Suing Gun Manufacturers: A Shot in the Dark

Matthew Pontillo
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INTRODUCTION

There is a dangerous trend in civil litigation that threatens to displace the well-established principles of tort law. Manufacturers of legal products are being sued for the misuse of their products by third parties, of which the manufacturers have no control over. Lawsuits brought against gun manufacturers are designed to recover the costs associated with gun violence from the manufacturers of firearms.1 These suits are premised on a dubious legal basis and their outcome is uncertain.2 Typically in these cases, the harm is the result of an intervening criminal act committed by a third party.3 It is important to remember that the weapons at issue here function as they were

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1 See, e.g., Hamilton v. Accu-Tek, 62 F. Supp. 2d 802 (E.D.N.Y. 1999) (denying defendant's motion for a judgement as a matter of law). In Hamilton, the plaintiffs sought compensatory and punitive damages from 25 handgun manufacturers for injuries caused by firearms. See id. at 808. Collectively, these defendants supplied most of the handguns on the United States market. See id. The plaintiffs asserted that the marketing and distribution practices of the defendants generated an underground market that provided criminals with easy access to firearms. See id. Liability was apportioned based upon a market share theory of liability. See id. at 839-46.

2 See id. Judge Weinstein held that the defendants had an obligation to exercise reasonable care in the marketing and distribution of their products so as to guard against criminal use. See id. But see Arimjo v. Ex Cam, Inc., 656 F. Supp. 771, 775 (D.N.M. 1987) (refusing to impose liability on handgun manufacturers for criminal misuse).

3 See Hamilton, 62 F. Supp. 2d at 808-10. The facts established that six of the plaintiffs were killed and a seventh permanently disabled as a result of the criminal misuse of a firearm by a third party in unrelated incidents. See id. In all of the incidents except one, the guns used to commit these crimes were never recovered or identified. See id.
designed to and are free of mechanical defects. Usually, there is no relationship between the manufacturer and the criminal user of the weapon or the victim.\(^4\) In each case the manufacturers have complied with state and federal laws regarding the manufacture and distribution of the firearms involved.\(^5\) The majority of the guns in question, when they have been recovered or identified, have been lawfully passed from the manufacturer to a licensed firearms distributor.\(^6\) Plaintiffs have succeeded in only a limited number of cases and under narrow circumstances.\(^7\) Private parties, as well as local municipalities, have brought lawsuits against manufacturers advancing a variety of legal theories upon which to premise recovery.\(^8\) Suits based upon products liability or strict liability theories of recovery stand on shaky legal ground and are unlikely to succeed because courts are unwilling to destroy established tort law principles.\(^9\)

In private actions, plaintiffs are either those injured by gun violence or their survivors; they seek compensatory and, in most cases, punitive damages.\(^10\) In municipal actions, local

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\(^7\) See *Kelley v. R.G. Indus.*, 497 A.2d 1143 (Md. 1985) (creating an exception that allows an action premised upon strict liability for injuries caused by poor quality handguns commonly known as “Saturday Night Specials” even though they function properly). But see *Md. CODE ANN.*, art. 27, 830-I (1999) (eliminating a gun manufacturer’s strict liability for damages caused by the criminal use of any firearm).

\(^8\) See *Hamilton*, 62 F. Supp. 2d at 808 (E.D.N.Y. 1999) (action brought by the victims of criminal attacks or their survivors against gun manufacturers); *Morial v. Smith & Wesson*, No. 98-18578 (La. Dist. Ct. filed Oct. 30, 1998) (action brought by the mayor of New Orleans seeking reimbursement for the costs of providing the emergency services necessitated by gun violence).


\(^10\) See, e.g., *Casillas*, 1996 U.S. Dist. LEXIS 7396, at *1–2 (commencing an action against the manufacturer seeking compensatory and punitive damages for non-fatal injuries caused by a criminal third party).*
governments seek compensation for the public health and law enforcement costs incurred as a result of gun violence.\textsuperscript{11} Making whole those who have been injured or suffered a loss is a noble and important endeavor. It is misguided, however, to shift the blame from those who are responsible to those who properly engage in a lawful activity. These suits have been inspired by and are modeled after the litigation against the tobacco industry.\textsuperscript{12} Accordingly, the courts have refused to impose liability based upon the tort theories of strict liability and products liability when the gun in question functioned properly. To do so would open the door to the imposition of liability against any manufacturer who produces an article that causes harm even though it has some social utility or value.\textsuperscript{13} Some advocates of manufacturer liability endorse it as a means of gun control.\textsuperscript{14} This approach is misguided because judicial activism in this area will usurp the legislative process.\textsuperscript{15}

I. "SEND LAWYERS, GUNS AND MONEY"\textsuperscript{16}

A. The Nature of the Gun Industry

Although the United States is the largest consumer of


\textsuperscript{12} See David Rosenbaum, Echoes of Tobacco Battle in Gun Suits, N.Y. Times, Mar. 21, 1999, at A32 (noting the similarity to suits brought by forty state Attorneys General against tobacco companies seeking to recover the expenses associated with smoking related illnesses).

\textsuperscript{13} See WAYNE LAPIERRE, GUNS, CRIME AND FREEDOM 22--28 (1994) (establishing the social utility of firearms as it is achieved through their use for self-defense and as a deterrent to criminal behavior).

\textsuperscript{14} See Fox Butterfield, California Cities to Sue Gun Makers Over Sales Methods, N.Y. Times, May 25, 1999, at A20 (indicating that the goal of a suit against a gun manufacturer is the reformation of the gun industry and recognition by cities that they would more likely achieve judicially what they have been unable to achieve legislatively).

\textsuperscript{15} See, e.g., Forni v. Ferguson, 648 N.Y.S.2d 73, 73 (1st Dep't 1996) (stating that it is for the legislature to determine whether the manufacture and sale of firearms should remain a legal endeavor).

\textsuperscript{16} WARREN ZEVON, Lawyers, Guns and Money, on EXCITABLE BOY (Elektra/Asylum Records 1978).
firearms in the world, it is a comparatively small $1.5 billion a year industry.  

"[T]here are more than 200 million guns in circulation in the United States, and more than a third of American households have one." There are three distinct groups of firearm manufacturers. Such well-known names as Smith & Wesson, Colt, and Mossberg, among others, comprise the "Gun Valley" companies, so named because of their geographical proximity to the Connecticut River Valley in New England. The Los Angeles area is home of the "Ring of Fire" companies, which include Lorcin, Davis Industries, and Bryco Arms, among others. The final group consists of foreign manufacturers such as Beretta and Glock. Almost all of the companies are privately held; therefore, very little information is known about their internal financial structure. Because of its highly competitive nature, the gun market, while small, produces narrow profit margins. In 1998, Sturm, Ruger & Co. (Ruger) had gross sales of $212 million and profits of just $23 million. This places Ruger among the most profitable gun manufacturers. Of the $212 million in gross sales, $67 million was attributable to Ruger's business activities outside the gun market.

19 See Symonds, supra note 17, at 63; Matt Bai, Clouds Over Gun Valley, NEWSWEEK, Aug. 23, 1999, at 34.  
20 See Larry Armstrong, No Surrender From Mr. Saturday Night Special, BUS. WK., Aug. 16, 1999, at 67. These companies produce inexpensive, small caliber, easily concealed firearms that law enforcement personnel typically refer to as "Saturday Night Specials" or "junk guns" because of their poor quality. See id. The name "Ring of Fire" was coined because the companies are geographically situated in the suburbs surrounding Los Angeles. See id. Bruce Jennings is the innovator who created the "Saturday Night Special" industry in this country in the wake of the Gun Control Act of 1968, which banned the foreign importation of similar weapons. See id. Jennings is considered a hard-liner in the industry who refuses to voluntarily alter his manufacturing and distribution strategy. See id.  
21 See Symonds, supra note 17, at 63–64 (noting that each foreign manufacturer has a United States subsidiary).  
22 See id. at 64.  
23 See id.  
24 See id.  
25 See id. Sturm, Ruger & Co. is the only publicly listed gun manufacturer in the United States. See id. Contrast Ruger's earnings with Colt. Colt had gross sales of $96 million with profits of just $6 million. See id.  
26 See id.
The firearms industry is heavily regulated by federal law.\textsuperscript{27} Firearm dealers must obtain a Federal Firearms License in order to buy and sell weapons.\textsuperscript{28} Dealers are required to have prospective purchasers sign a sworn statement attesting to their identity and fitness to purchase a firearm, and to conduct a background check.\textsuperscript{29} In the event a purchaser misuses a firearm, the violation of a regulation by the seller generally constitutes negligence per se.\textsuperscript{30} Many states have also promulgated a regulatory scheme concerning the manufacturing, sale, and licensing of firearms.\textsuperscript{31} A manufacturer who operates within the parameters of these regulatory schemes should not be subject to the same liability as one who violates an established regulation or safeguard.

The gun manufacturers do not sell their products directly to retail dealers or private consumers. Rather, most manufacturers sell exclusively to distributors who, in turn, supply independent retailers.\textsuperscript{32} The retailers, in turn, provide the guns to the consumer market. Under this two-tier approach, the manufacturers have no involvement with the retailers. Recently, the Arkansas Supreme Court recognized the unique nature of the industry when it refused to hold a manufacturer liable because the manufacturer had no control over the actions of the dealers or retailers.\textsuperscript{33} It is unrealistic to expect a

\textsuperscript{27} See generally 18 U.S.C. §§ 921–930 (2000) (establishing a comprehensive federal regulatory scheme that includes licensing requirements and guidelines for the manufacture, sale and distribution of firearms).


\textsuperscript{29} See id. § 922(c).


\textsuperscript{31} See, e.g., N.Y. PENAL LAW §§ 400.00–10 (McKinney 2000) (establishing licensing requirements for the possession, disposition and repair of firearms, as well as regulations concerning the reporting of firearm thefts).

\textsuperscript{32} See Symonds, supra note 17, at 65. The nature of the industry is probably the result of an accident of history stemming from a period when the industry was in its infancy and the transportation and communication systems in this country were crude. See Colt, History of Colt (visited July 6, 2000) <http://www.colt.com/colt/html/fla_historyofcolt.html> (noting that in the early part of Colt's 136 year history, the company utilized travelling "jobbers" who were essentially semi-independent wholesalers selling to local retailers).

\textsuperscript{33} See First Commercial Trust v. Lorcin Eng'g, Inc. 900 S.W.2d 202, 205 (Ark. 1995) (holding that the manufacturer had no duty under these circumstances
manufacturer to critique the business dealings of an independent retailer who is regulated by federal—and possibly state—law, and with whom the manufacturer has little or no contact.

Criminals procure guns in a variety of ways. One of the most common methods is the use of a "straw purchaser," or a stand-in, who legally purchases a gun and subsequently transfers it to someone else.\(^{34}\) Another method is the falsification of a "Firearms Transaction Record" by a purchaser at the time of sale.\(^{35}\) Criminals utilize these tactics to circumvent statutory safeguards. Consequently, the manufacturer does not know who ultimately possesses the gun in question. The answer to these problems is to enact uniform purchaser eligibility and identification measures among the states. These measures would prevent such practices and would render it unnecessary to impose liability upon a firm that lawfully sells a product. The manufacturers should not be singled out as pariahs simply because they are easy and unpopular sources of compensation for a particular societal shortcoming.

**B. Traditional Tort Causes of Action**

Plaintiffs who have been injured through the intentional or reckless misuse of firearms by third parties have advanced a variety of legal theories as a basis for recovery against manufacturers.\(^{36}\) Typically, plaintiffs have asserted claims based upon strict products liability,\(^{37}\) strict liability by reason of because it had no special relationship with the seller or the purchaser of the handgun).

\(^{34}\) See Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 826 (E.D.N.Y. 1999). Relatively few guns used to commit crimes are stolen. See id. at 838.

\(^{35}\) See id.


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an abnormally dangerous or ultra-hazardous activity,\textsuperscript{38} public nuisance,\textsuperscript{39} and more recently, negligent marketing and distribution.\textsuperscript{40} Evaluation of any such claim is necessarily predicated upon an analysis of the controlling law in the state whose substantive law applies to the controversy.\textsuperscript{41}

1. Strict Products Liability

In \textit{McCarthy v. Olin Corp.},\textsuperscript{42} the plaintiffs, who were the victims and survivors of a shooting rampage perpetrated by Colin Ferguson, sued the manufacturer of the "Black Talon" brand ammunition used in the attack.\textsuperscript{43} The plaintiffs asserted strict products liability, claiming that the ammunition was defective.\textsuperscript{44} In New York, strict products liability is established by demonstrating the existence of either a manufacturing, warning, or design defect.\textsuperscript{45} The plaintiffs claimed defective

\begin{itemize}
\item \textsuperscript{38} \textit{See} \textit{id}.
\item \textsuperscript{40} \textit{See} \textit{Hamilton}, 935 F. Supp. at 1314.
\item \textsuperscript{41} \textit{See} \textit{Leslie v. United States}, 986 F. Supp. 900 (D.N.J. 1997) (applying New Jersey law and dismissing the plaintiff’s strict products liability and negligence claims against the manufacturer of ammunition that performed as intended and advertised); \textit{Forni v. Ferguson}, 648 N.Y.S.2d 73, 73 (1st Dep’t 1996) (applying New York law and dismissing the plaintiff’s products liability claim where the manufacture of a bullet was legal and the bullet performed as it was designed to); \textit{Cincinnati v. Beretta U.S.A. Corp.}, No. A9902369, 1999 WL 809838 (Ohio Com. Pl. Oct. 7, 1999) (applying Ohio law and dismissing the plaintiff’s claim based upon strict liability, products liability and public nuisance).
\item \textsuperscript{42} 119 F.3d 148 (2d Cir. 1997). On December 7, 1993, Colin Ferguson attacked passengers on a Long Island Rail Road commuter train. Six passengers were killed and nineteen others were wounded. \textit{See id}.
\item \textsuperscript{43} \textit{See id}. at 151–52. Ferguson used nine-millimeter hollow-point ammunition called “Black Talons.” The bullet is designed to expand upon impact and inflict more tearing of flesh and bone than conventional ammunition. The ammunition was originally designed only for use by law enforcement, but Olin made it commercially available to consumers for approximately one year from 1992 to 1993. \textit{See id}.
\item \textsuperscript{44} \textit{See id}. at 154–55.
\item \textsuperscript{45} \textit{See id}. (citing \textit{Victorson v. Bock Laundry Mach. Co.}, 335 N.E.2d 275 (N.Y. 1975)) (noting that a manufacturing defect occurs when the product is dangerous because of a manufacturing mistake that renders it different from its intended
design because the ammunition's unique ability to inflict excessive bodily harm outweighed its utility. The court dismissed the claim because when the risk-utility analysis was applied, there was nothing wrong with the product, it performed exactly as designed. The court determined that "the risks ... [arose] from the function of the product, not any defect in the product." The court stated further that "[t]here is no reason to search for an alternative safer design where the product's sole utility is to kill and maim."

2. Negligent Marketing

In McCarthy, the plaintiffs also pursued a negligent marketing claim premised on the notion that the defendant should have restricted sales to law enforcement agencies and should have known that its marketing strategy would attract "many types of sadistic, unstable and criminal personalities, such as Ferguson." The court rejected the claim because the defendant did not owe a legal duty to the plaintiffs and could not control the criminal misuse of the "Black Talons" by Ferguson.

The federal court sitting in diversity in McCarthy gave great weight to a New York Appellate Division case, Forni v. Ferguson, involving almost identical issues and arising out of

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46 See McCarthy, 119 F.3d at 155. In New York, a plaintiff must prove that the harm of the product outweighed its utility and that a safer alternative design was possible. See Voss, 450 N.E.2d at 208–09.

47 See McCarthy, 119 F.3d at 155; see also Leslie v. Olin Corp., 986 F. Supp. 900, 907 (D.N.J. 1997) (holding that there is no cause of action for a non-defective product). The court also dismissed plaintiff's assertion that the "Black Talons" were an inherently dangerous product by finding this claim was phrased in terms of strict products liability, which is not recognized in New York when premised upon "an unreasonably dangerous per se product." See McCarthy, 119 F.3d at 156.


49 Id. at 155.

50 Id. at 156.

51 See id. at 156–57. The McCarthy court noted that foreseeability does not create a duty but, rather, is used to determine the scope of one's duty once such a duty is established. See id. (citing Pulka v. Edelman, 368 N.E.2d 1019, 1022 (N.Y. 1976)).

52 648 N.Y.S.2d 73 (1st Dep't 1996).
the same incident as in *McCarthy*. The Appellate Division affirmed the order of the New York County Supreme Court, dismissing the plaintiff’s complaint for failing to state a cause of action. The firearm and ammunition were not defective as a matter of law because "a product’s defect is related to its condition, not its intrinsic function." The court noted that the "manufacture, sale and ownership" of the gun and ammunition in question were legally sanctioned. Like the *McCarthy* court, the court in *Forni* found that there was no duty owed by the manufacturer to the plaintiffs: "New York does not impose a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product." Additionally, "[t]he manufacturers . . . certainly had no control over the criminal conduct of a third party."

The New York view is typical and emphasizes that "[p]roducts are not generically defective merely because they are dangerous." Similarly, in *Casillas v. Auto-Ordnance Corp.*, a California court noted that "[t]he California legislature confirmed that users of firearms, not manufacturers of legal, nondefective firearms, are responsible for injuries caused by firearms." A manufacturer is not an insurer for its product and

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53 See *McCarthy*, 119 F.3d at 154.
54 See *Forni*, 648 N.Y.S.2d at 74. As in *McCarthy*, the plaintiffs claimed that the gun, magazine and ammunition were defective and subject to strict products liability. See *id*.
55 *Id.* at 74 (citing Robinson v. Reed Prentice Div. of Package Mach. Co., 403 N.E.2d 440 (N.Y. 1980)).
56 *Forni*, 648 N.Y.S.2d at 74.
57 *Id*.
58 *Id*.
59 See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998) (indicating that a clear majority of jurisdictions have refused to impose liability based upon non-defective products that are nevertheless egregiously dangerous); see also Moore v. R.G. Indus., 789 F.2d 1326 (9th Cir. 1986) (denying recovery under California law when a gun was used intentionally to render the victim a quadriplegic); Shipman v. Jennings Firearms, Inc., 791 F.2d 1532 (11th Cir. 1986) (denying recovery under Florida law to a wife’s estate when she was intentionally killed by her husband with a properly functioning handgun); Strickland v. Fowler, 499 So. 2d 199 (La. Ct. App. 1986) (denying recovery under Louisiana products liability law because the guns in question functioned as designed and the inherent dangers associated with firearms were well known).
60 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998).
62 *Id.* at *3* (considering Cal. Civ. Code § 1714.4(b)(2), which provides that the manufacture of a non-defective firearm is not the proximate cause of injuries inflicted by a third party). The plaintiffs were seriously injured by gunfire during an
is not required to safeguard against every conceivable misuse when selecting design alternatives. It is recognized that "guns may kill; knives may maim; liquor may cause alcoholism; but the mere fact of injury does not entitle the person injured to recover . . . . [Rather] there must be something wrong with the product, and if nothing is wrong there will be no liability." Furthermore, manufacturers do not have a duty to warn the public of the dangers associated with firearms since those hazards are obvious and generally recognized.

The traditional tort theories of negligence and strict products liability do not provide a basis to hold gun manufacturers liable for the criminal misuse of guns by others. The courts that have addressed the issue have consistently refused to impose strict products liability upon the manufacturer of a firearm that performed as it was designed. When the assault but the gun in question was purchased nine years earlier by the defendant's family. See Casillas, 1996 WL 276830, at *1.


DeRosa, 509 F. Supp. at 769 (quoting MURPHY & SANTAGATA, ANALYZING PRODUCT LIABILITY 4 (1979)) (alterations omitted).


See id. at 760-61; see also John P. McNicholas & Matthew McNicholas, Ultrahazardous Products Liability: Providing Victims of Well-Made Firearms Ammunition To Fire Back at Gun Manufacturers, 30 LOY. L.A. L. REV. 1599 (1997) (acknowledging that traditional theories of tort law are inappropriate or inadequate for recovery against the manufacturers of well-made firearms that function properly, and instead, advocating the creation of a new cause of action, Ultrahazardous Products Liability, that would permit consumers and bystanders to recover from gun manufacturers).

See Moore v, R.G. Indus., 789 F.2d 1326, 1327 (9th Cir. 1986) (holding that a gun manufacturer is not strictly liable for the injuries that result, in the absence of negligent design, when a gun is used criminally); Shipman v. Jennings Firearms, Inc., 791 F.2d 1532, 1534 (11th Cir. 1986) (holding that when a gun is used in a criminal act, the manufacturer is not strictly liable for injuries under strict products liability); Perkins v. F.I.E. Corp., 762 F.2d 1250, 1267-68 (5th Cir. 1985) (holding that manufacturers who produce guns that work as designed are not strictly liable for injuries that result from the weapons used in the commission of a crime); Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1324 (E.D.N.Y. 1996) (holding that the plaintiff's strict liability claim for criminal misuse by a third party was not valid); Delahanty v. Hinckley, 564 A.2d 758, 761 (D.C. 1989) (holding that a police officer who was shot and injured by a criminal could not hold manufacturers of the weapon liable for the injuries he sustained); King v. R.G. Indus., 451 N.W.2d 874, 875 (Mich. Ct. App. 1990) (holding that a manufacturer could not be held strictly liable for criminal misuse of handgun).
plaintiff asserts a cause of action rooted in defective design because of insufficient safety features incorporated into the design of the weapon, the alleged defect in the weapon must be an actual cause of the injuries sustained and not just a mere condition. The intentional and reckless actions of pointing a purportedly defective gun at another and pulling the trigger is a superseding intervening cause that will relieve a manufacturer of liability. As unpleasant as it sounds, a firearm and its ammunition must be deadly in order to perform the function that they were designed to achieve.

3. Abnormally Dangerous or Ultra-Hazardous Activity

Part in parcel with the strict products liability cause of action, plaintiffs have usually included a cause of action based upon strict liability for an abnormally dangerous or ultra-hazardous activity. An activity may be classified as ultra-hazardous or abnormally dangerous depending upon the facts and circumstances of the incident. The following factors are relevant and should be considered:

(a) existence of a high degree of risk of some harm to the person, land, or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

63 See Rodriguez v. Glock, Inc., 28 F. Supp. 2d 1064, 1073 (N.D. Ill. 1998) (denying recovery from an allegation that the gun used was unsafe and defective for having a short trigger pull and no external safety mechanism, because the act of pointing the gun at the victim was an intervening cause of the injuries sustained).
64 See Eichstedt v. Lakefield Arms Ltd., 849 F. Supp. 1287, 1292 (E.D. Wis. 1994) (holding that the defect was irrelevant in light of the reckless conduct of the third party).
72 Id.
Strict liability has generally been applied to the unnatural uses of land. As such, it is an inappropriate remedy for an injury caused by a fungible good introduced into the stream of commerce. Under New York law, "there is no cause of action for an unreasonably dangerous . . . product." Proponents of the application of strict liability to gun manufacturers and distributors claim it is necessary to insure that victims of gun violence have a resource available to compensate them for their damages. This is primarily a policy argument that establishes an insurer's standard and ignores the substantive state law involved. Otherwise stated, "it is a misuse of tort law, a baseless and tortured extension of products liability principles." Strict liability for an ultra-hazardous activity arises from the use of a product and not its manufacture; therefore, the production of a handgun is not abnormally dangerous.

To recognize liability of a manufacturer or distributor would virtually make them the insurer for such products... even though ... [they] are not negligently made nor contain any defects. Although such a social policy may be adopted by the legislature, it ought not to be imposed by judicial decree.

73 See Doundoulakis v. Hempstead, 368 N.E.2d 24, 27 (N.Y. 1977); see also RESTATEMENT (SECOND) OF TORTS § 520 cmt. j (1977). In the seminal decision of Rylands v. Fletcher, 13 Hurl & C. 774 (1865), the storage of water was deemed an ultra-hazardous activity and the landowner was held liable when the water escaped causing damage to adjoining property.


75 McCarthy, 119 F.3d at 156; see also supra note 47.

76 See E. Judson Jennings, Saturday Night. Ten P.M.: Do You Know Where Your Handgun Is?, 21 SETON HALL LEGIS. J. 31 (1997) (recognizing the ineffectiveness and impracticality of gun control measures and instead advocating strict liability and mandated insurance coverage in order to provide victims of gun violence with adequate compensation).


78 See Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984) (holding that the manufacturing of handguns is not an ultra-hazardous activity); Casillas v. Auto-Ordinance Corp., No. C95-5601FMS, 1996 U.S. Dist. LEXIS 7396, at *13 (N.D. Ill. May 15, 1996) (holding that because the legitimate use of firearms is not ultra-hazardous by statute, the manufacturing and sale cannot be ultra-hazardous).

In addition, "[t]here are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use."\textsuperscript{80} Strict liability, "carried to its logical extension" would make the production "of any product that is significantly misused and has a great potential for injuring or killing persons . . . an ultra-hazardous activity."\textsuperscript{81} For example, it "is a statistical certainty that thousands of people will be killed in alcohol-related accidents."\textsuperscript{82} Firearms and ammunition are, by necessity, inherently dangerous.\textsuperscript{83} Courts that have considered the question have rejected the application of strict liability for abnormally dangerous activity to firearms manufacturing.\textsuperscript{84} The imposition of strict liability for an abnormally dangerous activity is an inappropriate means of circumventing the principle of products liability, which is the appropriate method of recovery when dealing with manufactured goods.

In \textit{Copier v. Smith \\& Wesson},\textsuperscript{85} the plaintiff asserted that because handguns were designed to inflict injury and it was a statistical certainty that some handguns actually do cause harm, handgun production was an ultra-hazardous activity.\textsuperscript{86} The

\textsuperscript{80} \textsc{Restatement (Second) of Torts} § 402A cmt. k (1965).
\textsuperscript{81} \textit{Copier v. Smith \\& Wesson}, 138 F.3d 833, 838 (10th Cir. 1998).
\textsuperscript{82} \textit{Id.; see also} \textit{Baker v. State}, 1997 Tex. App. LEXIS 2154, at *6 (Tex. Ct. App. 1999); \textit{State v. Church}, 530 So.2d 1235, 1242 (La. Ct. App. 1988) (Jones, J., concurring) (indicating that "2.1 million Americans were killed in alcohol related accidents prior to 1975 and in 1980 alone 650,000 were injured in accidents involving alcohol").
\textsuperscript{84} \textit{See}, e.g., \textit{Delahanty v. Hinckley}, 564 A.2d 758, 760 (D.C. 1989). The plaintiff, a policeman, was shot by John Hinckley during the attempted assassination of President Ronald Reagan. \textit{See id. at} 759.
\textsuperscript{85} 138 F.3d 833 (10th Cir. 1998). Tanya Copier was shot and paralyzed by her ex-husband with a revolver manufactured by the defendant. \textit{See id. at} 834.
\textsuperscript{86} \textit{See id.}
court considered the factors listed in the Restatement (Second) of Torts used to determine abnormally dangerous activities. See Restatement (Second) of Torts § 520 (1977).

"None of the... factors... [are] implicated by the manufacturing of handguns, as opposed to the use—or rather, the misuse—of handguns." See Copier, 138 F.3d at 836.

4. Public Nuisance

The municipal plaintiffs, as well as some of the private plaintiffs, have asserted that the manufacture and sale of firearms constitutes a public nuisance. See e.g., Bubalo v. Navegar, Inc., No. 96-C3664, 1997 U.S. Dist. LEXIS 8551, at *7 (N.D. Ill. June 13, 1997) (claim asserted by a private plaintiff against a gun manufacturer); Cincinnati v. Beretta U.S.A. Corp., No. A9902369, 1999 WL 809838, at *2 (Ohio Com. Pl. Oct. 7, 1999) (municipal suit by the City of Cincinnati against manufacturers, distributors and trade associations).

A public nuisance is created by an unreasonable interference with a right common to the general public. See Restatement (Second) of Torts § 821B(1) (1979). The factors used in determining whether an activity creates an unreasonable interference with a public right include consideration of:

(a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience, or
(b) whether the conduct is proscribed by a statute ordinance or administrative regulation, or
(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect and, as the actor knows or has reason to know, has a significant effect upon the public right.

Id. § 821B(2).


See id. at *4–6. A pistol manufactured by the defendant was used to shoot two Chicago Police Officers during the commission of a burglary. See id. The perpetrator of the offense was apprehended and subsequently convicted at a criminal trial. See id. The asserted public right that was interfered with by the manufacture and distribution of the firearm was the right "to be free from disturbance and reasonable apprehension of danger to person and property." Id. at *4 (citation omitted).

application of strict liability. Liability imposed upon a manufacturer, in the absence of a defect, amounts to an insurer’s standard and is an action that is properly within the purview of the legislature and should not be imposed by a judicial decree. The court was also reluctant to recognize a new theory of nuisance under then existing state law. A public nuisance cause of action fails when the defendant manufacturer does not substantially participate in carrying out the activity that constitutes the nuisance.

In Cincinnati v. Beretta U.S.A. Corp., the court rejected a nuisance cause of action because the nuisance lay in the manufacturers’ alleged negligent manufacture and distribution of firearms, which are lawful products. Nuisance was inappropriate because “[a] separate body of law (strict product liability and negligence) has been developed to cover the design and manufacture of products.” In the case of guns, “the nuisance [created] is the criminal or reckless misuse of firearms by third parties who are beyond the control of the defendants” and not their manufacture. To allow the application of a public nuisance cause of action “to the design and manufacture of lawful products would be to destroy the separate tort principles which govern those activities.”

Proponents of manufacturer liability contend that firearm design contributes to both intentional and unintentional shootings. They advocate an alternative safer design incorporating passive safety features or “smart gun technology” to prevent the use of the firearm by anyone other than the owner. The rationale of this proposition is that manufacturer

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94 See id. at *12–15.
95 See id. at *13.
96 See id. at *14.
97 See id. at *10.
99 See id. at *2.
100 Id.
101 Id.
102 Id.
103 See Mark D. Polston & Douglas S. Weil, Unsafe By Design: Using Tort Actions To Reduce Firearms-Related Injuries, 8 STAN. L. & POL’Y REV. 13 (1997) (advocating the application of strict liability to manufacturers and gun owners in order to induce them to prevent injuries and practice safe storage techniques).
104 See id. at 15–16.
liability will provide a technology forcing incentive.\textsuperscript{105} Colt is already in the process of developing a "smart gun\textsuperscript{106} and it claims that it may have a working prototype in as early as two years.\textsuperscript{107} Colt estimates that development will cost as much as $40 million, however, it is currently forced to spend more of its limited assets on litigation than on the development of a commercially viable "smart gun."\textsuperscript{108} There is already a strong incentive to develop smart-gun technology without litigation. Sandia National Laboratories (SNL) conducted a two-year feasibility study for the National Institute of Justice regarding "smart guns" because there is a need in the law enforcement community for this technology.\textsuperscript{109} One out of every six police officers who is killed in the line of duty is shot with his or her own gun.\textsuperscript{110} Given the rather large army of law enforcement personnel in this country, there is a very strong commercial incentive for manufacturers to develop a viable "smart gun" for use by the law enforcement community.\textsuperscript{111} Until the technology

\textsuperscript{105} See id. at 17-18.

\textsuperscript{106} See Iver Peterson, Smart Guns Set Off Debate: How Smart Will They Really Be?, N.Y. TIMES, Oct. 22, 1998, at B1. "Smart guns" are designed to restrict use to the owner of the weapon. The Colt prototype uses a radio transponder contained inside of a bracelet that sends a signal to a receiver in the gun allowing the weapon to function. The transponder has a limited range and must be within a few inches of the gun. There are still serious doubts as to reliability, battery life and resistance to abuse. See id. Colt vows that it is committed to the development of personalized gun technology, but cautions that the technology is not yet mature and issues involving product safety and reliability have not yet been resolved. See Colt, Colt's Position on Personalized Weapons Technology (visited April 1, 2001) <http://www.colt.com/colt/html/k1_positionpaper.html>.

\textsuperscript{107} See Leslie Wayne, Colt Best Defense; In Difficult Times, a Gun Maker Tries to Counterattack, N.Y. TIMES, Mar. 12, 1999, at C1 (estimating that a commercially available "smart gun" could be ready within four years).

\textsuperscript{108} See id. Although Colt has received a $500,000 grant from the government to develop a "smart gun," financing is a significant problem for them. See id. In 1997, the company earned only $2 million in profits on sales of $96 million. See id.


\textsuperscript{110} See id. Approximately one police officer a month between 1979 and 1993 was killed during one of these take-away situations. See id. A "smart gun" would prevent these occurrences. See id.

\textsuperscript{111} As of June 1996, there were approximately 74,500 full-time federal law enforcement officers authorized to carry weapons. See BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FEDERAL LAW ENFORCEMENT OFFICERS 1996 (1998). This is an average of 28 officers for every 100,000 inhabitants. See id. On the state and local level, there are 2.4 law enforcement officers for every 1000 people in the population of the United States. See FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1998 291 (1999). New York City boasts the largest police department in the
is available and reliable, there will be no better alternative to current handgun design. In order to facilitate the research and development of more effective and safer firearms, which is critical to law enforcement, the private gun companies must remain economically viable and competitive.

C. Quasi Exception to Strict Liability

In Kelly v. R.G. Industries, the Maryland Court of Appeals carved out an exception to the state's common law by allowing the imposition of strict liability against a gun manufacturer under certain circumstances. The plaintiff, Olen J. Kelly was shot in the course of an armed robbery of the grocery store where he was employed. The court refused to impose strict liability upon the manufacture of firearms as an abnormally dangerous or ultra-hazardous activity because the application of this doctrine was limited to the owners or occupiers of land under Maryland law. The court next considered the product liability claim. The consumer expectation test failed since a product is not defective simply because it is capable, by design, of inflicting harm and consumers reasonably expect firearms to be dangerous. The risk utility test was inapplicable because that test only applies when a product malfunctions, here the gun functioned as designed. The court then indicated that "Saturday Night Specials" were not sanctioned as a matter of public policy and stated:

Saturday Night Specials are generally characterized by short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability. These characteristics render the Saturday Night Special particularly attractive for criminal use and virtually useless for the legitimate purposes of law enforcement, sport, and protection of persons, property and businesses.

The court reasoned that the legislative policies of the United States' Congress and the Maryland General Assembly, as

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112 497 A.2d 1143 (Md. 1985).
113 See id. at 1144.
114 See id. at 1147 (noting that this decision was consistent with the other jurisdictions that have confronted the issue).
115 See id. at 1148.
116 See id. at 1149.
117 Id. at 1153–54.
manifested in various gun control statutes, reflected the view that "Saturday Night Specials" should be treated differently from other handguns and that they have no legitimate place in American society.\textsuperscript{118} The court held that, "consistent with public policy," manufacturers of Saturday Night Specials are strictly liable to innocent victims of the criminal use of their products and that it is for the trier of fact to determine if a handgun is a "Saturday Night Special."\textsuperscript{119} That holding was subsequently nullified by the Maryland legislature which statutorily exempted gun manufacturers from strict liability for injuries caused by the criminal act of a third party.\textsuperscript{120} Other jurisdictions that have confronted the issue have refused to adopt the exception for "Saturday Night Specials."\textsuperscript{121} Carving out a special class or category of firearms can be problematic when one attempts to define the characteristics of the class.\textsuperscript{122} For example, low cost may be an attractive feature to criminals but it may also be indicative of efficient manufacturing, innovative design and the use of new materials. Therefore, these features may be equally attractive to law-enforcement agencies as well as others who lawfully use firearms.

II. MODERN ATTACKS ON MANUFACTURERS

A. Novel Approaches

A negligent distribution cause of action may apply to a firearms manufacturer who fails to employ reasonable means to prevent the sale of guns to those who are likely to misuse them.\textsuperscript{123} Under the doctrine of negligent entrustment, "[o]ne


\textsuperscript{119} See id. at 1159–60.

\textsuperscript{120} See MD. CODE ANN., Crimes and Punishments art. 27, § 36-I(b)(1) (1999) (preventing the application of strict liability for any harm caused by a firearm that was perpetrated by a third party).


\textsuperscript{122} See Delahanty, 564 A.2d at 762 (stating that one characteristic that would put guns into this special category is the fact that they are cheap).

\textsuperscript{123} See Bubalo v. Navegar, No. 96-C3664, 1997 U.S. Dist. LEXIS 8561, at *15–16 (N.D. Ill. June 13, 1997) (rejecting the claim because, under Illinois law, manufacturers of non-defective firearms have no duty to control the legal distribution beyond a legitimate sale).
who supplies... a chattel for the use of another whom the supplier knows or has reason to know... [is] likely... to use it in a manner involving unreasonable risk of physical harm to... others... is subject to liability." Therefore, the manufacturer must know or have reason to know the identity of the ultimate purchaser or, alternatively, the location where the weapon is going to end up. The nature of the gun industry does not provide for, or facilitate, such notice. Realistically, the manufacturer's liability ends once the firearm is legally transferred to a licensed dealer. The negligent distribution theory, used in Hamilton v. Accu-Tek, was based upon the premise that "the gun companies knew or should have known that oversupplying guns to southern states with weak gun laws led to 'the iron pipeline'—the shipping of guns up [Interstate] 95 for illegal use in strong gun control states like New York." 

The theory of negligent marketing as applied to gun manufacturers, contemplates the imposition of liability when a manufacturer utilizes methods of packaging and promotion that induce someone who is likely to misuse a firearm to purchase one. Under this theory, the method of marketing must have been a factor in the third party's decision to purchase the firearm. The fact that a manufacturer advertises a product that has distinguishing features is insufficient to impose liability even if those features are destructive in nature. Liability for advertising distinguishing features, such as the lethality of firearms, is tantamount to imposing limitless liability and making a manufacturer an insurer against the criminal misuse of firearms.

124 Restatement (Second) of Torts § 390 (1965).
125 See Bubalo, 1997 U.S. Dist. LEXIS 8551, at *15–16; Robinson v. Reed-Prentice, 403 N.E.2d 440, 443 (N.Y. 1980) (stating that a manufacturer is not obligated to trace its product through every step of the distribution process).
127 Mark Hamblett, Solo Counsel in Gun Case Gets Win With a Little Help, N.Y. L.J., February 18, 1999, at 8 (reporting comments by Elisa Barnes, Esq., counsel for the plaintiffs, discussing the jury verdict in favor of the plaintiffs in Hamilton v. Accu-Tek).
128 See Bubalo, 1997 U.S. Dist. LEXIS 8551, at *19–29 (dismissing the plaintiffs' claim because there was no causal relationship between the alleged negligent marketing practices and the injury); see also Resteiner v. Sturm, Ruger & Co., 566 N.W.2d 53, 54 (Mich. Ct. App. 1997) (holding that there is no cause of action for negligent marketing for the criminal misuse of a gun without a special relationship between the manufacturer and the victims).
of its products. When making the decision to purchase a particular firearm, a law enforcement agency or a citizen wants to know that they are getting the best that technology has to economically offer. The overwhelming majority of appellate decisions have rejected negligence causes of action and have held that there is no duty to refrain from the lawful manufacture or sale of firearms.

In *Hamilton v. Accu-Tek*, the plaintiffs, victims of gun violence perpetrated by third parties who obtained and used firearms unlawfully, brought a suit against forty-nine gun manufacturers. The manufacturers defended by asserting that they manufacture and sell a legal product in compliance with federal and state law regarding the distribution of firearms. The court noted that compliance with these regulations does not preclude a negligence action and is only evidence of due care by the defendants. The plaintiffs claimed that the firearms were defectively designed because they did not incorporate anti-theft or other passive safety devices designed to prevent their use by those other than the legitimate owner. The court rejected this claim because the plaintiffs were unable to establish that such devices existed or that they would constitute a reasonable alternative design. Strict liability for an ultra-hazardous activity was also rejected because this cause of action pertains primarily to the hazardous uses of land. The court found that the marketing of dangerous handguns was beyond the scope of this principle. The suit additionally claimed that the manufacturers marketed and distributed handguns in a negligent manner that facilitated the growth of

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132 See *Merrill v. Navegar, Inc.*, 75 Cal. Rptr. 2d 146, 203 (Cal. Ct. App. 1999) (Haerle, J., concurring in part and dissenting in part) (noting that there have been sixteen appellate cases since 1983 in which a cause of action premised upon negligence has been dismissed).


134 See *id* at 1314; see also 18 U.S.C. §§ 921–30 (1999) (establishing an extensive regulatory scheme applicable to the sale and distribution of firearms).


136 See *id*. at 1321–22.

137 See *id*. at 1324.

138 See *id*.

139 See *id*. The court also rejected a cause of action premised upon fraud because any representations made by the manufacturers were directed at the consumers of firearms and not the plaintiffs. See *id*. 
the illicit underground handgun market.140 The plaintiffs were faced with a proof problem because some of the victims were unable to identify the particular gun used to cause their injuries.141

Because only some form of collective liability142 would allow recovery, the court adopted a national market share theory of apportioning responsibility among manufacturers, theorizing that the New York Court of Appeals would do the same because of its history of innovation.143 The Court of Appeals had adopted the market share theory for apportioning liability in cases involving the generic anti-miscarriage drug DES.144 The Hamilton court disregarded the explicit warning provided by the New York Court of Appeals:

We stress, however, that the DES situation is a singular case, with manufacturers acting in a parallel manner to produce an identical, generically marketed product, which causes injury many years later, and which has evoked a legislative response reviving previously barred actions. Given this unusual scenario, it is more appropriate that the loss be borne by those that produced the drug for use during pregnancy, rather than by those who were injured by the use, even where the precise manufacturer of the drug cannot be identified in a particular action.145

The latent characteristic of the harm to the victims, long latency period, and the legislative intervention altering the statute of limitations were apparently critical elements affecting

140 See id. at 1314.
141 See id. at 1325.
142 See id. at 1329 (stating that collective liability enables the establishment of liability where proving causation is impossible and establishing a method of damage apportionment among the co-defendants).
143 See id. at 1327–29. The court rejected the “concerted activity” and “enterprise liability” theories of recovery since the former requires a tacit agreement to commit a tort and the latter requires joint control through a trade association or similar organization. See id. at 1331. The court found that the manufacturers’ lobbying and participation in trade associations was protected by the First Amendment under the Noerr-Pennington doctrine. See id. at 1316–21. Lobbying activity is not protected when it is a “sham” designed to disguise an attempt to injure a competitor or when the political activity involves illegal or unethical means. See id. at 1317.
144 See id. at 1328. The court reasoned that market share theory was necessary when the situation made it impracticable to prove which defendant caused the injury. See id. at 1329.
the New York court's decision. The situation with gun manufacturers is patently different because there has been no legislative intervention against the manufacturers and the hazards of firearms are widely known and a matter of common sense. National market share is also inappropriate because it includes all sales of firearms and does not distinguish between guns that were negligently and non-negligently sold. DES, by contrast, was potentially harmful with every sale and when used as it was intended.

After a four-week trial, fifteen of the manufacturers were found to have negligently marketed and distributed firearms. Damages were only awarded to Stephen Fox and his mother and were apportioned according to the national market share of the three manufacturers who could have produced the weapon that caused his injuries. The defendants' motions to dismiss and for a judgement as a matter of law were denied. Judge Jack Weinstein recommended, in his opinion, that the Second Circuit Court of Appeals certify the question of national market share liability to the New York Court of Appeals.

The defendants, in their motions, argued that they did not owe a duty to the plaintiffs under traditional tort principles. The court disagreed and determined that a duty was created because the manufacturer's special ability to detect and prevent risks created a protective relationship with foreseeable victims. The court reasoned that the jury could have concluded that the manufacturers were aware of the propensity of their products to make it into the illegal market. Under this approach any manufacturer can be liable for the conduct of a

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146 See id.
147 See id. at 1072 (stating that DES may cause "harmful latent effects" for children of mothers who took DES).
149 See id. at 808–09.
150 See id. at 802.
151 See id. at 847–48.
152 See id. at 821; see also Waters v. New York City Hous. Auth., 505 N.E.2d 922, 924–25 (N.Y. 1987) (holding that there is no duty to provide for the security and safety of pedestrian passersbys from the criminal acts of third parties and recognizing that to do so would create limitless liability).
third party no matter how egregious or distant the illicit activity is from the manufacturer.

According to the court, the manufacturer's ability to control the downstream distributors and retailers created a duty.\textsuperscript{155} This finding was based in large part on the testimony of Robert Hass, a former vice-president for marketing at Smith & Wesson.\textsuperscript{156} He indicated that the gun manufacturers could do more to stem the flow of guns into the illegal market by isolating retailers who either repeatedly made multiple sales or had large numbers of guns traced back to them.\textsuperscript{157} The court reasoned that manufacturers could decline to do business with unscrupulous dealers, limit sales at unregulated gun shows and require that transactions take place inside legitimate retail establishments.\textsuperscript{158} This reasoning disregards the inherent nature of the industry's two-tier structure. Under the present two-tier system, manufacturers have little opportunity to discover where their products ultimately end up. Judge Weinstein attempted to distinguish the \textit{Hamilton} case from other leading cases such as \textit{McCarthy v. Olin Corp.}\textsuperscript{159} and \textit{Forni v. Ferguson.}\textsuperscript{160} He stated that those cases sought to impose liability upon the manufacturers for marketing a dangerous product while \textit{Hamilton} focused on the method of marketing.\textsuperscript{161} But, in \textit{McCarthy} and \textit{Forni}, marketing methods were also challenged. The courts in those cases found that there was no duty to refrain from a lawful act and recognized that the defendants could not be expected to control the actions of a third person.\textsuperscript{162} The \textit{Hamilton} court, however, found a duty despite the general reluctance of New York courts to impose a duty to anticipate the criminal or tortious acts of third parties.\textsuperscript{163} Such liability may destroy a defendant's ability to provide a socially useful product or service; it is also inherently unfair to impose a duty upon someone who could do little to prevent the harm.\textsuperscript{164}

\textsuperscript{155} See id. at 821–22.
\textsuperscript{156} See id. at 832.
\textsuperscript{157} See id.
\textsuperscript{158} See id. at 826.
\textsuperscript{159} 119 F.3d 148 (2d Cir. 1997).
\textsuperscript{160} 648 N.Y.S.2d 73 (1st Dep't 1996).
\textsuperscript{162} See \textit{McCarthy}, 119 F.3d at 156–57; \textit{Forni}, 648 N.Y.S.2d at 74.
\textsuperscript{163} See \textit{Hamilton}, 62 F. Supp. 2d at 819–22.
\textsuperscript{164} See id. (distinguishing handguns from other, more acceptable, endeavors).
The jury in *Hamilton* awarded $500,000 to Stephen Fox, who was left paralyzed after being shot in the head. For the first time, a jury returned a verdict against a gun manufacturer in a negligence case involving non-defective firearms. If the verdict is subsequently appealed, many experts believe that the law is ultimately on the side of the defendants.

Similarly, the California Court of Appeals recently held that an action for the negligent marketing and distribution of a firearm could be maintained against a gun manufacturer for the injuries sustained as a result of a third party criminal act. The court found that the defendant owed a duty of care to the plaintiffs. It also found that there was a triable issue of fact as to whether they breached that duty by affirmatively placing and marketing a weapon into a stream of commerce that had a propensity for criminal misuse and clientele. The court was influenced by a legislative finding that the particular gun involved was, by definition, an "assault weapon," banned by

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165 See id. at 808–09, 820–21 (outlining the shooting of Stephen Fox).
166 See Fox Butterfield, Verdict Against Gun Makers is Likely to Prompt More Suits, N.Y. TIMES, Feb. 13, 1999, at B1. Richard Feldman, executive director of the American Shooting Sports Council, commented that the amount of the verdict was indicative of how insignificant the verdict was. See id. at B6. He said, "[i]n New York, $500,000 for brain damage is nothing these days, folks." Id.
167 The first case to reach a jury asserting negligent marketing and distribution was *Halberstam v. S.W. Daniel, Inc.*, No. 95-Civ.3323 (E.D.N.Y. 1998). In the end, the jury found in favor of the defendant because the link between the defendants marketing practices and the criminal use of the gun was too tenuous. Interestingly, this case was litigated before Judge Jack Weinstein, the same judge who presided over the *Hamilton v. Accu-Tek* case. See Timothy D. Lytton, Negligent Marketing: *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROO. L. REV. 681 (1998).
168 See Symonds, supra note 17, at 65–66. Harvard Law Professor W. Kip Viscusi noted that the law favors manufacturers, but warns that this may be irrelevant because "[i]f you get enough of these claims lodged against you, all you need is one jury getting mad at you." Id. at 66; see also Merrill v. Navegar, 89 Cal. Rptr. 2d 146, 203 (Cal. Ct. App. 1999) (Haerle, J., concurring in part and dissenting in part) (criticizing Judge Weinstein's holding and suggesting that it runs contrary to precedent established by the Second Circuit).
169 See Merrill, 89 Cal. Rptr. 2d at 171–78. In Merrill, the action was brought by the victims and survivors of those killed in a shooting rampage perpetrated by Gian Ferri inside of a law firm located at 101 California Street on July 1, 1993. See id. at 152. Ferri was armed with two nine-millimeter semi-automatic pistols manufactured by the defendant. See id. At the conclusion of his rampage, Ferri took his own life. See id. The court affirmed the lower court's decision to dismiss the cause of action asserting a claim premised on the theory of ultra-hazardous activity. See id. at 190–92.
170 See id. at 161–89.
California statute.\textsuperscript{171} The weapon was deemed to be a particular hazard when possessed by criminals that served no legitimate sporting purpose.\textsuperscript{172} The holding here, much like the "Saturday Night Special" exception,\textsuperscript{173} seems specifically tailored to the particular facts of this case. Like the "Saturday Night Special," the gun in question was an "assault weapon," as specifically defined by state statute,\textsuperscript{174} and the legislature had already addressed the issue. The term "assault weapon," however, is something of a misnomer. Mechanically, these firearms function in the same manner as any other semi-automatic weapon and differ only in their cosmetic appearance.\textsuperscript{175} Merrill v. Navegar has been criticized as "an egregious exercise in judicial legislation,"\textsuperscript{176} and contrary to established tort principles.\textsuperscript{177} The Merrill court's holding may be short lived since the California Supreme Court has decided to review the matter.\textsuperscript{178}

The Hamilton court's conclusion emphasized the proposition that the manufacturers had constructive notice of the diversion of firearms into the illegal market.\textsuperscript{179} In order for a manufacturer to prevent risks and control distributors, it must have information regarding the propensity with which its firearms get into the hands of criminals.\textsuperscript{180} The manufacturer must also be able to identify the source distributor or retailer who supplied the crime gun in order to have a realistic

\textsuperscript{171} See CAL. PENAL CODE §§ 12275.5, 12276 (Deering 1999); see also Merrill, 89 Cal. Rptr. 2d at 171.

\textsuperscript{172} See Merrill, 89 Cal. Rptr. 2d at 171–78. The court distinguished another California statute in reaching its conclusion. California Civ. Code § 1714(a) states that in a products liability action, a non-defective firearm is not the proximate cause of injuries caused by third parties. The court reasoned that the case at bar was not cast in terms of products liability but rather negligence. Therefore, the statutory exemption did not apply. See id. at 175–77.

\textsuperscript{173} See supra notes 117–122 and accompanying text.

\textsuperscript{174} See CAL. PENAL CODE § 12276 (Deering 1999).

\textsuperscript{175} See LAPIERRE, supra note 13, at 52–60.

\textsuperscript{176} Merrill, 89 Cal. Rptr. 2d at 193 (Haerle, J., concurring in part and dissenting in part).

\textsuperscript{177} See id. at 193–215.

\textsuperscript{178} See Merrill v. Navegar, 991 P.2d 755 (Cal. 2000) (granting the defendant's motion to review the California Court of Appeals' decision).


\textsuperscript{180} See Lytton, supra note 179, at 38–42.
opportunity to take appropriate remedial measures.\textsuperscript{181} The issue of notice is especially relevant when the gun in question has a short "time-to-crime."\textsuperscript{182} In these situations, the gun is closer to the manufacturer in the chain of commerce, which affords the manufacturer a better opportunity to exert its influence upon downstream consumers.\textsuperscript{183} The manufacturer will be more likely to have the ability to identify rouge dealers and thwart the illicit traffic in guns.

Recently, the Bureau of Alcohol, Tobacco and Firearms (ATF) has "significantly increased [its] efforts to determine how felons and other prohibited persons ... obtain firearms."\textsuperscript{184} Historically, the ATF has not routinely traced all firearms that were recovered by local police, including those used during the commission of crimes.\textsuperscript{185} The gun traces are necessary to provide the manufacturers with the accurate information they need to curtail the flow of guns into the underground market. If all of the guns used in crimes are not traced, the manufacturers will not be able to determine how and in what quantities their guns are being unlawfully used. This will inhibit any potential remedial action. The manufacturers are only now beginning to get the information they need from the ATF.\textsuperscript{186} Because of this inconsistent flow of information, the Hamilton court's analysis is flawed and the connection between the manufacturers and crime is tenuous at best.

B. The Tobacco Factor and Municipal Suits

On June 20, 1997, the Attorneys General of forty states

\textsuperscript{181} See id.

\textsuperscript{182} U.S. DEPT. OF THE TREASURY & U.S. DEPT. OF JUST., GUN CRIME IN THE AGE GROUP 18-20 13 (1999) [hereinafter GUN CRIME]. "Time-to-crime is the time it takes for a gun to move from the shelf of a federally licensed firearms dealer to recovery by a law enforcement official in connection with a crime." Id. at 13. Over 43\% of the guns recovered in the 27 cities participating in the Youth Crime Gun Interdiction Initiative had a time-to-crime of three years or less. See id.

\textsuperscript{183} See Lytton, supra note 179, at 38–42.

\textsuperscript{184} GUN CRIME, supra note 182, at 2.

\textsuperscript{185} See id. at 2–3. Local law enforcement was encouraged to submit crime guns to the National Tracing Center in order to identify the licensed dealer and the purchaser. See id. "The National Tracing Center of ATF traces firearms to their original point of sale upon the request of police agencies [but these agencies] do not request traces on all firearms used in crimes." MARIANNE W. ZAWITZ, U.S. DEP'T OF JUST., GUNS USED IN CRIME 4 (1995).

\textsuperscript{186} See supra notes 180–81 and accompanying text.
suing the tobacco industry and the tobacco companies announced that they had reached a settlement in the litigation.\textsuperscript{187} The suits were brought to recover health care costs incurred by the states as a result of smoking related ailments.\textsuperscript{188} The combination of state suits and private plaintiff class action suits threatened the very existence of the industry.\textsuperscript{189} The settlement of the tobacco litigation has inspired various municipalities to bring actions against the gun manufacturers in an effort to achieve similar results.\textsuperscript{190} Many of the same trial lawyers who spearheaded the tobacco litigation are involved in the suits against the gun companies.\textsuperscript{191} Philadelphia Mayor Edward Rendell was the first to publicly propose that municipalities sue gun manufacturers to recover the law enforcement and health care costs related to firearm violence.\textsuperscript{192} Similar to the manner in which cigarette companies targeted children, the gun companies are accused of targeting criminals, even if only tacitly doing so.\textsuperscript{193} In addition to the municipalities, the NAACP has also filed a suit in the

\textsuperscript{187} See Maria G. Bianchini, The Tobacco Agreement That Went Up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation, 87 CAL. L. REV. 703, 705 (1999). Bianchini provides a summary of the history of the tobacco litigation and the proposed settlement. See id. Under the proposed settlement, the FDA would be granted regulatory authority over tobacco, advertising would be further restricted, tobacco companies would have to take affirmative steps to reduce underage smoking, and the companies would have to pay $368.5 billion. See id. at 707–09. Initially, the tobacco companies supported the agreement because it contained an immunity provision that prevented suits based upon claims of addiction, eliminated punitive damages, and fixed a yearly cap on damages. See id. The parties sought congressional approval of the settlement which would make it more difficult to challenge later on. See id. at 713–15. The proposed bill became stalled in committee because the immunity provision was removed and the tobacco industry lobbied against it. See id. at 713–16.

\textsuperscript{188} See id. at 711–12.

\textsuperscript{189} See id. at 710.

\textsuperscript{190} See Newark to Join Lawsuits Against Gun Makers, N.Y. TIMES, Mar. 18, 1999, at B8; see also Bai supra note 19, at 34 (indicating that 24 municipalities have filed suits against the gun industry).

\textsuperscript{191} See, e.g., Newark, supra note 190, at B8 (noting that, at the time, lawyers at Sarah Brady's Center to Prevent Handgun Violence had sixteen cases pending against the tobacco industry at once).

\textsuperscript{192} See Matt Bai, Targeting Gun Makers, NEWSWEEK, Apr. 13, 1998, at 37. The suit brought by the City of Bridgeport, Connecticut in Ganim v. Smith & Wesson Corp., was dismissed because it sought to regulate firearms in a manner preempted by state law. See Ganim v. Smith & Wesson, 1999 Conn. Super. LEXIS 3330, at *18 (Conn. Super. Ct. Dec. 10, 1999). Additionally, the city lacked standing, either statutorily or under the common law, to recoup its law enforcement and healthcare expenditures. See id. at *4.

\textsuperscript{193} See Rosenbaum, supra note 12, at A32.
Eastern District of New York. Interestingly, the suit seeks only injunctive relief against the manufacturers rather than monetary damages. The suit asks the court to impose restrictions regarding sales practices that are alleged to facilitate the "underground market in illegal handguns." Recently, the White House and the Department of Housing and Urban Development announced plans to assist local housing authorities in bringing suits against the gun industry as a means of recovering the costs associated with the misuse of firearms as well as bringing about changes in the industry.

The tobacco and gun controversies are analogous in that the manufacturers in both fields produce dangerous products. There are, however, significant differences between the two situations. Cigarettes are deadly when used as intended by the manufacturers, whereas firearms do not cause tortious harm to others when used properly. Unlike cigarettes, the harm caused by firearms typically requires the intervening act of a third party over whom the manufacturers have no control. The potential dangers of firearms are generally recognized as a matter of common sense and these dangers are not disputed by the industry. Additionally, firearms are not addictive and they produce tangible social benefits.

While success with these suits could be described as virtually impossible, the cities do not have to win—they must

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195 See id.
196 Id. Among the restrictions sought is a limitation of one gun sale to any individual per month. See id. Critics argue that this is not a matter for the court but rather an issue within the province of the legislature. See id.
197 See David Stout and Richard Perez-Pena, Housing Agencies to Sue Gun Makers, N.Y. TIMES, Dec. 8, 1999, at A1. If these suits are successful in bringing about fundamental changes within the gun industry, the Clinton administration will have accomplished through legal pressure what it could not do legislatively. See id.
199 See id.
200 See id.
simply file enough suits to coerce the manufacturers into settling. Additionally, the cities are clearly not as concerned about winning as they are about forcing fundamental changes in the gun industry. Some manufacturers and trade associations are already exploring the possibility of reaching an amicable settlement or, at the very least, taking affirmative measures to curb the flow of firearms into the illicit market. New York may be the first state to bring a negligent distribution action against gun manufacturers unless the industry takes certain precautions. These precautions include marketing of guns in a more responsible manner, providing sample bullets from every gun manufactured to the ATF to assist in gun tracing, and contributing money to the state crime victims compensation board.

There are significant costs associated with the municipal suits aside from the impact that they will have on a lawfully permitted industry. Litigation is expensive and time consuming, and the outcome is often uncertain. Too much judicial

(dismissing the suit brought by Bridgeport Connecticut because the plaintiff lacked standing and was preempted by state law from regulating the manufacture and sale of firearms); City of Cincinnati v. Beretta U.S.A. Corp., No. A9902369, 1999 WL 809838 (Ohio Com. Pl. Oct. 7, 1999) (dismissing the suit because it was an improper attempt to usurp the authority of the legislature and restrict interstate commerce).

See Butterfield, supra note 14, at A20. California cities, led by San Francisco and Los Angeles, are suing 31 manufacturers, distributors and trade organizations under a section of the California Business Practices Law which allows recovery for "unlawful, unfair and deceptive acts and practices." Id. The plaintiffs asserted that the defendants intentionally directed sales toward the black market. See id.

See id. The objective of the suits is to change the manner in which firearms are distributed and manufactured, including the addition of safety devices. See id.

See Fox Butterfield, Lawsuits Lead Gun Maker to File for Bankruptcy, N.Y. Times, June 24, 1999, at A14. Bob Delfay, President of the National Shooting Sports Foundation, the industry's largest trade association, proposed a conference with law enforcement officials, the National Rifle Association, and gun manufacturers in order to devise a strategy to curb the flow of firearms into the black market. See id. Gun company executives met with Bureau of Alcohol, Tobacco and Firearms officials in August 1999 and indicated that they would be willing to change the two-tier marketing system so that they would know where their guns are ultimately sold. See Bai, supra note 19, at 35.


See STEVEN K. SMITH ET AL., U.S. DEPT OF JUST., TORT CASES IN LARGE COUNTIES 1 (1995) (indicating that on average, it takes eighteen months to dispose of a tort case). Only three percent of tort cases reach a jury and the plaintiffs in those cases are successful in approximately half of the verdicts. See id. at 5.
activism bears the risk of eroding the integrity and separation of powers between the legislative and judicial branches of government. Additionally, some of the municipal plaintiffs now find themselves defending their actions against the gun industry in a suit brought by the Second Amendment Foundation.\textsuperscript{207}

III. CONSEQUENCES AND CONSIDERATIONS

A. Legislative Response

In response to this recent wave of litigation at least fourteen state legislatures have acted to prevent suits against gun manufacturers.\textsuperscript{208} For example, during his tenure as governor of Texas, George W. Bush signed a bill prohibiting Texas municipalities from initiating lawsuits against gun manufacturers.\textsuperscript{209} A similar statute with a retroactivity clause was enacted by the Louisiana legislature,\textsuperscript{210} which effectively nullified the suit previously brought by the Mayor of New Orleans against the gun companies.\textsuperscript{211} The State of Georgia not only enacted a similar measure,\textsuperscript{212} but it also drafted a resolution inviting the firearms manufacturers who have their principle place of business in Connecticut to relocate to Georgia.\textsuperscript{213} This

\textsuperscript{207} See SAF, SAF Lawsuit Headed to Appeals Court (last updated May 16, 2000) [http://www.saf.org/pub/rkba/news/MayorsUpdate.html]. On November 30, 1999, the Second Amendment Foundation filed a suit in the federal district court in Washington, D.C. naming the U.S. Conference of Mayors as well as 23 individual mayors as defendants. The suit alleges that the mayors, by bringing suits against the gun manufacturers, have encroached upon the Constitution and interfered with interstate trade. See id. The Second Amendment Foundation promotes itself as "the nation's oldest and largest firearms civil rights legal defense, research and educational organization." Id.

\textsuperscript{208} See Bush Signs Bill Banning Anti-Gun Lawsuits, N.Y. TIMES, June 19, 1999, at A11.


\textsuperscript{210} See 1999 La. Acts 291 (preempting local governments from bringing suits against gun manufacturers for damages or injunctive relief).

\textsuperscript{211} See New Orleans Gun Suit is Stymied by Legislature, N.Y. TIMES, June 4, 1999, at A25 (noting that Mayor Morial intends on challenging the legislation in court).

\textsuperscript{212} See H.R. 189, 145th Gen. Assem., Reg. Sess. (Ga. 1999) (enacted Feb. 9, 1999). The statute preempts local governments from bringing an action against a firearm or ammunition manufacturer or a trade association and explicitly states that the "lawful design, marketing, manufacture, or sale of firearms or ammunition to the public is not unreasonably dangerous activity and does not constitute negligence per se." Id.

legislation should not necessarily be viewed as advocating gun ownership and possession. It is more likely to have been inspired by the fear of runaway tort litigation that could eliminate an entire industry and escalate into other dangerous yet useful activities and products.

B. Financial Considerations

Davis Industries of Chino California, one of the ten largest manufacturers of handguns filed for bankruptcy on May 27, 1999. This raises the specter of other manufacturers acting similarly; thus, thwarting the goals of the municipal and private plaintiff suits. Bankruptcy would allow a gun maker to avoid, or at least reduce, judgments as well as attorneys fees. The gun manufacturers do not have the financial capacity of the cigarette companies whose sales average $45 billion annually. In contrast, the gun industry grosses only $1.5 billion a year. It has been estimated that tobacco companies spend approximately $600 million a year defending against suits brought by the states. Gun companies are incapable of financing a similar defense. They are also incapable of paying any sizable damage awards. Eventually, so many suits will be filed that litigation costs alone will consume all of the gun manufacturers' resources. If the manufacturers are forced into bankruptcy, potential plaintiffs asserting traditional claims, e.g., a strict product's liability action concerning an article with a manufacturing defect will have no recourse and will be unable to...

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214 See Butterfield, supra note 204, at A14 (noting that many of the smaller companies will file for bankruptcy protection as the number of suits increase, however, the larger, well-established gun manufacturers will probably not resort to such a tactic).
215 See Armstrong, supra note 20, at 67 ("They can file for bankruptcy, dissolve, go away until the litigation passes by, then reform and build guns to the new standard.").
216 See Rosenbaum, supra note 12, at A32.
217 See Symonds, supra note 17, at 63.
218 See Butterfield, supra note 204, at A14.
219 See id.
220 See id.
recover any damages.\textsuperscript{221} Additionally, the source of a needed product and its technological advancements will disappear along with its associated economic activity. Bankruptcy will also drive the values of existing guns even higher and create more of a demand for them in the illicit underground market.

C. Subterfuge for Gun Control

High-profile incidents of abhorrent criminal behavior heighten people's emotions and focus their attention on the issues of violence and the proliferation of firearms in our society.\textsuperscript{222} Likewise, egregious criminal behavior fosters renewed concerns and demands for gun control.\textsuperscript{223} The National Rifle Association insists that the most effective way to address the problem is to hold those who engage in anti-social behavior responsible by strictly enforcing existing criminal statutes.\textsuperscript{224} The municipal suits seek to hold manufacturers responsible, and by design, are vehicles for the implementation of judicially created gun control prohibitions.\textsuperscript{225} The suit filed by the City of Cincinnati is typical.\textsuperscript{226} The city sought "injunctive relief which would require [the] defendants to change the methods by which they design, distribute[, and] advertise their products nationally."\textsuperscript{227} This was deemed "an improper attempt to have [the] court substitute its judgment for that of the legislature, something which [the] court is neither inclined nor empowered to

\begin{footnotes}
\footnotetext[221]{See id.}
\footnotetext[222]{See Elizabeth Angell, Guns and Their Deadly Toll, NEWSWEEK, Aug. 23, 1999, at 20 (providing a chronology of infamous criminal rampages, nationwide, between Oct. 1, 1997 and Aug. 10, 1999). The list of high-profile criminals include: Russel Eugene Weston, who killed a police officer, a federal guard, and wounded a visitor in the Capitol Building on July 24, 1998; Eric Harris and Dylan Klebold, who killed twelve students and a teacher inside Columbine High School in Littleton, Colorado on Apr. 20, 1999; and white-supremacist, Buford Furrow, who wounded five people inside a Jewish community center and then killed a postal worker on Aug. 10, 1999. See id.}
\footnotetext[223]{See Guns in America: What Must Be Done, NEWSWEEK, Aug. 23, 1999, at 23–25.}
\footnotetext[224]{See id. at 25. The National Rifle Association is a proponent of "Project Exile" in Richmond, Virginia. The program encourages the strict enforcement of existing gun laws to prevent and deter crime and is considered very successful. See id.}
\footnotetext[225]{See Butterfield, supra note 14, at A20 (indicating that the goal of the suit is the reformation of the gun industry and recognition by the cities that they are more likely to achieve judicially what they have been unable to achieve legislatively).}
\footnotetext[227]{Id. at *1.}
\end{footnotes}
do." Furthermore, the court held that the injunctive relief sought by the city constituted a regulation of commercial conduct lawful in and affecting other states and, as such, was a violation of the Commerce Clause of the United States Constitution. Additionally, one of the primary purposes of suits filed by municipalities is to force fundamental changes in the way gun companies conduct their business.

Government sponsored suits seeking injunctive relief may constitute state action; thus raising a Second Amendment issue. The law regarding the applicability and purpose of the Second Amendment has never been settled. The "states rights" or "collective rights" advocates maintain that the right to bear arms merely permits the states to establish and maintain militias. The "individual rights" advocates maintain that the right is an individual guarantee "inherent in the concept of ordered liberty." The courts are divided on the issue and there is no definitive resolution in sight. The subject is too complex and beyond the scope of this article to adequately discuss. It is only offered as food for thought in the context of the application of judicial decrees enjoining manufacturers from engaging in a lawful activity.

The private suits are also, in effect, an unwarranted and unwise attempt "to ban or restrict handguns through courts and juries, despite the repeated refusals of state legislatures and

228 Id.
229 See id. Thus far, federal district courts that have faced the "Commerce Clause" issue have generally remanded the cases back to state courts, absent diversity of citizenship, holding that the municipal suits do not present a federal question involving interstate commerce. See Boston v. Smith & Wesson, 66 F. Supp. 2d 246 (D. Mass. 1999); Archer v. Arms Tech., Inc., No. CIV. 99-40254, 1999 WL 993306 (E.D. Mich. Oct. 14, 1999).
230 See supra note 225.
231 U.S. CONST. amend. II. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Id.
233 See id.
234 Id.
235 See Hickman v. Block, 81 F.3d 98, 100–01 (9th Cir. 1996) (holding that the plaintiff lacked standing to sue for denial of a pistol permit because the right is one conferred upon the states and is not an individual right); U.S. v. Emerson, 46 F. Supp. 2d 598, 610–11 (N.D. Tex. 1999) (holding that "18 U.S.C. § 922(g)(8) is unconstitutional because it allows a state court divorce proceeding, without particularized findings of a threat of violence, to automatically deprive a citizen of his individual right to possess a firearm").
Congress to pass strong, comprehensive gun-control measures." The judicial system is, at best, ill equipped to deal with the emotional issues of handgun control. The jury system in these situations is suspect because horrific events are likely to have a negative impact upon the potential jury pool for civil litigation involving gun manufacturers. Paul Junnuzzo, vice-president and general counsel for Glock, Inc., commented, "I don't want a jury of [twelve] people deciding public policy because no one's given them a better solution." Juries may be inclined to react passionately rather than apply the relevant facts in light of the controlling law.

Issues concerning the boundaries and applications of gun control are best left to our legislative bodies because they are the physical manifestation of the will of the people. Congress has entered the field and promulgated regulations and restrictions concerning the sale and possession of firearms. These regulations are tempered by a provision that gives a qualified person a remedy for the erroneous denial of permission to acquire a firearm. Furthermore, Congress explicitly excluded firearms and ammunition from the definition of a "consumer product." This prevents the Consumer Product Safety Commission from promulgating regulations banning these articles. This is a strong indication that Congress intended that the regulation of firearms remain a legislative perogative. The courts have generally deferred to the legislature when

236 Patterson v. Gesellschaft, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985) (holding that a product must be defective under the product's liability theory of recovery and refusing to recognize a cause of action for distribution defect); see also Forni v. Ferguson, 648 N.Y.S.2d 73, 73 (1st Dep't 1996).

237 Patterson, 608 F. Supp. at 1216. In the Patterson opinion, District Court Judge Buchmeyer expressed his belief that handguns should be banned but recognized that this is appropriately a matter for the legislature and not the courts. See id.

238 Bai, supra note 19, at 35.

239 See Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1202–04 (7th Cir. 1984); Rhodes v. R.G. Indus., 325 S.E. 2d 465, 467 (Ga. Ct. App. 1984) ("While we recognize with regret the numerous deaths caused by firearms, we are powerless to remedy the situation without a clear legislative mandate."); Richardson v. Holland, 741 S.W.2d 751, 757 (Mo. Ct. App. 1987) (holding that the court will not create a cause of action by judicial legislation).


241 See 18 U.S.C. § 925A (1995) (providing a remedy when a background check erroneously reveals that the person is not qualified to acquire a firearm).


evaluating the utility of articles that are generally available and widely consumed even though they pose a substantial risk of harm.\textsuperscript{244} In the absence of popular action by legislative bodies, the people themselves can institute change by means of ballot proposals or voter referendums on Election Day.\textsuperscript{245} “While there have been and will be countless debates over the issue of whether the risks of firearms outweigh their benefits, it is for [the] [l]egislature to decide whether the manufacture, sale and possession of firearms is legal.”\textsuperscript{246} Gun control in the hands of the courts will result in inconsistent and uneven results and will exact a tremendous expenditure of judicial resources.\textsuperscript{247} Judicial activism in this area is inherently unfair because manufacturers will not be able to rely on established principles of common law or upon statutory proscriptions when governing their affairs. An activist judiciary is inappropriate when federal and state legislatures have been active in the field and promulgated regulations relevant to the issue.\textsuperscript{248}

D. Social Utility of Firearms

One of the central underpinnings of the causes of action asserted in the cases discussed seems to be that firearms have little or no social utility while causing great harm. In \textit{Copier v. Smith & Wesson},\textsuperscript{249} the court pointed out that the plaintiff had lumped all uses of guns into one destructive purpose, ignoring legitimate uses such as self-defense, home-protection and law-enforcement.\textsuperscript{250} Less than one percent of the firearms in

\textsuperscript{244} See \textit{RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY} § 2 cmt. a (1998).
\textsuperscript{245} See, \textit{e.g.}, \textit{NEW YORK CITY CAMPAIGN FINANCE BOARD, CHARTER REVISION VOTER GUIDE ‘99} 16 (1999). The general election held in New York City on November 2, 1999 included a ballot proposal to amend the city’s charter. The proposal contained a provision “requiring people purchasing or obtaining firearms to purchase or obtain safety locks for all firearms and to use safety locks when storing all firearms.” Id.
\textsuperscript{246} Forni v. Ferguson, 648 N.Y.S.2d 73, 73 (1st Dep’t 1996); see also Leslie v. United States, 986 F. Supp. 900, 910 (D.N.J. 1997) (declining to impose liability or prohibit Black Talon bullets in the absence of legislative action on the matter).
\textsuperscript{248} \textit{See Merrill v. Navegar, Inc.}, 89 Cal. Rptr. 2d 146, 207–09 (Cal. Ct. App. 1999) (Haerle, J., concurring in part & dissenting in part) (noting that the issue is properly vested within the purview of the legislature and that local elected officials have been attentive to the matter of gun regulation).
\textsuperscript{249} 138 F.3d 833 (10th Cir. 1998).
\textsuperscript{250} \textit{See id.} at 836.
Firearms in the hands of a responsible and capable law-abiding citizen are an effective deterrent against crime. This is important since government agencies are not obligated to provide protection to individual members of society. Fifteen major studies have estimated that citizens use firearms in self-defense between 764,000 and 3.6 million times annually. A study by the Bureau of Justice Statistics, based upon crime data reported by the states to the Federal Bureau of Investigation, reports an annual average of 83,000 defensive firearm uses between 1987 and 1992. This study has been criticized as an unrealistically low estimate because most local jurisdictions do not necessarily report incidents involving the justifiable use of force to the Federal Bureau of Investigation and the reporting process in general is flawed. Regardless of whose data are most accurate, there are nevertheless a significant number of firearms in the United States are ever involved in violence.

See H. Sterling Burnett, Nat’l Center for Pol’y Analysis, Suing Gun Manufacturers: Hazardous to Our Health (1999).

See LaPierre supra note 13, at 23.

See, e.g., Warren v. District of Columbia, 444 A.2d 1 (D.C. 1981). The plaintiffs sustained injuries as a result of the criminal conduct of third parties. Their injuries were exacerbated and their recovery impeded because of malfeasance on the part of the police. The court held that there was no special relationship between the public and law enforcement; thus, the police were under no duty to provide protection or other services to the general public. See id. at 2-4.

See Gary Kleck, Targeting Guns: Firearms and Their Control 150–89 (1997). Gary Kleck is a criminologist from Florida State University who has estimated, based upon a detailed survey, that there are 2.5 million defensive uses of firearms each year. A defensive use means discharging or displaying a firearm in order to ward off a criminal attack. See id. at 151.


See, e.g., N.Y. Penal Law §§ 35.00–.30 (McKinney 1998) (delineating the circumstances under which the use of deadly force is justified).

See Burnett, supra note 251 (criticizing the accuracy of the report); see also Federal Bureau of Investigation, Crime in the United States 1998: Uniform Crime Reports (1999). In its annual report, the Bureau stated:

The Crime Index is composed of selected offenses used to gauge fluctuations in the overall volume and rate of crime reported to law enforcement. The offenses included are the violent crimes of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault, and the property crimes of burglary, larceny-theft, motor vehicle theft, and arson.

Id. at 5. The data contained in this annual report has been criticized because of questionable imputation procedures and incomplete reporting. See Michael D. Maltz, U.S. Dep’t of Justice, Bridging Gaps in Police Crime Data 23–34 (1999).
occurrences, thus providing a tangible benefit to society. The report further indicates that "a fifth of the victims defending themselves with a firearm suffered an injury, compared to almost half of those who defended themselves with weapons other than a firearm or who had no weapon."²⁵⁸ "[P]rivate ownership of firearms has long had a notable effect in reducing crime, particularly violent crime, as shown by studies by notable scholars such as Dr. Gary Kleck of Florida State University."²⁵⁹

Firearms have a significant impact on the economy in the United States. More than twenty million Americans participate in various shooting sports each year, accounting for more than $30 billion in economic activity as well as 986,000 jobs.²⁶⁰ Firearms are also used by sportsmen for recreational activities such as hunting and target shooting.²⁶¹ One of the lures of target shooting is that it is a hobby that requires exact control and self-discipline. The reward a shooter receives, much like in golf, is the internal gratification associated with one’s "conquest of the laws of physics."²⁶²

E. The Slippery Slope

Firearms may be unpopular or, at the very least, troublesome in the minds of many. Therefore, the imposition of liability upon manufacturers for the criminal acts of third

²⁵⁸ RAND, supra note 255.
²⁶⁰ See SAAMI: Sporting Arms and Ammunition Manufacturers' Institute, Inc., Market Size and Economic Impact (visited April 20, 2000) <http://www.saami.org/publications.html> (relying on a compilation of data provided by the U.S. Fish and Wildlife Agencies, the National Shooting Sports Foundation and The National Sporting Goods Association). SAAMI is a firearms trade association that was founded in 1926 and participates in establishing industry standards. See id.
²⁶¹ Each year the New York State Department of Environmental Conservation issues nearly 700,000 hunting licenses to residents and over 50,000 hunting licenses to non-residents. See N.Y. Dept. Envtl. Conserv., Hunting in New York (visited April 20, 2000) <http://www.dec.state.ny.us/website/dfvmarwur/treat.html>. Further, the state maintains public lands, called "wildlife management areas" for recreational use. The Department of Environmental Conservation promotes hunting activities in the state and notes that such activities support conservation programs through licensing fees as well as supporting retailers and tourism. The regulated hunting system serves to manage wildlife populations and to prevent crop and environmental damage. See id.
parties or the promulgation of regulations by means of judicial construction may seem palatable. This is precisely the danger involved in permitting recovery from gun manufacturers. Once liability is established it may very well destroy the entire industry. From that point it will only take a short step to apply the principle to other articles or endeavors that involve an element of danger or unpleasantness. The bounds of liability will be limitless and there is no telling where the litigation trail will end. In an interesting case of man bites dog, New Orleans could have found itself liable to shooting victims in much the same way it attempted to impose liability upon gun manufacturers. In February 1998, New Orleans decided to upgrade the pistols carried by its police force. The city traded 8000 confiscated firearms and 715 police department Beretta service pistols to local gun distributors in return for 1700 new Glock pistols that were used to arm the police. The guns that were traded in were subsequently resold by the distributors to retailers and, eventually, private consumers. Local governments may also face liability because they issue firearms licenses to citizens. The principle of facilitating gun possession and commerce is the same as the premise underlying the claims in the suits brought against the manufacturers.

The United States Chamber of Commerce, Institute for Legal Reform is supporting the gun manufacturers. The Institute for Legal Reform recognizes that once the precedent is established any industry can be targeted. By analogy, it is possible to extend this principle to driver's licenses and other privileges that most people take for granted.

Other legally manufactured and possessed products, such as

264 See BURNETT, supra note 251, at n.116.
265 See David W. Chen, Lawsuit Against a Village Tests the Limits of Gun Liability, N.Y. TIMES, Feb. 20, 1999, at B1. The family of a murder victim filed a suit against Westchester County because the county failed to revoke the pistol permit of the man whose gun was used in the homicide. The crux of the claim is that the county was on constructive notice that the pistol owner was unfit to possess a weapon because of numerous complaints filed against him for harassment and similar offenses. See id. But see N.Y. PENAL LAW § 400.00(1) (McKinney 1999) (prohibiting issuance of a license to any one convicted of a felony or a serious offense).
266 See Rosenbaum, supra note 12, at A32. Jim Wootton, director of the Chamber's Institute for Legal Reform, stated: "They started with tobacco. Now its guns. This can be used against any industry." Id.
alcohol, also exact a toll on society.\textsuperscript{267} For example, in 1996, motor vehicle accidents involving intoxicated motorists accounted for over 13,000 fatalities.\textsuperscript{268} On an average day during the same year, it was determined that just under two million offenders under the jurisdiction of the criminal justice system consumed alcohol at the time they committed their offense.\textsuperscript{269} Furthermore, deaths caused by motor vehicle accidents far surpass the number of accidental deaths caused by firearms.\textsuperscript{270} "In 1998, 41,471 people were killed in the estimated 6,334,000 police-reported motor vehicle traffic crashes, 3,192,000 people were injured and 4,269,000 crashes involved property damage only."\textsuperscript{271} As a matter of fact, traffic accidents account for more fatalities than homicides, suicides and gun accidents combined.\textsuperscript{272} These statistics are presented only to demonstrate that there are many dangerous activities, some of which are even more lethal than those involving firearms. Once liability is established for gun manufacturers, should it be extended to these other activities as well? Automobile makers produce vehicles capable of exceeding the maximum speed limit. In a society where freedom of choice is so highly valued, is it appropriate to also hold these producers liable because of the intentional or reckless actions of others?


\textsuperscript{268} See Lawrence A. Greenfield, U.S. Dep't of Just., Alcohol and Crime 11 (1998) (providing an analysis of national data by the Bureau of Justice Statistics regarding the prevalence of alcohol in criminal activity).

\textsuperscript{269} See id. at 20.

\textsuperscript{270} See Bureau of the Census, U.S. Dep't of Com., Statistical Abstract of the United States 1998, 108 (1998). In 1995, 43,363 people were killed in motor vehicle accidents and 3,790 people drowned while 992 people were killed in firearms accidents. See id.


CONCLUSION

The attempt to impose liability on the manufacturers of a lawful product for the harms caused by the criminal actions of third parties is misguided. The courts should not overstep their bounds and create law in an area that is properly within the purview of the legislature. Judicial construction in the name of public policy can promulgate rules that are diametrically opposed to the will of the people. The court in *Kelly v. R.G. Industries*\(^{273}\) acted in a manner it believed was consistent with the public policy of the state only to be rebuffed by the Maryland legislature. The theories of strict liability and strict products liability do not apply to non-defective products or naturally-dangerous products that have a significant social utility. Public nuisance is inappropriate because it circumvents the aforementioned tort causes of action by applying a negligence standard to a lawfully manufactured, well made product. Negligent marketing and distribution should fail absent actual participation by the manufacturers in facilitating the underground market. To impose liability because manufacturers should have known about the latent dangers is too tenuous and could eventually lead to liability for countless other lawful endeavors. The suits are also counterproductive because, unlike the tobacco industry, the gun industry does not have deep pockets. Vilifying the manufacturers is simply an imposition of misguided blame. "Somehow guns themselves—pieces of hardware, no more, no less—have become the source of evil, while the actions of depraved individuals are conveniently ignored."\(^{274}\)

In the future, the gun industry will have to undergo fundamental changes and some of the smaller manufacturers may not survive. The two-tier distribution system will probably be modified so that manufacturers will know where their products are going and in what quantities. This is both appropriate and reasonable. If they resist, they will be consumed by the litigation costs of defending the municipal suits. Potential plaintiffs, such as those who are injured by defective products, may suffer because some of the defendants will be made judgement proof by the costs of litigation. Both law

\(^{273}\) 497 A.2d 1143 (Md. 1985).
\(^{274}\) Clancy, *supra* note 262, at xiv.
abiding gun buyers, and taxpayers—as the purchasers for law enforcement agencies—will pay more for these changes. Law enforcement will suffer because manufacturers will not have the capital necessary to fund research and development of new and innovative designs. This onslaught of litigation has served to threaten the very existence of a well-established and legally-sanctioned industry. More importantly, the adaptation of existing legal principles to facilitate these suits jeopardizes the integrity and consistency of the tort system. The courts should summarily dismiss the suits and defer the issue to the appropriate legislative bodies to promulgate regulations affecting the industry.