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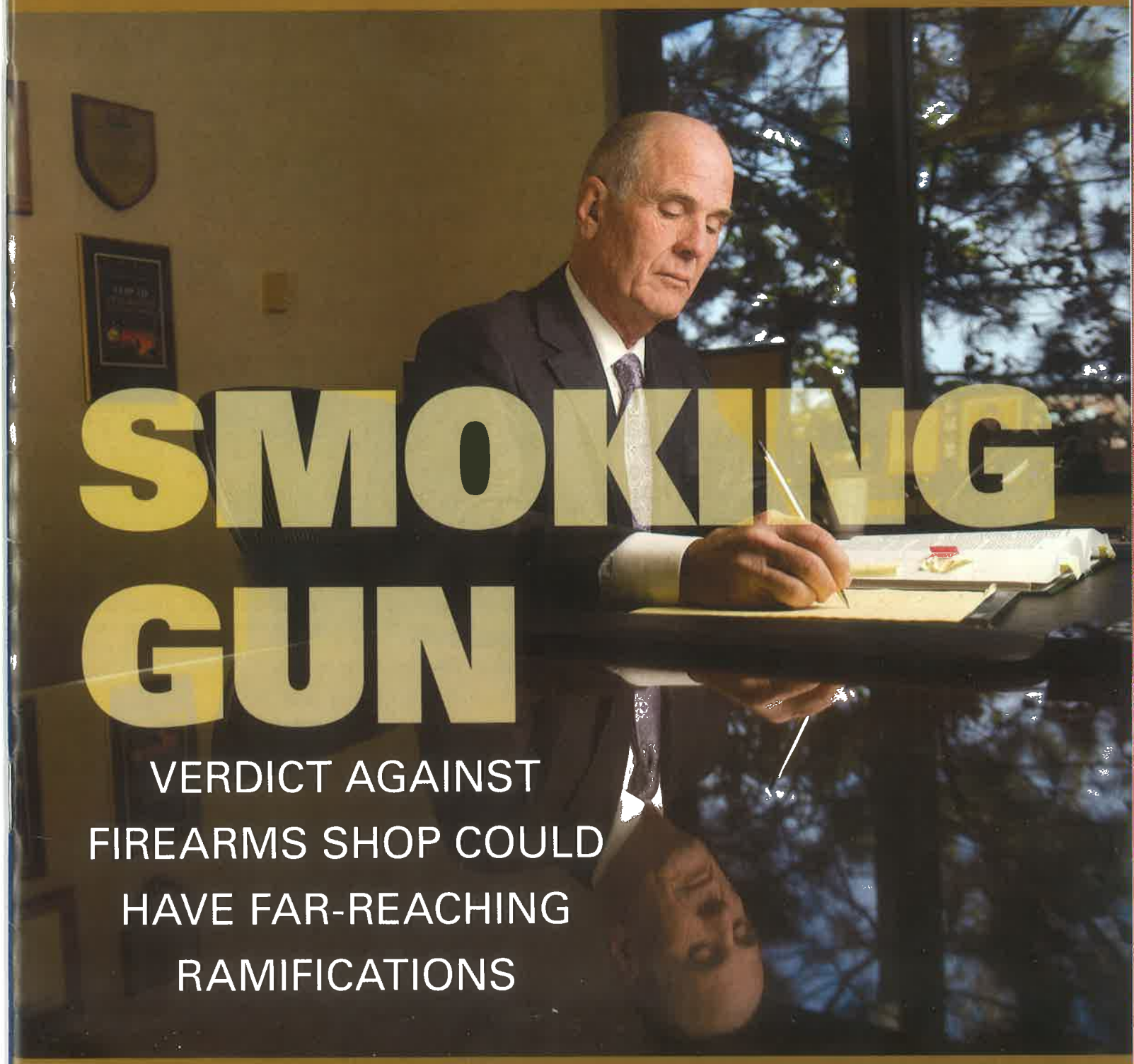

SMOKING GUN

VERDICT AGAINST FIREARMS SHOP COULD HAVE FAR-REACHING RAMIFICATIONS

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CLOSING ARGUMENTS

QUESTION:

Four years on, has Wisconsin's punitive-damage cap been beneficial?

BACKGROUND:

With Gov. Scott Walker still best known for his Act 10 law that substantially curbed the collective-bargaining rights of most public employees, few might remember that one of his first priorities upon taking office in 2011 was actually tort reform.

Among the changes included in a bill the governor had signed within the first month of that year was one that limited the punitive damages a plaintiff could recover to either $200,000 or to double the amount of compensatory damages awarded, whichever of the two was higher. Proponents of the cap argued it would help make Wisconsin more attractive to businesses, which would be shielded from exorbitant legal costs.

Opponents, in contrast, said the change would take away one of the justice system's chief means of getting wrongdoers to reform their ways. Now, more than four years after the 2011 tort changes were passed, can something be done to improve the cap? Or does the policy remain indefensible?

PRO | DUE PROCESS NECESSARY FOR PUNITIVE DAMAGES

Wisconsin's punitive-damages statute requires clear and convincing evidence that a defendant acted with malice or intentionally disregarded the rights of a plaintiff.

An "intent to disregard rights" does not mean the intent to harm, but rather that one acts with a purpose to disregard the plaintiff's rights, or an awareness that the acts are substantially certain (read: inevitable) to result in the plaintiff's rights being disregarded. While this standard is vague to many, there is general acceptance that "intentional disregard" was changed in 1995 from "wanton, willful and reckless disregard" to make it harder to recover punitive damages.


Matt McClean

In theory, the vast majority of negligence cases should not be able to satisfy the heightened-statutory standard. Not even all cases involving intentional conduct will warrant punitive damages.

The 2011 tort-reform bill further limited recovery of punitive damages by capping the amount of a punitive-damages award to the greater of $200,000 or twice the amount of a compensatory-damage award. The cap was justified, at least in part, as a way to bring predictability to the law and to prevent runaway juries from awarding massive verdicts.

The idea of a cap did not come completely out of left field. The U.S. Supreme Court, considering the constitutionality of punitive damages, said in 1996 that basic fairness demands that a "person receive fair notice, not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."

Then in 2003, the court concluded that "few awards exceeding the single-digit ratio between punitive and compensatory damages" could be constitutional. In Wisconsin, before 2011, courts had rejected the notion of a fixed ratio between compensatory damages and punitive damages, but did consider a comparison between the two an important consideration in assessing the fairness of awards.

But these legislative changes and court decisions have not made punitive damage awards more predictable. Counsel for plaintiffs and defendants still consistently argue over what conduct satisfies the heightened standard.

Trial judges serve as gatekeepers for claims of punitive damages, but apply different standards and procedures. Some will decide issues on summary judgment, some will not.

Some will allow the claims to go to trial, let the jury hear all the evidence, and then decide whether to include a verdict question on punitive damages. Some will wait to modify awards in motions after a verdict. Others will bifurcate punitive damages from the underlying claims.

In that sense, the 2011 reforms made only the amount of punitive damages more predictable; the application and enforcement of them remain unpredictable.

Is it better? As my colleague Chris Strohbehn explains, legislating away the unpredictability may lead to unjust results. This may be the difficult reality of balancing a flawed system. Would it be more palatable if the cap were higher?

Perhaps. But having no standards at all - and therefore no notice to defendants -would be unconstitutional.

Matt McClean is a shareholder at Davis & Kuelthau and is the head of the firm's litigation team.

CON | WHAT'S THE POINT OF PUNITIVIE DAMAGES?

Punitive damages were designed to punish and deter wrongful conduct. They enjoyed a long jurisprudence controlled by the discretion of courts and the province of juries. That interplay worked to help make the public safer from injury.

However, since the Wisconsin Legislature enacted a punitive damage "cap," the law has been gutted of its original purpose – to punish and deter wrongdoing in order to protect the public. The "wild card" that existed to protect the public has been removed. Sadly, the deck is now stacked against everyone's safety.

Punitive damages have operated as an incentive to businesses and individuals to act in the best interests of others or else risk financial punishment beyond compensatory damages. Like criminal sentences, the punishment was meant to send a message that certain conduct would not be tolerated.

My colleague Matt McClean suggests that additional guidance is needed to clarify the current standard that trial judges apply in their role as gatekeepers. While good lawyers can disagree over whether the current standards satisfy due process, my belief is that the policy is now so flawed that, on the grand scale, it does not matter.

Today, the only message a Wisconsin jury can send is one that is well within the ability of many defendants to cover in their risk-management budgets. The wrongdoer now gets to decide, already knowing the maximum risk of financial loss, whether to adopt safer product designs or standards of hire.

A safety decision is now an easy business decision. What incentive does an auto company have to eliminate defects that threaten safety? What incentive does a school district or nursing home have to hire qualified personnel? What incentive do drug companies have to tell consumers about their products' dangers?

In contrast, what would happen if those wrongdoers faced a loss commensurate with their wealth? Would they be more likely to pull the plug on a product that they know will harm the public? Would they be more likely to consider public safety? A law with teeth changes the calculation.

Now, the only types of wrongdoers likely to be punished and actually feel that punishment are members of the middle class or small-business owners who are "collectible."

An exception exists in the law for drunken drivers, as there should be. Yet, that political carve-out leaves nearly all injured Wisconsinites out in the cold. If the plaintiff is the minor child of parents killed in a drunken-driving crash - there is no punitive-damage cap.

If that same minor child is orphaned as a result of a road-rage crash – there is a punitive-damage cap. But what if that same drunken defendant shot and killed someone in an argument? Once again, there is a punitive damage cap. These results apparently make sense to many politicians; somehow, they have managed to ignore the fact that their logic has emasculated the intended purpose of the policy.

With the swoop of a pen, the Legislature has protected an ocean of civil wrongdoing from appropriate punishment. The decision to decimate Wisconsin's punitive damage law has served only to inflict further harm on victims, and it will take the intended purpose of the policy down with it in the wreckage.


Chris Strohbehn

Chris Strohbehn is a partner at Gimbel, Reilly, Guerin & Brown.