

- Are companies entitled to market any good for which there is demand, or do they have a responsibility to market only goods that have a net benefit to the consumer? Some authors point to psychic benefits associated with products, such as an enhanced self-image. Does this make tobacco a product that arguably produces net benefits?
- The tobacco industry pursues vigorous investigation into the background of plaintiffs who have brought suits. There are reports of unannounced visits late in the evening to take depositions from family members. The industry also steadfastly denied any link between tobacco and cancer. Is the industry justified in the activities it uses to defend itself?

### *Decision Scenario B*

#### **SELLING GUNS: NEGLIGENT MARKETING?**

News of Nafis Jefferson's death on April 20, 1999, was dwarfed by the tragic shootings one day later at Columbine High School in Littleton, Colorado. His death, however, typifies the gun problems found in many large cities.

Nafis was shot to death on the streets of South Philadelphia. Neighborhood children were playing on Sigel Street that spring day when a five-year-old boy found a gun under an abandoned car, not an uncommon occurrence in drug-ravaged neighborhoods of the cities where dealers often stash drugs and guns in or under such cars. The child's older brother took the gun away, placed it on the car, and, as he had been taught, went to inform an adult. In the intervening moment, another child picked it up. The gun discharged, killing 7-year-old Nasif.

The gun was traced to a man who had a history of purchasing guns at rural gun shops and then selling them for a handsome profit to those not legally able to purchase them. Other guns he purchased have turned up in armed robberies and drug cases. So far, police have confiscated 12 of his guns from criminals in places ranging from New York to Philadelphia to Charlotte, North Carolina. This is a pattern that is seen repeatedly by police in major cities. Straw buyers purchase guns legally and then distribute them to others who would be barred

from purchases either because of age or because the background checks required by the Brady Handgun Control law would reveal them to have criminal records. Mayors of large cities charge that thousands of guns end up on their streets because of bulk purchases later resold by these traffickers. A Bureau of Alcohol, Tobacco, and Firearms study recently claimed that half of all guns seized from young criminals were purchased legally by straw buyers and then resold.

This situation has led a number of cities to file suits against the gun manufacturers, charging them with saturating the market with handguns, knowing that many will be illegally resold and end up in the hands of criminals on city streets. The suits allege that the gun makers negligently market their guns, knowing that the volume of sales is greater than the legal market can bear. In fact, in a complicated verdict, a jury in a private suit in New York City awarded one plaintiff damages on the grounds that his injuries were the result of three gun companies negligently failing to discourage sales of weapons that end up later being sold illegally.

Other suits allege that the companies are negligent for failing to develop technology that will decrease the chances that the gun can be fired by anyone other than its original purchaser. Trigger locks for handguns already exist. "Smart technology" is being developed by some manufacturers. Colt, with research funded by the Justice department, is working on a transmitter embedded in a ring that would only allow the ring wearer to fire the handgun. Other designs depend on handprints or hand density. The suits charge, though, that the companies have not moved quickly enough to pre-

This case was prepared from the following materials: Clea Benson, "Philadelphia Bill Promotes 'Smart' Guns," *The Philadelphia Inquirer*, April 30, 1999; Editorial, *The Philadelphia Inquirer*, February 23, 1999; Michael Matza, "Making Firearms Safer, Smarter," *The Philadelphia Inquirer*, April 21, 1999; Robert Moran, Craig McCoy, and Rita Giordano, "Tracing a Gun's Trail of Tears to Philadelphia," *The Philadelphia Inquirer*, April 21, 1999; Vanessa O'Connell, "Open Season," *The Sacramento Bee*, February 21, 1999; Ron Scherer, "Gunmakers in Legal Crosshairs," *The Christian Science Monitor*, February 16, 1999; Leslie Wayne, "In Difficult Times, a Gun Maker Tries to Counterattack," *The New York Times*, March 12, 1999.

vent the harms caused by unauthorized uses of their guns.

(In response to such suits, the gun industry is lobbying state legislatures to pass laws prohibiting cities from suing on these grounds. Georgia was the first state to pass such legislation. Texas joined it in June of 1999. At the urging of the gun lobby, other states, such as Pennsylvania, passed laws preempting municipal laws that limit sales or purchases of guns.)

Critics of the gun manufacturers allege that they should be held responsible for the harms caused by their products. Others find such claims of responsibility absurd and a dangerous "slippery slope." Why not, they suggest, hold auto manufacturers responsible for the deaths and injuries caused by people who drive recklessly or by drunk drivers? Holding the manufacturers responsible ignores the fact that the harms are caused by other people who irresponsibly misuse the manufacturer's products.

Critics of the industry are undeterred by this argument. They believe that it makes sense to sometimes hold firms responsible for the foreseeable, but unintended, harms caused by their products, even when those harms are caused by misuse. After all, they contend, failure to prevent foreseeable misuse is a traditional basis for product liability assignments. Moreover, they argue, the misuse, while not eliminable, is certainly reducible by actions that the manufacturers could take. They could monitor and control their distributors more vigilantly. They could design safer guns. They could avoid marketing guns in ways that highlight their attractiveness to criminals (by not emphasizing, as they sometimes have, the small, concealable size or fingerprint-resistant handles).

They also point to examples where other industries have taken steps to reduce the probability that their products will be used in harmful ways. Years ago, for example, *sterno*, the product used for keeping food warm in chafing dishes, was sold in liquid form. The manufacturer altered the formulation to a solid after it was found that alcoholics on skid rows were drinking the product for a cheap high. Medicine packaging was redesigned to prevent children from gaining access to a product that could cause them harm. When retailers in the Philadelphia area learned that aerosol products used for cleaning computer keyboards were being "huffed" by teenagers, they placed the products behind the counter and limited sales. The same has

been done in coordinated efforts by manufacturers and retailers of spray paint in the attempt to limit disfiguring graffiti in urban areas. So, critics charge, it is possible for sellers to take steps to reduce the potential for harms caused by the marketing of their products. The critics suspect that the domestic gun industry, suffering from declining handgun sales, is simply not interested in anything that would further reduce its profits.

Gun manufacturers must not only assess their exposure to legal liability. They must also decide what moral responsibilities they have for their products and their marketing strategies. On the basis of their decisions, they have a number of options. They can take steps to limit illegal access to their own products (for example, by reviewing arrangements with sellers and distributors) while at the same time actively lobbying for stricter laws and increased enforcement across the industry. They could take no active role in urging stricter laws (such as the one-gun-a-month proposals) but tighten controls on the marketing and distribution of their own firms' products. They could continue supplying whatever market demand there is while leaving pro-gun lobbying to others like the NRA. Or they could continue business as they have and also play political hardball by urging passage of state and federal legislation limiting their liability and preventing cities from suing on grounds of negligent marketing. Activity in Congress indicates that they have at least pursued the last strategy. In the spring of 2004, legislation was debated that would have exempted gun manufacturers from liability suits. That legislation, however, was defeated after the manufacturers and the NRA withdrew their support when an amendment was attached extending a federal ban on the sale of certain assault weapons.

- Assuming that sometimes firms are responsible for foreseeable but unintended harms caused by their products (a principle of even the negligence standard of liability), under just what conditions does this responsibility exist? Just when do the intervening actions of another absolve the manufacturer of responsibility?
- Are there relevant differences among the following products that give rise to different levels of moral responsibility for harms caused by the products: guns, tobacco, automobiles, alcohol, and prescription medicines?

- What are your opinions of industry attempts to limit liability by lobbying for state legislative preempting of city law suits? Under what conditions would you find such political action legitimate or illegitimate? For what specific reasons?
- When ought manufacturers take steps to reduce access to their products by those who may misuse them?

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*Decision Scenario C***THE MICHIGAN TOY BOX COMPANY**

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The Michigan Toy Box Company of Detroit, Michigan, has established a reputation for producing durable, high-quality toy chests for children. Recently, however, they have discovered that the very durability of their toy chests can pose serious threats to the children who use them. The toy chests are constructed of prime hardwoods with a thickness of three quarters of an inch. The lids of these chests alone weigh eight pounds. Reports have returned to the company that nationally nearly one hundred children a year are either killed or seriously injured when a toy box lid falls on their heads or necks while they are reaching into the chest.

Consumer advocates have suggested a solution to the problem. It involves installing a friction hinge on the lid that prevents the lid from falling freely. The hinge functions by providing a resistance that causes the lid to close by dropping slowly. If all toy chests had such a safety device, consumer safety experts claim, the deaths and injuries suffered by children using toy chests would decline to almost zero. The recent nature of the safety problem and the slowness of government regulatory agencies concerned with safety, however, have prevented any mandatory safety standards for toy chests from being established as law. The Michigan Toy Box Company must decide whether to install the suggested safety device voluntarily.

The production costs associated with the addition of the safety hinge are clear. The cost per unit for the hinges is rather small, under \$1.50. However, the company has determined that installation of the hinge will require an additional quarter-hour of labor time in the production of each chest. Salaries of workers at the plant are higher than national averages for unskilled laborers because of the com-

petition for labor in the Detroit area and because of the strength of unions in the local labor scene. The additional quarter-hour will cost the company \$1.25 for each chest produced. Although the hinges would require no major retooling for the production line, the installation of the hinges will also entail capital and maintenance expenditures associated with the purchase of additional tools and the creation of a new work station in the assembly process. The company estimates that installation of the hinges will raise costs by about \$5.00 per chest.

Although the company's reputation and sales are strong, there is increasing competition from other manufacturers because inflation has made the Michigan Toy Box product appear high-priced to parents of young children. The company doubts whether it could increase retail prices by \$5.00 and retain an important segment of its consumer population. In fact, the relatively infrequent rate of injury associated with the toy chests makes it less than probable that marketing that emphasized the new safety feature could offset expected sales losses due to increased prices. The infrequent injury rate also makes less likely any major liability settlements against the company and in favor of families whose children were injured. (The expectation is that the courts will not find the product defective and that liability insurance will not increase because of large settlements.)

Management of the company decided for the interim to forgo installation of the hinges because of an impending recession that will dampen sales. They did not wish to exacerbate that decline in sales by installing the hinges, although the addition of the hinges would not have threatened the continued viability of the company.