

# Consumer Regulation of Handguns by the Illinois Attorney General

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in collaboration with  
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## Introduction

It is a simple truth that making guns safer would save thousands of lives each year. Illinois' Consumer Fraud and Deceptive Business Practices Act offers a powerful tool to achieve safer handguns and protect Illinois citizens, particularly children. The Consumer Fraud Act grants to the Attorney General the authority to promulgate rules to protect consumers against products that cause injury to children. This authority clearly applies to products that are harmful to children, such as handguns. The Massachusetts Attorney General, acting under similar statutory authority, enacted a series of gun safety regulations in 1997, which were upheld by the Massachusetts Supreme Court in 1999. We urge Illinois Attorney General Lisa Madigan to follow this example for the sake of Illinois' children.

## The Harm Posed by Unsafe Firearms in Illinois

In Illinois, as at the national level, death and injury from firearms are at epidemic levels. There is no shortage of statistics documenting this tragedy:

### **At the national level:**

- In 2000 alone, firearms were responsible for nearly 29,000 deaths.<sup>1</sup>
- Firearms remain a leading cause of injury-related death in this country, second only to motor vehicles.<sup>2</sup>
- Between 1993 and 1998, an average of 115,000 persons suffered firearm-related injuries each year.<sup>3</sup>
- Approximately 15,000 persons are treated each year in hospital emergency rooms for unintentional gunshot wounds.<sup>4</sup>

### **Children suffer tragic harm from firearms:**

- In 2000, gun violence killed 3,042 American children and teens.<sup>5</sup>
- Every day in America, 8 young people die from gunshot wounds.<sup>6</sup>
- Children under 15 suffered an average of 770 fatal and 3,519 nonfatal firearm-related injuries annually from 1993 to 1998.<sup>7</sup>
- Children aged 15-19 suffered 4,152 fatal and 18,481 nonfatal firearm-related injuries.<sup>8</sup>
- According to one federal study, 8% of accidental shooting victims are under the age of six.<sup>9</sup>

**Each year, gun violence injures or kills hundreds of Illinois citizens:**

- In 1999, gun violence claimed 1,209 victims in Illinois.<sup>10</sup>
- In Illinois, more than 300 young people are killed by gun violence each year.<sup>11</sup>
- Between 1994 and 1996, a total of 715 children aged 0-19 were treated in Illinois hospitals for unintended firearms injuries; of these, 247 were under the age of ten.<sup>12</sup>
- In the same period, 34 children aged 0-19 died of unintentional firearm-inflicted injuries in Illinois.<sup>13</sup>
- Between 1998 and 2000, 25 Illinois children aged 0-19 died as a result of unintentional firearm-related injuries.<sup>14</sup>

**Handguns are disproportionately responsible for gun deaths:**

- While handguns account for only one-third of all firearms owned in this country, they account for more than two-thirds of all firearm-related deaths each year.<sup>15</sup>

**Children have ready access to unsafe handguns:**

- More than half of U.S. gun owners living with children keep unlocked weapons in their homes.<sup>16</sup>
- A gun kept in the home is 22 times more likely to be used in a homicide, suicide or unintentional shooting than it is to be used in self-defense.<sup>17</sup>
- Of the homes with children and firearms, 55% of those surveyed reported having one or more guns in an unlocked place and 43% reported keeping guns without a trigger lock in an unlocked place.<sup>18</sup>
- Even the youngest children are strong enough to fire many handguns now available in the U.S. 25% of 3-4 year olds, 70% of 5-6 year olds, and 90% of 7-8 year olds are able to pull a trigger of at least 10 pounds. 59 of 64 commercially available handguns require a trigger-pull strength of less than 10 pounds.<sup>19</sup>

**Existing laws are inadequate to protect Illinois children from unsafe handguns:**

Federal law does not set any safety or quality standards for domestically manufactured firearms. Although the Gun Control Act of 1968 sets such standards for imported handguns, that law does not extend to handguns manufactured in this country. Most consumer products are regulated by the Consumer Product Safety Commission, established in 1972 by the Consumer Product Safety Act. The statutory definition of the term "consumer product" *excludes* several products that are regulated elsewhere by the federal government (e.g., food and drugs, regulated by the Food and Drug Administration, and aircraft, regulated under the Federal Aviation Act). However, the definition of "consumer product" also specifically excludes firearms and ammunition (as well as tobacco products), even though these products are not otherwise subject to federal safety or quality standards.

Under Illinois law, it is unlawful for a person to store a gun without childproofing if a child under the age of fourteen gains access and thereafter causes death or great bodily harm.<sup>20</sup> However, reactive measures such as this merely punish the gun owner after a child or other person has already been injured or killed because the gun has no childproofing devices. The U.S. General Accounting Office (GAO) has estimated that 31 percent of accidental deaths caused by firearms might be prevented by the addition of two devices: a child-proof safety (8 percent) and a loading indicator (23 percent).<sup>21</sup> Thus, the incorporation of simple childproofing devices on guns is an important *preventative* measure against common handgun injuries to children.

### **Child Safety Regulations Would Make Handguns Safer and Reduce Death and Injury in Illinois**

Regulations requiring handguns to satisfy the following child safety criteria would help mitigate the grave risk of harm posed to Illinois children:

- incorporate built-in locking devices to prevent unauthorized access;
- incorporate load indicators or other devices on handguns that use a magazine, to show when the weapons are loaded;
- use a childproof design to prevent small children from operating guns, such as large grip size, requiring multiple motions to operate, and setting a minimum pull-strength; and
- have all handgun models tested to ensure they will not accidentally discharge if dropped.

### **The Attorney General has Broad Power to Define and Remedy Unfair Acts or Practices under the Illinois Consumer Fraud Act**

The Illinois Consumer Fraud Act proscribes “[u]nfair methods of competition and unfair or deceptive acts or practices . . . in the conduct of any trade or commerce . . .”<sup>22</sup> The Illinois Act defines “trade” and “commerce” as “the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, . . . and shall include any trade or commerce directly or indirectly affecting the people of this State.”<sup>23</sup> By its own terms, the Act must be liberally construed.<sup>24</sup> To be sure, handguns fall within the purview of the statute as tangible property offered for sale in the state of Illinois.

Section 4 of the Act delegates broad power to the Attorney General to promulgate rules to remedy unfair practices. “The Attorney General may, in addition to other powers conferred upon [her] by this Act...promulgate rules and regulations as may be necessary, which rules and regulations shall have the force of law.”<sup>25</sup> Illinois courts have described this delegation as conferring “the broadest kind of power” on the Attorney General to protect consumers.<sup>26</sup> This power extends to the Attorney General’s discretion to identify, on a case-by-case basis, those unfair practices that are contrary to the public interest.<sup>27</sup> “The Act is clearly within the class of remedial statutes which are

designed to grant remedies for the protection of rights, introduce regulation conducive to the public good, or cure public evils.”<sup>28</sup>

In *United Consumers Club, Inc. v. Attorney General*, plaintiffs challenged the Attorney General’s 1980 adoption of substantive rules regulating buyers’ clubs in Illinois, exercised pursuant to section 4 of the Act.<sup>29</sup> In a strongly worded opinion upholding the rules, the Illinois Appellate Court rejected the argument that the Attorney General’s power to promulgate rules was limited to procedural matters, concluding that the statute’s explicit language made it clear that rules and regulations promulgated by the Attorney General under section 4 are legislative in nature, and thus are binding on the courts.<sup>30</sup>

There is also ample precedent for a finding by the Attorney General that selling products that cause injury to children is an “unfair” practice under the Act. By its terms, the Act is to be construed with consideration to interpretations of the Federal Trade Commission and the federal courts of Section 5(a) of the Federal Trade Commission Act.<sup>31</sup> Illinois courts routinely look to federal interpretations of the FTC Act to inform their decision of matters brought under the Consumer Fraud Act.<sup>32</sup> In a long line of decisions, both the Supreme Court and the Federal Trade Commission (FTC) have found that selling products that cause injury to children is an “unfair” practice under the FTC Act.<sup>33</sup>

### **Consumer Product Safety Regulations Promulgated by the Massachusetts Attorney General and Upheld by the Massachusetts Supreme Court Offer a Compelling Model for Handgun Regulation in Illinois**

In 1997, then-Massachusetts Attorney General Scott Harshbarger promulgated a series of regulations pursuant to Massachusetts’ consumer protection law. These regulations define as deceptive or unfair acts or practices: (1) the sale of a handgun by a commercial seller that is not equipped with some form of trigger lock; (2) the sale of a handgun by a commercial seller that is not equipped with a mechanism to prevent an average 5-year old from firing the gun, such as increasing trigger resistance, altering the firing mechanism so that the child’s hand is too small to operate the gun, or requiring a series of motions to operate the gun; and (3) the sale of a semi-automatic handgun by a commercial seller that is not equipped with a load indicator or magazine disconnect.<sup>34</sup> The regulations further declare that the sale of a handgun prone to accidental discharge, either by repeated firings based on a single pull of the trigger or firing upon being dropped, is an unfair or deceptive practice.<sup>35</sup>

In *American Shooting Sports Council, Inc. v. Attorney General*, the Massachusetts Supreme Court upheld the authority of the Massachusetts Attorney General to promulgate regulations establishing safety standards for handguns under that State’s unfair business practices act.<sup>36</sup> Rejecting the argument that the Massachusetts Act was limited to regulation of marketing practices, the court found that unsafe products with either an inherent risk of danger or latent performance inadequacies amounted to unfair or deceptive acts that could be regulated by the

Attorney General under the Act.<sup>37</sup> The court reasoned that this was especially the case where the risk of harm could not be avoided by adequate disclosures or warnings.<sup>38</sup> For example, even where the purchaser of a handgun can read any warnings included with the gun, subsequent or unauthorized users—such as children who find and play with the gun—will likely not have read the warnings. In some cases, the child may be too young to understand the warnings. Thus, warnings are inadequate to protect against the harm. Further, noting that the Massachusetts Act was to be interpreted with reference to the FTC Act, the court found that under the FTC Act, “unwarranted health and safety risks may support a finding of unfairness.”<sup>39</sup>

## Conclusion

The Massachusetts experience offers valuable guidance and support for action by the Illinois Attorney General to protect Illinois children from unsafe, deadly handguns. The Illinois Consumer Fraud Act provides the platform for such action. We look forward to working with Illinois Attorney General Lisa Madigan to make safer handguns a reality in Illinois, and to saving the lives of innocent Illinois children.

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<sup>1</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR HEALTH STATISTICS, 50 NATIONAL VITAL STATISTICS REPORT No. 15, table 18 (Sept. 14, 2002).

<sup>2</sup> Karen D. Gotsch, et al., CDC SURVEILLANCE SUMMARY No. SS-2, SURVEILLANCE FOR FATAL AND NONFATAL FIREARM-RELATED INJURIES—UNITED STATES, 1993-1998 (2001), available at <http://www.cdc.gov/mmwr/pdf/ss/ss5002.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> CDC, 2000, United States Firearms Deaths and Rates per 100,000.

<sup>6</sup> CDC, NATIONAL CENTER FOR HEALTH STATISTICS, 50 NATIONAL VITAL STATISTICS REPORT No. 15, table 18, *supra* note 1.

<sup>7</sup> Gotsch, et al, Table 1 (*supra* note 2).

<sup>8</sup> *Id.*

<sup>9</sup> U.S. GEN. ACCOUNTING OFFICE, ACCIDENTAL SHOOTINGS: MANY DEATH AND INJURIES CAUSED BY FIREARMS COULD BE PREVENTED, at 17 (1991), available at <http://161.203.16.4/d20t9/143619.pdf>.

<sup>10</sup> CDC, NATIONAL CENTER FOR HEALTH STATISTICS, 49 NATIONAL VITAL STATISTICS REPORT No. 8, table 26 (Sept. 21, 2001).

<sup>11</sup> Jenifer Cartland, et al., Center for Childhood Safety, Child Health Data Lab, Children’s Memorial Hospital, STATE & COMMUNITY REPORTS ON INJURY PREVALENCE & TARGETED SOLUTIONS (SCRIPTS), CHILD AND ADOLESCENT INJURY IN ILLINOIS (1998), available at <http://www.chdl.org>.

<sup>12</sup> *Id.* Table 1.1.

<sup>13</sup> *Id.*

<sup>14</sup> CDC, 1998-2000, ILLINOIS UNINTENTIONAL FIREARM DEATHS AND RATES PER 100,000.

<sup>15</sup> A.L. Kellerman, R.K. Lee, et al., *The Epidemiological Basis for the Prevention of Firearm Injuries*, ANNU. REV. PUBLIC HEALTH, at 31 (1991).

<sup>16</sup> *Are Children at Risk? Survey: Most Gun Owners with Children Leave Weapons Unlocked*, available at <http://abcnews.go.com/sections/us/DailyNews/gunlocks000330.html> (2000).

<sup>17</sup> A.K. Kellerman, et al. at 27, *supra* note 14.

<sup>18</sup> *Are Children at Risk?*, *supra* note 15.

<sup>19</sup> S.M. Naureckas, et al., *Children’s and Women’s Ability to Fire Handguns*, 149 ARCHIVES OF PEDIATRICS & ADOLESCENT MEDICINE, (Dec. 1995).

<sup>20</sup> 720 ILCS § 5/24-9.

<sup>21</sup> See U.S. GEN. ACCOUNTING OFFICE, *supra* note 8, at 2-3.

<sup>22</sup> 815 ILCS § 505/2.

<sup>23</sup> *Id.*

<sup>24</sup> 815 ILCS § 505/11a.

<sup>25</sup> 815 ILCS § 505/4.

<sup>26</sup> *United Consumers Club v. Illinois*, 456 N.E.2d 856, 859–60 (Ill. App. Ct. 3d. 1983).

<sup>27</sup> *Scott v. Assn. for Childbirth at Home*, 430 N.E.2d 1012, 1018 (1981).

<sup>28</sup> *Id.* at 1017.

<sup>29</sup> 456 N.E.2d 856 (Ill. App. Ct. 3d. 1983).

<sup>30</sup> *Id.* at 859.

<sup>31</sup> 815 ILCS § 505/2.

<sup>32</sup> See, e.g., *People v. Datacom Systems*, 585 N.E.2d 51, 64 (1991); *Scott v. Assn for Childbirth at Home*, 430 N.E. 2d at 1013

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(effective regulation of unfair practices requires flexibility and case-by-case definition).

<sup>33</sup> FTC v. R.F. Keppel & Bro. Inc., 291 U.S. 304 (1934) (practice of selling penny candies in “break and take” packs was unfair because it violated public policy by tempting and encouraging children to gamble); F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 243 (1972) (finding that the unfairness doctrine was not limited to deceptive or anti-competitive conduct); Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), *reprinted in* H.R. REP. NO. 156, Pt. 1, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. 33-40 (1983); [*hereinafter* 1980 Policy Statement]; In the Matter of Philip Morris, Inc., 82 F.T.C. 16 (1873). In the 1980 Policy Statement, the FTC set forth a three factor test to determine whether a practice is unfair: (1) whether the practice injures consumers; (2) whether it violates established public policy; and (3) whether it is unethical or unscrupulous. Under this three-pronged test, selling unsafe handguns, either because they lack a device to prevent a child from operating the gun or discharge upon being dropped, is an unfair practice. For an extensive discussion of the application of this test to unsafe handguns, see the White Paper.

<sup>34</sup> American Shooting Sports Council v. Attorney General, 711 N.E.2d 899, 901-02 & nn 2-6 (Mass. 1999); see also Office of the Massachusetts Attorney General, ENFORCEMENT NOTICE #2, ATTORNEY GENERAL’S HANDGUN SAFETY REGULATIONS 1-5 (2000), available at <http://www.ago.state.ma.us/guns.asp> (Aug. 15, 2001).

<sup>35</sup> American Shooting Sports Council at 902 n.4.

<sup>36</sup> *Id.* at 901-02.

<sup>37</sup> *Id.* at 904-05.

<sup>38</sup> *Id.* at 904.

<sup>39</sup> *Id.* at 907