equipment to CT scan a pistol. The best and most comprehensive CT scanning and mapping of every pistol component is at North Star Imaging (<http://tinyurl.com/y5zmo4qe>), which has labs in California, Massachusetts, and Minnesota and provides 3-D images of every gun component in a non-destructive manner.

the rifle capable of inflicting a great amount of damage in a short period of time. The plaintiffs contend that the defendants improperly made these deadly, military-grade capabilities a prime selling point in their marketing. This included advertising the gun with images of soldiers on combat missions and highlighting the military-grade performance of the weapon.

On the standing issue, the court determined that “a party directly injured by conduct arising from such advertising can bring an action pursuant to CUTPA even in the absence of a business relationship with the defendant.”⁷ The plaintiffs based their CUTPA claims on two grounds: first, that the XM15-E2S had no legitimate civilian use because of the extreme risks and likelihood that it would end up in the hands of someone who would misuse it and therefore it should not be in the stream of commerce; and second, that the defendants engaged in “unethical, oppressive, immoral, and unscrupulous” marketing and advertising of the weapon such that it encouraged unlawful use of the gun. It was on this second ground that the court ruled that the plaintiffs’ case could proceed.


Bridgeport, Conn., attorney Josh Koskoff, who represents the plaintiffs, explained, “We’re not starting from a completely blank

slate here. You don’t get to a marketing campaign like they have had targeting young men that wasn’t well thought out. These families weren’t the target audience for Remington. The Sandy Hook shooter was their target. He was in the crosshairs of their marketing campaign, and he knew a lot about what that gun could do.”

The court rejected the defendants’ contention that the CUTPA claim was a strict products liability unreasonably dangerous claim masquerading as a trade practices violation that would be preempted. The complaint did not contain traditional products liability allegations, such as inadequate warnings, and the plaintiffs offered a sufficient basis for advertising violations, the court found.

The court also extensively reviewed the PLCAA, its legislative history, and whether the CUTPA would override PLCAA’s protections for the defendants. It specifically considered the PLCAA’s “predicate exception,” which provides for civil liability when “a manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or marketing of the [firearm]” that proximately caused a plaintiff’s injuries.⁸ The court focused on the meaning and scope of the term “applicable” and ruled that the predicate exception can

be interpreted broadly because Congress did not preface it with language such as “directly” or “expressly.” It further noted that the exception specifically mentions marketing and that at the time that the PLCAA was passed, no federal statute governed the marketing of firearms that would preempt a state law.

The viability of the plaintiff’s argument will now be tested in court. Remington has indicated that it intends to file a petition of certiorari with the U.S. Supreme Court. But the ruling is an important step forward in holding gun makers accountable, according to Koskoff. “The families’ goal has always been to shed light on Remington’s calculated and profit-driven strategy to expand the AR-15 market and court high-risk users, all at the expense of Americans’ safety. This decision is a critical step toward achieving that goal.” 

NOTES

1. 15 U.S.C. §§7901–7903 (2005).
2. 15 U.S.C. §7903(5)(A)(i)–(vi).
3. Conn. Gen. Stats. §41-110a et seq. (2011).
4. *Soto v. Bushmaster Firearms Int’l, LLC*, 2016 WL 2602550 (Conn. Super. Ct. Apr. 14, 2016).
5. *Soto v. Bushmaster Firearms Int’l, LLC*, 2019 WL 1187339 (Conn. Mar. 19, 2019).
6. *Id.* at *66.
7. *Id.* at *88.
8. 15 U.S.C. §7903(5)(A)(iii).