

Back to <http://www.claytoncramer.com/popularmagazines.htm>

Gun Laws Under The Influence

For the last two decades, California has been on the cutting edge of gun control nonsense. The session of the California legislature just ended has once again demonstrated that gun control advocates aren't interested in "reasonable gun control."

One of the new laws signed by Governor Gray Davis was AB 496, which makes a seemingly minor change to California law concerning product liability. From the recent lawsuits that have been filed around the country (and which the gun banners have mostly lost), the intent is clear: to ban handguns in California on the basis that manufacturers are engaged in "negligent marketing" of guns. A careful reading of the law suggests that this may be used to bankrupt gun manufacturers in states other than California.

What does AB 496 do? Surprisingly enough, it changes a law that was originally about drunk driving and bars. California law has long made it illegal for a bar to serve alcohol to an obviously intoxicated person. Back in the early 1970s, the California courts decided that if a bar broke this law, and the drunk drove off and hit someone, the bar could be held liable for those injuries.

There is a certain logic to this; the bar was already breaking a criminal statute when they served alcohol to someone who was obviously intoxicated. Why not make the bar liable for injuries caused by the drunk? The bar has deep pockets, and this would certainly make the bar owner a lot more careful to whom it served alcohol.¹

¹ *Vesely v. Sager*, 5 Cal.3d 153, 486 P.2d 151, 95 Cal.Rptr. 623 (1971) cited in *Thoring v. Bottonsek*, 350 N.W.2d 586 (N.D. 1984), available at <http://www.court.state.nd.us/court/opinions/10555.htm>, found this liability based on common law negligence; *Bernhard v. Harrah's Club*, 16 Cal.3d 313, 546 P.2d 719, 128 Cal.Rptr. 215 (1976), also cited in *Thoring v. Bottonsek*, derived this liability from California's law prohibiting bars from selling alcohol to those already intoxicated.

One problem with this is that some drunks do a much better job of hiding their intoxication than others. Another problem is that the drunk is *already* drunk: he might go out and kill someone whether the bar gives him another drink or not. California's courts then went one better, and decided that if you were serving alcohol at a party at your house, you could be liable if one of your drunken guests drove off and hit someone.²

Unsurprisingly, California's legislature went ahead and wrote Civil Code § 1714, which told California's courts where to stuff these decisions. The bar (or the host at a party) was *not* responsible for the actions of the drunk driver "because the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person."³ This is perfectly logical; the bar didn't run you over; the drunk ran you over. Sue the drunk, not the bar.

When gun banners started suing firearms makers because criminals, in spite of California's very strict gun control laws, misused a gun, even California's legislature recognized the absurdity of this. In one of its rare moments of rationality, California's legislators added a provision to Civil Code § 1714 that said that if a gun works, it's not defective.⁴

This law was a problem for the gun banners. While there are defective guns, and there are even dangerously defective designs, gun makers have gotten a lot more careful in the last thirty years. New handguns, even cheap new handguns, are astonishingly safe; they fire when you pull the trigger, and seldom at any other time. Gun banners could sue

² *Coulter v. Superior Court of San Mateo County*, 21 Cal.3d 144, 577 P.2d 669, 145 Cal.Rptr. 534 (1978), cited in *Thoring v. Bottonsek*, (N.D. 1984).

³ Cal. Civil Code § 1714.4(b) (2002).

makers for individually defective guns, but there was no way to hold a gun manufacturer liable when a criminal shot someone during a robbery. Just like the drunk driver and the bar, the “proximate cause of injuries” wasn’t the gun, or the maker that built it, but the criminal who misused the gun.

AB 496 changes California’s firearms product liability law—and in a way that shows that California’s government is simply dishonest. When Governor Davis’s office issued a press release trumpeting his signing of this bill into law, they described it as: “Under current law, gun manufacturers are the only industry that is exempt from product liability lawsuits. So even if a gun-maker is grossly negligent, it can’t be held accountable when innocent people get hurt.”⁵

This statement is untrue. The provision that AB 496 repealed included the statement, “This section shall not affect a products liability cause of action based upon the improper selection of design alternatives.”⁶ There was no exemption from product liability for gun makers; but if a gun worked, that’s not a defect. Guns are *supposed* to be dangerous. Just like the bar didn’t run you over (and is exempted from civil liability by § 1714), the gun maker didn’t pull the trigger. The criminal is the responsible party.

Furthermore, § 1714.45, which was *not* repealed by AB 496, specifically exempts manufacturers or sellers from liability if a “product is inherently unsafe and the product is known to be unsafe by the ordinary consumer....” My guess is that this would include dirt bikes and probably guns, if there had been a specific provision put into the previous subsection concerning guns. Another exemption is if the “product is a common

⁴ Cal. Civil Code § 1714.4 (2002).

⁵ Office of the Governor, “GOVERNOR DAVIS ANNOUNCES REPEAL OF IMMUNITY FOR GUN INDUSTRY 9/25/2002”, Press Release L02:182.

consumer product intended for personal consumption, such as sugar, castor oil, alcohol, and butter....” All of these products could be dangerous if misused, of course, if you were an idiot. Tobacco, of course, was specifically listed as something that was *not* exempted.⁷ Davis lied (please don’t be surprised); lots of industries are exempted from product liability suits.

Okay, so this is bad news for California gun manufacturers and sellers, and therefore, for California gun buyers. I’m glad that I left that unlocked insane asylum last year. Do the rest of us have something to worry about? Unfortunately, yes. What happens when a criminal misuses a gun in California, and gun banners sue the manufacturer in another state. “This gun is defective—it can be criminally misused!” or “Your ads for this gun are misleading—they say that having a gun in your house makes you more safe!” The gun maker will at least have to defend themselves from the suit, and they may well lose in front of a California jury. “They can’t do that!” you say. “California law won’t apply outside of California.”

Are you sure? It turns out that one of the civil suits that California’s more intelligent 1970s legislature overturned when they wrote Civil Code § 1714 started out as a drunk at a bar at Harrah’s Club, in Nevada; the injured party was suing a bar for actions that took place in another state. There is also a lawsuit that decided that a Montana bar owner could not be held liable for injuries caused in North Dakota. The drinking took place in Montana, but the injuries—and the lawsuit—took place in North Dakota. The North Dakota Supreme Court, while it decided that the Montana bar could *not* be held liable, was careful to emphasize that this was specific to the particular states in question.

⁶ Cal. Civil Code § 1714.4(b)(2)(c) (2002).

The question of “extraterritoriality”—can one state’s laws create liability for actions that take place in another state—could be decided differently with different facts or states involved.⁸

Unlike California, quite a number of states have now passed laws that directly shield gun manufacturers from liability if their guns work as intended. So what happens when the laws of two states conflict about this? This is one the reasons that the U.S. Constitution gives the federal government sole authority to regulate interstate commerce. There had been a series of disputes in the 1780s between the states over which state was allowed to regulate ferry services that crossed state lines. This is a somewhat similar question: can one state’s laws create liability for actions taken under another state’s laws?

California’s Governor Davis recognizes that if Congress passes a law limiting product liability lawsuits, California’s attempt at banning handguns by lawsuit is going to fail. In the same press release where he lied about gun manufacturer product liability, “Governor Davis also announced that he is sending a letter to Congress to oppose two federal bills, H.R. 2037 and S. 2268, that attempt to use interstate commerce laws to shield every gun manufacturer and seller in America from liability for any harm caused by the unlawful misuse of a firearm.”⁹ It sounds like gun owners need to let their Congressmen and Senators know that we want those bills to pass.

If there were any consistency of principle involved with this bill, it would also hold bars responsible for injuries caused by drunk drivers, and hold beer and wine makers

⁷ Cal. Civil Code § 1714.45(a)

⁸ Thoring v. Bottonsek, 350 N.W.2d 586 (N.D. 1984), available at <http://www.court.state.nd.us/court/opinions/10555.htm>.

⁹ Office of the Governor, “GOVERNOR DAVIS ANNOUNCES REPEAL OF IMMUNITY FOR GUN INDUSTRY 9/25/2002”, Press Release L02:182.

responsible for “negligent marketing” of their products as well. If gun makers are engaged in “negligent marketing,” the alcohol industry has vastly more liability. Beer ads imply that you will be cool and attractive to the opposite sex. Wine ads imply buying their brand will make your dinner parties sophisticated and cultured successes. Alcohol abuse plays a significant part in causing murder, rape, child molestation, and surprisingly enough, even crimes like robbery. But California is a major producer of alcohol, and many California legislators have had serious alcohol problems. One really gross example is State Senator Art Torres, one of the antigun fanatics, arrested twice for drunk driving in 14 months.¹⁰

Who should be responsible for the criminal misuse of a gun? The criminal? Or a company that may have made that gun a century ago? California’s actions demonstrate that the gun banners have no shame about the lies that they are willing to tell to bankrupt gun makers—and to let criminals off the hook.

Clayton E. Cramer is a software engineer and historian. His last book was *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* (Praeger Press, 1999). His web site is <http://www.claytoncramer.com>.

¹⁰ <http://www.calvoter.org/archive/94general/cand/ins/journal.html>.