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John Fowler

Will a Repeal of Gun Manufacturer Immunity from Civil Suits Untie the Hands of the Judiciary?

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Code Sections Affected
Civil Code §§ 1714 (amended), 1714.4 (repealed).
SB 682 (Perata); 2002 STAT. Ch. 913.

I. TAKING A BEAD ON GUN MANUFACTURERS

In 1983, the California Legislature created a statutory bar to gun manufacturer liability in civil suits for the misuse of firearms.[1] Immunity was justified as a codification of existing common law.[2] Chapter 913 repeals that statutory provision.[3] The resulting question is: so what? Will courts begin to hold gun manufacturers liable for gun misuse absent statutory immunity? In other words, has the common law or public policy changed in the past two decades, and if so, to what extent does the change advantage future plaintiffs? Assessing the significance of claims against the gun industry in the post-immunity environment requires surveying the arsenal of legal theories traditionally available to plaintiffs in products liability actions and exploring the contours of the policy debate surrounding Chapter 913.

II. THE LEGAL ARSENAL

A. Negligence Theories

California allows an injured plaintiff to recover against the producer of a dangerous or defective product under three primary legal theories: breach of warranty, negligence, and strict liability.[4] The foundation of California negligence law, as codified in section 1714 of the California Civil Code, holds each person responsible for injuries caused to another by his lack of due care or skill.[5] Gun manufacturers may be held liable for negligence demonstrated in the entrustment, marketing, manufacture, and design of their firearms.[6]

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1. CAL. CIV. CODE § 1714.4 (West 1998).
2. *Id.* § 1714.4(d).
3. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 2 (May 14, 2002).
4. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 3 (May 14, 2002) (stating that the three categories of liability appropriately used against a product manufacturer are breach of express or implied warranty, negligence, and strict liability).
5. *See* CAL. CIV. CODE § 1714(a) (West 1998) (stating that
> [e]very one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property

A negligent entrustment claim typically alleges that a manufacturer provided a firearm to a consumer group foreseeably lacking the capacity to exercise ordinary care.[7] However, the court in *Linton v. Smith & Wesson* refused to allow a negligent entrustment claim to proceed against a gun manufacturer for selling a weapon to the general public, ultimately used in a criminal shooting, reasoning that the general public does not lack the capacity to exercise ordinary care.[8]

Other negligence actions brought against gun manufacturers for injuries due to criminal shootings have failed for lack of duty or causation.[9] The court, in *Bennet v. Cincinnati Checker Cab Company*, found that the dealer of a non-defective product had no duty to anticipate injury caused by its criminal misuse.[10] Similarly, the court, in *Moore v. R.G. Industries, Inc.*, refused to extend liability to a manufacturer for lack of a causal connection between the manufacture and marketing of a handgun and the plaintiff's injury.[11]

Courts have typically held that gun manufacturers have no duty to refrain from marketing lawful products in light of their lethal nature.[12] The existence of a duty is determined by the court as a matter of law upon consideration of policy factors, including the presence of a special relationship between the parties and the foreseeability of the resulting harm.[13] Courts generally have refused to hold

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or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.).

6. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 3-4 (May 14, 2002) (defining the various negligence theories commonly argued against gun manufacturers); *see generally* David Polin, *Cause of Action Against Manufacturer for Negligent Marketing of Firearm*, *in* 15 CAUSES OF ACTION SECOND § 6 (West 2000) (outlining considerations and case law relevant to negligent marketing suits against gun manufacturers).

7. *See* Polin, *supra* note 6, § 3 (discussing negligent entrustment cases in the context of gun manufacturer liability).

8. *See* 469 N.E.2d 339, 340 (Ill. App. Ct. 1984) (distinguishing a negligent entrustment claim against a gun manufacturer selling to the general public from one against a toy manufacturer that sold an air rifle to a child, by noting that children comprise "a class of persons known to be irresponsible in the use of such products.").

9. *See* Deborah Robinson, *Point Blank: Product Liability Law Takes Aim at Guns*, 4 J. HEALTH CARE L. & POL'Y 88, 89-90 (2000) (stating that "courts have easily dispensed with these negligence actions" alleging the "manufacture and sale of firearms to the general public created an unreasonable risk of harm" by holding that "manufacturers owe [the general public] no duty . . . for legally-made products"); *see, e.g.*, Ileto v. Glock, Inc., 194 F. Supp. 2d 1040, 1055, 1061 (C.D. Cal. 2002) (failing to find that Glock owed plaintiffs a duty because the foreseeability of their injuries was too attenuated and that Glock was not in sufficient control of the weapons used to support a finding of proximate cause).

10. *See* 353 F. Supp. 1206, 1210 (E.D. Ky. 1973) (holding a manufacturer's duty to prevent an unreasonable risk of harm to users of its product extended only to those who used the product lawfully).

11. *See* 789 F.2d 1326, 1327 (9th Cir. 1986) (holding that California products liability law does not allow recovery against a manufacturer for intentional injuries caused by a properly functioning handgun).

12. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 5 (May 14, 2002); *see, e.g.*, Bojorquez v. House of Toys, Inc., 62 Cal. App. 3d 930, 931, 133 Cal. Rptr. 483, 484 (1976) (finding that a seller has no duty to ensure its products are sold to individuals who will not misuse them, unless it has knowledge that such misuse will follow).

13. *Ileto*, 194 F. Supp. 2d at 1050; *see, e.g.*, City of Philadelphia v. Beretta, 126 F. Supp. 2d 882, 899 (E.D. Pa. 2000) (stating that whether a duty exists is a matter of law to be determined by the court upon

that a manufacturer's marketing decisions could foreseeably result in injury from misuse of a well-made product.[14] An exception is found in the *Hamilton v. Accu-Tek* (*Hamilton I*) decision, which ascribed a duty on a gun manufacturer to use reasonable care in the marketing and distribution of its products so as to guard against foreseeable criminal misuse.[15] *Hamilton I*, however, was overturned on appeal after the New York Court of Appeals, on certification, determined that state law did not support finding such a duty of care owing.[16]

B. Strict Liability and the Risk/Utility Analysis

Strict liability theories do not require a showing of negligence for liability to flow.[17] The strict liability theories argued in cases against firearms manufacturers include strict liability for ultrahazardous activities and strict products liability.[18] Courts have held that, as a matter of law, the manufacture or sale of a firearm is not an ultrahazardous activity.[19] For example, Louisiana law prevents a plaintiff from prevailing on a theory that the marketing of firearms to the public constitutes an ultrahazardous activity on two grounds: (1) criminal misuse is not a foreseeable result of marketing firearms, and (2) the ultrahazardous activity doctrine is restricted to activities involving land ownership.[20] Thus, victims of gun violence usually sue gun manufacturers in strict products liability, alleging that the gun used was defective in its manufacture or design.[21]

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consideration of policy factors including: "(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; (5) and the overall public interest in the proposed solution.").

14. *See* CAL. CIV. CODE § 1714.4(b) (West 1998) (stating that "[i]njuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but . . . by the actual discharge of the product."); *see also* Delahanty v. Hinckley, 564 A.2d 758, 762 (D.C. App. 1989) (stating that "no liability exists in tort for . . . criminal acts of third parties").

15. *See* 62 F. Supp. 2d 802, 824-27 (E.D.N.Y. 1999) [hereinafter *Hamilton I*] (distinguishing past negligent marketing cases from plaintiffs' theory which alleged that certain guns should not be marketed based upon their lack of social utility, rather than focusing on the defendant's particular marketing practices in light of its knowledge of criminal access to its distribution channels).

16. *See* Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21, 29 (2d Cir. 2001) [hereinafter *Hamilton II*] (reporting the reasoning of the New York Court of Appeals in response to certified questions regarding duty and market-share liability).

17. *See* Merrill v. Navegar, 26 Cal. 4th 465, 479, 28 P.3d 116, 124-25 (2001) (explaining that, in contrast to strict liability, under a negligence theory a plaintiff must prove that a defect caused injury and, additionally, that the defect resulted from the defendant's negligence).

18. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 6-7 (May 14, 2002).

19. *See Navegar*, 26 Cal. 4th at 475, 28 P.3d at 122 (stating, as to the plaintiff's ultrahazardous activities claim, the court held that, "as a matter of law, the manufacture and distribution of a firearm, even an assault weapon, is not inherently dangerous."); *see also* Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1205 (7th Cir. 1984) (holding that the marketing of handguns is not an ultrahazardous activity).

20. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1251, 1255-56 (5th Cir. 1985) (holding that the marketing of a firearm is not an ultrahazardous activity and all liability imposed under the theory concerned land use).

21. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 6 (May 14, 2002) (stating that "[m]ost products liability cases are brought on a theory of strict products liability" and that "a strict product liability action may be brought with regard to a defect in manufacture or a defect in design.").

Strict products liability suits typically fail due to the plaintiff's inability to prove that the gun used was defective.[22] A gun may be shown to be defective in manufacture if it fails to perform as the manufacturer intended.[23] The 1978 holding in *Barker v. Lull Engineering Company* established the notion that a manufacturer of a well-made product could be held strictly liable in California for injuries resulting from its product's defective design by showing either:

(1) "that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner"; or

(2) that if, "in light of the relevant factors, . . . the benefits of the challenged design [do not] outweigh the risk of danger inherent in such design."[24]

The first prong of the *Barker* analysis is not useful to plaintiffs in suits against gun manufacturers because consumers have an expectation that guns are designed to impart deadly force, thus cannot be considered defective for functioning properly.[25] In 1983, the California Legislature enacted section 1714.4 of the California Civil Code to prevent plaintiffs from using the second prong of *Barker* (risk/utility analysis) against manufacturers of firearms and ammunition in an effort to protect the industry from burgeoning litigation[26] that threatened its

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22. George L. Blum, Annotation, *Firearm or Ammunition Manufacturer or Seller's Liability for Injuries Caused to Another by Use of Gun in Committing Crime*, 88 A.L.R. 5th 1, 14 (2001); *see also* Marnie L. Sayles & the Honorable James R. Lambden, *Stop Shooting Down Tort Liability: It is Time to Resuscitate the Abnormally Dangerous Activity Doctrine Against Handgun Manufacturers*, 12 STAN. L. & POL'Y REV. 143, 148 (2001) (discussing judicial refusal to hold gun manufacturers strictly liable for "well made" firearms that perform exactly as intended).

23. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 134, 501 P.2d 1153, 1162-63 (1972) (explaining that "it was sufficient that plaintiff proved that he was injured while using [a product] in a way it was intended to be used as a result of a defect in . . . *manufacture*").

24. 20 Cal. 3d 413, 431-32, 573 P.2d 443, 455-56 (1978) (stating that

> in evaluating the adequacy of a product's design pursuant to [the risk/utility test], a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.);

see also Moore v. R.G. Indus., Inc., 789 F.2d 1326, 1327 (9th Cir. 1986) (stating that "California product's liability law imposes strict liability upon a manufacturer only when a defect exists in the design of the product."); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 6 (May 14, 2002) (indicating that the two-prong approach from *Barker* is viable under current California law to evaluate whether a product is defective in design in a strict liability action).

25. *See* Robinson, *supra* note 9, at 89-91 (explaining the application of the consumer expectations and risk/utility tests from *Barker*).

26. CAL. CIV. CODE § 1714.4 (West 1998); SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 75, at 1-3 (1983-84 Reg. Sess.) (May 25, 1983); *see* Sayles & Lambden, *supra* note 22, at 149-50. (reasoning that the California Legislature passed AB 75 "presumably because [it] believed few firearms could survive the risk/utility test [from *Barker*]").

solvency.[27] Chapter 913 repeals section 1714.4 of the California Civil Code, giving courts latitude to revisit the question of gun manufacturer liability for gun misuse.[28]

III. THE HISTORICAL TERRAIN

A. *Prior Legislation: AB 75 to Section 1714.4 of the California Civil Code*

Assembly Bill 75 (AB 75), passed by the California Legislature in 1983, added section 1714.4 to the California Civil Code.[29] The language of section 1714.4[30] afforded gun manufacturers immunity to civil suits brought by shooting victims that involved the application of the risk/utility calculus established in *Barker*.[31] Section 1714.4 further provided that a firearm's potential to cause harm did not render it defective in design and that the actual discharge of the weapon, not its potential to be discharged, was the proximate cause of resulting harm.[32] Actions not barred by section 1714.4 included those alleging the improper selection of design alternatives,[33] the breach of a duty to warn in light of a malfunctioning product,[34] and the furnishing of a statutorily banned weapon.[35] When enacted, section 1714.4 applied retroactively to knock out existing suits by precluding courts from holding furnishers or sellers of firearms or ammunition liable except as specified within its provisions,[36] and it purported to be "declaratory of existing law."[37]

AB 75 was designed to preclude courts from using products liability theories incorporating a risk/utility analysis to hold gun manufacturers civilly liable to victims of shooting violence.[38] When AB 75 was proposed, numerous suits had

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27. *See* John Hurst, *Assembly Bill Aims to Head Off Lawsuits by Handgun Victims*, L.A. TIMES, Feb. 13, 1983, at 3, 20 (claiming that the price of handgun related violence in California was "staggering and could wipe out the handgun industry . . . if it were forced to pay." "[Dallas attorney Windle] Turley acknowledged that if his litigation [was] successful the handgun industry could be all but wiped out or forced to sell only to special markets such as law enforcement agencies and sports shooting clubs.")

28. SB 682 (2001) (as amended May 6, 2002); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 1 (May 14, 2002).

29. CAL. CIV. CODE § 1714.4 (West 1998).

30. *See id.* § 1714.4(a) (establishing that "[i]n a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.").

31. *See* 20 Cal. 3d 413, 435, 573 P.2d 443, 457-58 (1978).

32. CAL. CIV. CODE § 1714.4(b).

33. *Id.* § 1714.4(c).

34. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 75, at 2 (1983-84 Reg. Sess.) (May 25, 1983).

35. *Id.*

36. *Id.* at 5.

37. CAL. CIV. CODE § 1714.4(d) (West 1998).

38. *Id.* § 1714.4(a); *see also* SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 75, at 2, 4 (1983-84 Reg. Sess.) (May 25, 1983) (proposing the addition of the language "in a products liability action" to AB 75 and that provisions therein be applied only to products liability actions).

been filed nationally against manufacturers of "Saturday Night Special" handguns.[39] Texas attorney Windle Turley was credited with pioneering litigation[40] premised on the theory that Saturday Night Specials are inherently defective.[41] He argued that the weapon's "availability. . . . to the general public causes widespread and severe harm without conferring any substantial social benefit."[42] In addition to the liability threat posed by the "Turley suits,"[43] California's Legislators were concerned that the fallout from the Maryland Supreme Court decision in *Kelley v. R.G. Industries, Inc.*[44] would lead to an explosion of litigation in California against good-faith gun manufacturers for the violent actions of their customers.[45] The holding in *Kelley*, in addition to receiving nationwide criticism,[46] was legislatively overturned in 1988.[47]

Proponents of AB 75 viewed these suits as being "without merit," stretching the limits of tort law, and opening "a backdoor [to] gun control."[48] Turley argued that tradition supported the courtroom as the appropriate forum to debate gun manufacturer liability and opposed legislative interference.[49] Based on model

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39. *See* SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 75, at 2 (1983-84 Reg. Sess.) (May 25, 1983) (describing Saturday Night Special handguns as inexpensive, lightweight, small, and easily concealable).

40. *See* Hurst, *supra* note 27, at 20 (explaining that "Windle Turley, well-known Dallas lawyer who is pioneering this type of litigation in about [twenty] suits all over the country, including California").

41. *See id.* at 3 (stating that plaintiff's attorneys in many suits against weapons manufacturers "argue that handguns are 'inherently defective' products because the danger posed by these firearms far outweighs any social benefits.").

42. *See* SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 75, at 9-10 (1983-84 Reg. Sess.) (May 25, 1983) (recanting the position of proponents of "Turley suits" and their reliance on Justice Traynor's public policy arguments in Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944) in favor of strict products liability against manufacturers); *see, e.g.*, Moore v. R.G. Indus., Inc., 789 F.2d 1326 (9th Cir. 1986) (refusing to extend liability to manufacturers of firearms in a suit filed by Windle Turley).

43. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 75, at 9 (1983-84 Reg. Sess.) (May 25, 1983).

44. *See* 497 A.2d 1143, 1159 (Md. 1985) (holding that "it is entirely consistent with public policy to hold the manufacturers and marketers of Saturday Night Special handguns strictly liable to innocent persons who suffer gunshot injuries from the criminal use of their products"); *see also* Sayles & Lambden, *supra* note 22, at 150. (citing *Kelley* as "[t]he only case thus far to hold a gun manufacturer liable under a strict liability theory").

45. *See Bill Needed to Negate Gun Maker Immunity*, MODESTO BEE, June 5, 2002, at B6 (explaining that "[t]he Legislature granted gun makers broad immunity in 1983, out of concern that a Maryland court decision . . . could lead to lawsuits in [California] against manufacturers who act in good faith but some of whose customers do not.").

46. *See* Blum, *supra* note 22, at § 4[a] (stating that the decision in *Kelley* has "essentially been overturned by legislation").

47. *See* MD. ANN. CODE art. 27, § 36-I(h)(1) (1996) (providing in part that "[a] person or entity may not be held strictly liable for damages of any kind resulting from injuries to another person sustained as a result of the criminal use of any firearm by a third person, unless the person or entity conspired with the third person").

48. *See* SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 75, at 2-3 (1983-84 Reg. Sess.) (May 25, 1983) (relaying the position of proponents of AB 75 with reference to the "products liability lawsuits [being brought] against makers of 'Saturday Night Special' handguns.").

49. *See* Hurst, *supra* note 27, at 20 (commenting that Turley insisted such litigation was really a front-door approach to gun control given that most U.S. safety laws are rooted in common law and applied through the judiciary rather than the Legislature).

legislation drafted by the National Rifle Association,[50] AB 75 would retroactively bar all such suits and afford gun manufacturers similar protection from liability as that extended by the 1978 legislation to "dram shop" operators against suits alleging sales of alcoholic beverages to "drunks."[51]

B. The Decision in Merrill v. Navegar, Inc.

Judicial application of section 1714.4 of the California Civil Code in *Merrill v. Navegar, Inc.*[52] sparked criticism that the California Supreme Court afforded more protection to gun manufacturers than was contemplated by the Legislature.[53] On July 1, 1993, Gian Luigi Ferri entered a high-rise office building at 101 California Street in San Francisco carrying two TEC-9/DC9 semi-automatic assault pistols manufactured by Navegar, Inc. that he used to kill eight people and wound six others before killing himself.[54] The subsequent lawsuit filed by the survivors and representatives of the shooting victims alleged that Navegar was negligent in selling the TEC-9/DC9 on the civilian market knowing that it would attract purchasers likely to misuse it.[55] In support of their argument, the plaintiffs' cited Navegar's advertisements that the TEC-9/DC9 possessed "32 rounds of firepower, . . . excellent resistance to finger prints, . . . and all powder residues" and that it "could 'be used in modes of fire impossible with most handguns.'. . . including 'hipfire at shortest range.'"[56] The

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50. *See* Allen Rostron, *Gunning for Justice*, GUN INDUSTRY LITIG. REP., Jan. 2002, at 13 (stating that "[section 1714.4 of the California Civil Code], enacted in 1983 [was] based upon model legislation drafted by the National Rifle Association"); *see also Protect Kids Not the Gun Industry, Repeal Blanket Immunity for Gun Manufacturers, Pass SB 682 (Perata) and AB 496 (Koretz)* (n.d.) (on file with the *McGeorge Law Review*) (claiming that "the gun industry is allowed to hide behind a special legal loophole written by the [National Rifle Association]."). Idaho, Montana and North Carolina are the only states other than California that "enacted the NRA's 'model legislation' to provide broad, blanket immunity for gun manufacturers." *Id.*

51. Hurst, *supra* note 27, at 3 (explaining that McAlister "modeled [AB 75] on 1978 legislation that protects 'dram shop' keepers" that he ironically opposed).

52. 26 Cal. 4th 465, 28 P.3d 116 (2001).

53. *Id.* at 492-93, 28 P.3d at 134-35 (Werdegar, J., dissenting); *see* Recent Case, *Firearms Litigation—Supreme Court of California Holds that State Products Liability Statute Bars Negligence Action Against Firearms Manufacturer*—Merrill v. Navegar, Inc., 28 P.3d 116 (Cal. 2001), 115 HARV. L. REV. 717, 717 (2001) (stating "the [California Supreme Court] created for gun-manufacturers an overly broad immunity from liability."). "[T]he majority would have better effectuated the [L]egislature's intent by looking at the broader set of policy concerns at work in the statute." *Id.* at 721.

54. *Navegar*, 26 Cal. 4th at 470-72, 28 P.3d at 119-20.

55. *See id.* at 481, 28 P.3d at 126-27 (characterizing plaintiffs' claim as "a products liability action based on negligence, [asserting] that the TEC-9/DC9 was defective in design because the risks of making it available to the general public outweighed the benefits of that conduct, and that [Navegar] knew or should have known this fact."); *see also id.* at 493, 28 P.3d at 134-35 (Werdegar, J., dissenting) (stating that "[p]laintiffs allege negligence, rather, in Navegar's *selling that firearm on the general civilian market knowing it would attract purchasers likely to misuse it*, rather than restricting sales to buyers with a lawful use for the tools of assaultive violence, such as police and military units.").

56. *Id.* at 471, 28 P.3d at 119; *see also id.* at 496, 499-500, 28 P.3d at 136-37, 139 (Werdegar, J., dissenting) (stating that Navegar additionally advertised that the TEC-9/DC9 allowed attachment of silencers and flash suppressors, was compatible with a trigger modification to enhance its speed of fire to hundreds of

California Supreme Court granted Navegar's motion for summary judgment, reversing the Court of Appeal, and held that the plaintiffs' argument amounted to the sort of design defect theory that section 1714.4 of the California Civil Code was enacted to bar.[57]

The majority in *Navegar* found that a product liability action could be rooted in either strict liability or common law negligence[58] and that the Legislature intended to bar both species of actions[59] evidenced by its use of the language "products liability," as opposed to "strict liability," in the statute.[60] The Court explained that evidentiary matters relevant to risk/utility balancing in both negligent design and strict liability actions are similar because to find a product to be negligently designed is to find it defective.[61] The Court determined that allowing plaintiffs' to proceed on a negligence action that required a balancing of a weapon's risks and benefits was contrary to legislative intent.[62] Thus, the majority characterized the plaintiffs' negligent distribution claim as a design defect action in disguise[63] and held it to be within the contemplated scope of section 1714.4.[64]

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rounds per minute, and "conveyed the idea that it could be used to initiate fire in an 'offensive-type situation.'").

57. *See id.* at 481, 491, 28 P.3d at 126-27, 133 (concluding that plaintiffs' argument is essentially one for defective design that California public policy precludes from proceeding).

58. *See id.* at 478, 28 P.3d at 124 (stating that "a plaintiff may seek recovery in a 'products liability case' either 'on the theory of strict liability in tort or on the theory of negligence.'"). The "plaintiffs' allegation that Navegar made the TEC-9/DC9 available to the general public adds nothing to the standard products liability action." *Id.* at 481, 28 P.3d at 126-27.

59. *See id.* at 484, 28 P.3d at 127-28 (stating, "we cannot properly conclude, as does the dissent, that the Legislature intended to preserve a claim based on a manufacturer's alleged negligence in 'selling' its firearm 'to the general public.'"); *see also* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 10 (May 14, 2002) (explaining that

> what is clearly not possible under the holding in *Navegar* is any suit that relies on a theory of design defect, alleging that the gun's inherent potential for harm outweighs its benefits—regardless of whether such a suit is brought on a negligence or a strict liability theory. . . . even if it relies not only on the dangers of the weapon, but on its sale to the general public.).

60. *See Navegar*, 26 Cal. 4th at 485, 28 P.3d at 129 (stating that "the Legislature did not use the term 'strict liability,' which on its face would not have included use of the risk/benefit analysis in a negligence action. Instead, it referred more broadly to 'products liability actions' which, . . . includes *both* negligence and strict liability theories of recovery") (citation omitted).

61. *See id.* at 480, 28 P.3d at 125 (supporting the rationale that a product liability action can be based on a negligent design theory by exposing the similarity in analysis required to reach either conclusion).

62. *See id.* at 486, 28 P.3d at 129-30 (finding "no indication that . . . the Legislature intended to prohibit a jury from weighing the risks and benefits of a firearm in considering strict liability while allowing it to perform the same task in a negligence action").

63. *See id.* at 481, 28 P.3d at 126-27 (reading plaintiffs' claim to be that Navegar's decision to distribute the TEC-9/DC9 to the public was negligent considering its particular design characteristics).

64. *See id.* at 482, 28 P.3d at 127 ("reject[ing] the view of plaintiffs and the dissent that plaintiffs' claim for negligent distribution to the general public falls outside of [California Civil Code] section 1714.4's scope.").

The decision in *Navegar* is indicative of courts' deference to legislatures and reluctance to create new causes of action by judicial fiat.[65] Because the majority in *Navegar* cited legislative support for their holding,[66] it follows that a repeal of section 1714.4 of the California Civil Code indicates a marked shift in legislative policy.[67]

IV. CHAPTER 913: NEW BATTLE LINES DRAWN

The primary effects of Chapter 913 are to repeal section 1714.4[68] and to amend section 1714 of the California Civil Code by expressly extending its provisions to apply to the design, distribution, and marketing of firearms and ammunition.[69] Opponents of Chapter 913 argue that it is a veiled attempt at gun control[70] aimed at enriching trial lawyers and bankrupting the firearms industry.[71] Supporters of the measure seek to even the playing field between firearms

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65. *See id.* at 491, 28 P.3d at 133 (stating that "the Legislature has set California's public policy regarding a gun manufacturer's liability under these circumstances."); *see also id.* at 492, 28 P.3d at 134 (Kennard, J., concurring) (explaining the task of the judiciary as to interpret the Legislature's intent and not to question the wisdom of its judgments); *see, e.g.*, Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1066 (N.Y. 2001) (expressing reluctance to "[impose] novel theories of tort liability while the difficult problem of illegal gun sales . . . remains the focus of a national policy debate"); Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1159 (Md. 1985) (concluding that the establishment of a new cause of action of products liability for "Saturday night specials" was properly in the domain of the legislature which had pre-empted the field of handgun regulation).

66. *See Navegar*, 26 Cal. 4th at 482-83, 28 P.3d at 127-28 (indicating that both the Senate and Assembly Judiciary Committee of AB 75 support a finding that section 1714.4 of the California Civil Code bars the plaintiffs' negligence claim).

67. *See id.* at 482-86, 28 P.3d at 127-130 (summarizing that the legislative intent behind AB 75 pertaining to the enactment of section 1714.4 of the Civil Code was

> (1) "to protect manufacturers and sellers of firearms from being held liable in tort for selling or furnishing a firearm that was used to cause an injury or death"; (2) "to preclude courts from using products liability theories to hold firearm manufacturers and dealers civilly liable to victims of firearms usage"; (3) "to prevent the courts from extending products liability laws to hold a supplier of a firearm liable in tort to persons injured by use of the weapon"; and (3) [sic] "to stop at birth the notion that manufacturers and dealers are liable in products liability to victims of handgun usage.").

68. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 2 (May 14, 2002).

69. CAL. CIV. CODE § 1714 (amended by Chapter 913) (adding that "[t]he design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill required by [section 1714]"); *see id.* § 1714(a) (providing that

> [e]very one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, bought the injury upon himself.).

70. *See* Letter from Jeff Sievers et al., Legislative Advocate, Civil Justice Association of California to Members of the Senate (May 16, 2002) (on file with the *McGeorge Law Review*) (claiming that "the California Legislature is attempting to impose gun control without directly banning [firearms].").

71. *See* Ralph Weller, *Who is Liable for the Actions of Criminals?* (June 7, 2002), *available at* http://www.calnra.org/mfg_liability.html (copy on file with the *McGeorge Law Review*) (heralding SB 682 and AB 496 as attempts by legislators to drive firearm manufacturers out of business while "schmooz[ing] their liberal attorney friends with years of legal billings.").

makers and makers of other products by removing the gun industry's unique statutory protection and "clarify[ing] those who design or market firearms or ammunition owe the public the same duty of care as manufacturers of other consumer products."[72]

V. PLAINTIFFS TAKE AIM

The debate surrounding Chapter 913 echoes much of what was said about AB 75 prior to the enactment of section 1714.4.[73] Arguments in support of the passage of Chapter 913 include: (1) gun manufacturers should not enjoy immunity from liability not afforded manufacturers of other products,[74] and (2) a repeal of section 1714.4 of the California Civil Code will ensure gun manufacturers make responsible choices in marketing and distribution of their products or pay for their reckless decisions.[75] Arguments in opposition to Chapter 913 focus on the economic and legal implications resulting from a repeal of section 1714.4: (1) a repeal will result in the gun industry's exposure to excessive frivolous litigation, passing the social costs of criminal violence onto lawful firearms purchasers,[76] and (2) section 1714.4 continues to be reflective of

72. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 12 (May 14, 2002).

73. *Compare* Letter from Alister McAlister, Attorney at Law, to All Members of the California Senate & Assembly (May 16, 2002) (on file with the *McGeorge Law Review*) (explaining that the effect of gun maker liability for non-defective products would be to hamper the industry and "constitute a form of gun control thru the back door"), *and* Letter from Jane Elizabeth Lovell et al., McCutchen, Doyle, Brown & Enersen, LLP, to the Honorable Martha Escutia, Chair, Senate Judiciary Committee & the Honorable Ellen M. Corbett, Chair, Assembly Judiciary Committee (May 10, 2002) [hereinafter Lovell Letter] (on file with the *McGeorge Law Review*) (arguing for repeal or amendment of section 1714.4 to allow "negligence action[s] based on the conduct of the manufacturer in selling a military assault weapon to the general public" and to ensure "that manufacturers and sellers of weapons . . . will be held responsible when their sales practices do not meet the standard of care required of all product manufacturers and distributors."), *with* SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 75, at 3, 10 (1983-84 Reg. Sess.) (May 25, 1983) (relating arguments in support of AB 75 to concern the spate of litigation against gun manufacturers as "a backdoor attempt at gun control" and arguments in opposition to herald Saturday Night Special handguns as causing widespread harm without conferring any substantial social benefit and noting that the "complex ramifications of [gun manufacturer liability law] should be determined on a case-by-case basis and not summarily eliminated from the courts' consideration.").

74. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 12 (May 14, 2002) (stating that "[s]upporters argue that it is unfair, and bad social policy as well, to provide special statutory protection to the gun industry.").

75. *See* Letter from Charles L. Blek, Jr., President, California State Council, Million Mom March, to Senator Don Perata (May 3, 2002) (on file with the *McGeorge Law Review*) (arguing for repeal of section 1714.4 which provides "gun makers, including makers of assault weapons, [with] total immunity from the consequences of their negligent marketing practices in [California].").

76. *See, e.g.*, Letter from Mark Hennelly, Deputy Director, California Waterfowl Association, to the Honorable Kevin Shelley, Assembly Majority Floor Leader (May 29, 2002) [hereinafter Hennelly Letter] (on file with the *McGeorge Law Review*) (indicating that because Chapter 913 "would encourage and facilitate frivolous lawsuits, firearms manufacturers would necessarily be forced to pass on the expense of fighting such litigation to consumers"); Letter from Dennis Anderson, Legislative Chair, Safari Club International, to the Honorable Don Perata, Senate (May 17, 2002) (on file with the *McGeorge Law Review*) (stating "SB 682 would

prevailing case law;[77] thus its repeal will only serve to confuse the state of relevant tort law, pending judicial clarification.[78]

"Economic impact surveys . . . indicate that the hunting and shooting sports market generates [annual revenues] in excess of $30.9 billion. . . . [and] supports more than 986,000 jobs."[79] According to the Sporting Arms and Ammunition Manufacturers' Institute, Inc. (SAAMI), thousands of businesses are wholly or largely dependant on the hunting and shooting markets as the nation's 31.9 million hunters and recreational target shooters spend in excess of $10.7 billion annually on equipment and trip-related expenses.[80] SAAMI notes that money spent by hunting enthusiasts supports rural populations, with small town "merchants look[ing] to hunting season the way Macy's looks to Christmas."[81] It follows that the gun industry's collapse would have profound economic effects on some societal sectors, but such a result is an unlikely effect of Chapter 913's enactment,[82] especially given the courts' established reluctance to stray from precedent and create new causes of action in this area of tort law absent legislative intervention.[83]

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result in making innocent manufacturers, their employees, and the lawful consumers of their products pay for the actions of criminals and other wrongdoers.").

77. *See* Letter from Alister McAlister, Attorney at Law, to All Members of the California Assembly Judiciary Committee (May 10, 2002) (on file with the *McGeorge Law Review*) (stating that section 1714.4 not only claims to be declarative of existing law, but has been validated as such by the holding in *Navegar*).

78. *See id.* (expressing two concerns: (1) that repeal of section 1714.4 is unlikely to impose manufacturer liability retroactively for guns already present in the State, but could "creat[e] a confusing . . . double track for firearms liability" if the door opens on liability for new firearms; and (2) that, following a repeal of section 1714.4, court's rulings would be unpredictable as the issue of gun manufacture liability becomes "up for grabs"); *see also* Letter from Gerald H. Upholt, Manager of Governmental Affairs, California Rifle and Pistol Association, Inc., to Senator Don Perata (May 15, 2002) (on file with the *McGeorge Law Review*) (claiming that Chapter 913 will hold manufacturers liable for how individuals misuse their non-defective products, "promot[ing] the notion that people are not responsible, nor should they be held accountable, for their own actions.").

79. *See* Sporting Arms and Ammunition Manufacturers' Institute, Inc., *Market Size and Economic Impact of Sporting Firearms and Ammunition Industry in America* (1998), *available at* http://www.saami.org.html (copy on file with the *McGeorge Law Review*) [hereinafter SAAMI] (providing an economic overview of the gun industry based upon "surveys by the U.S. Fish & Wildlife Agencies (Southwick Associates), The National Shooting Sports Foundation and others"); *see also* Hennelly Letter, *supra* note 76 (citing a 1996 United States Federal Wildlife Service study as finding "that hunting generates 704,600 jobs . . . representing almost 1 [percent] of the entire civilian labor force and contributing $22.1 billion annually to the national economy.").

80. *See* SAAMI, *supra* note 79 (reporting that "[t]here are more than 1,100 manufacturers, 100 distributors and 14,000 retailers in the United States whose business is totally or largely dependent on the hunting or recreational shooting market, according to the National Shooting Sports Foundation.").

81. *See id.* (claiming that "dollars spent by hunters pack special oomph, because they hit small towns far off the interstate.").

82. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 11 (May 14, 2002) (indicating that legislative silence as to manufacturer liability has not put other manufacturers of dangerous products (e.g. explosives or knives) out of business and that such a fear "seems exaggerated"); *see also supra* notes 79-81 and accompanying text (explaining the fiscal impact the demise of the shooting industry may have on the national economy).

83. *See Navegar*, 26 Cal. 4th at 491, 28 P.3d at 133 (indicating the court's deference to the Legislature).

A. Traditional Theories of Liability and Their Potential for Success

National case law supports gun manufacturer immunity from liability for non-defective products that are subject to misuse by consumers.[84] Two observations underpin this proposition: (1) most states have not enacted legislation to protect the firearms industry from liability for criminal shootings, preferring to follow a common law approach,[85] and (2) plaintiffs have largely been unsuccessful in recovering against a gun manufacturer on any traditional theory in the absence of such immunity statutes.[86] However, in the context of common law negligence, a window may have opened allowing California courts to hear suits alleging negligent marketing and distribution similar to that in *Hamilton I*.[87]

While suits invoking a risk/utility analysis in their need to identify a class of weapons as lacking any legitimate social utility have failed,[88] the *Hamilton I* approach is concerned with showing that a manufacturer was aware that its marketing and distribution practices were directed at criminals, thus enhancing risk to the general public in violation of a duty not to.[89] In such suits, a court must identify the duty owed by the manufacturer to the plaintiff.[90] Two arguments oppose finding duty in this context: (1) the threat of crushing liability on the industry and (2) the unfairness of imposing a duty on a party unable to have prevented the resulting harm.[91] The *Hamilton I* court determined that manufacturers could avoid "crushing liability. . . . by marketing and distributing their product[s] responsibly."[92] Further, the *Hamilton I* court concluded that defendants were in control of practices that could have reduced the risk of their

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84. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2 cmt. d (1998) (explaining that courts have not imposed liability upon the manufacturers of non-defective commonly used, widely distributed products, even in light of their inherent dangerousness, rather indicating such restriction on commercial distribution to be more properly within the purview of legislatures and administrative bodies).

85. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 10 (May 14, 2002) (explaining that there are no "guarantees of liability" with the repeal of section 1714.4).

86. *See id.* at 12 (observing that only the court in *Kelley* has imposed liability on a gun manufacturer "on the grounds that the risks of a class of guns outweighed its benefits"); *see Kelley*, 497 A.2d at 1160 (holding that a manufacturer of Saturday Night Special handguns may be held liable for death or injury resulting from the criminal misuse of its products). *But cf. supra* Part III.A and notes 46-47 (noting the subsequent legislative abrogation of the holding in *Kelley* by enactment of article 27, section 36-I(h)(1) of the Maryland Code).

87. *See Hamilton I*, 62 F. Supp. 2d at 826-27 (alleging negligence on the part of a gun manufacturer in its decision to use certain marketing practices in light of its awareness that its weapons were more likely to reach criminal distribution networks).

88. *See infra* Part V.B.1.

89. Polin, *supra* note 6, § 6 (explaining the theory of negligence tried in *Hamilton I*).

90. *See Hamilton I*, 62 F. Supp. 2d at 825 (defining the duty sought to be imposed by plaintiffs); *see also* Polin, *supra* note 6, § 6 (discussing duty analysis in various case contexts).

91. Polin, *supra* note 6, § 6.

92. *Hamilton I*, 62 F. Supp. 2d at 826-27; Polin, *supra* note 6, § 6.

firearms reaching the hands of criminals.[93] Though overturned as inconsistent with New York law,[94] *Hamilton I* provides a compellingly effective duty argument.[95]

While California courts have yet to find an affirmative duty owing by gun manufacturers to victims of gun misuse, decisions in *Casillas v. Auto-Ordnance Corp.* and *Ileto v. Glock, Inc.*[96] help illuminate the path. The *Casillas* court concluded that no legal authority existed for imposing a duty to insure against third party misuse of a non-defective firearm after discussing the legislative restrictions set forth in section 1714.4.[97] The *Casillas* court, however, indicated that plaintiffs had not presented evidence that the shooter's actions were foreseeable by defendants or that the advertisements proffered as evidence were directed at criminals.[98] The court in *Ileto* similarly failed to find a duty where the plaintiff's injuries were unforeseeable and too attenuated from defendant's conduct.[99] The *Ileto* court distinguished the negligent manufacture claim brought in *Casillas* from one involving negligent distribution.[100] The *Ileto* court also noted that, while *Merrill* involved a claim for negligent distribution, it failed to allege that defendant's negligence involved targeting criminals; it only alleged sales to the general public.[101] The *Ileto* court, in denying the existence of a duty, cited to *Casillas*, *Merrill*, and the policies expressed by section 1714.4.[102] The *Casillas* decision implies that a duty may exist where it is shown that a manufacturer made a gun for a criminal market or knew or should have known

93. *See Hamilton I*, 62 F. Supp. 2d at 826 (stating that defendants could have declined to do business with careless Federal Firearms Licensees, limited sales at unregulated gun shows, and required that the first sales to the public take place at responsibly operated stores).

94. *See supra* note 16 and accompanying text (describing the result of certification of the duty question in *Hamilton I* to the New York Court of Appeals).

95. *See generally Hamilton I*, 62 F. Supp. 2d at 826; *see also* Polin, *supra* note 6, § 6 (describing actions on behalf of injured parties in the context of firearms litigation).

96. *See* Casillas v. Auto-Ordnance Corp., No. C95-3601FMS 1996 WL 276830 (N.D. Cal. 1996) (determining that the California Supreme Court was not likely to expand liability under the more narrow standards of negligence when it refuses to allow liability under the broader standard of products liability law); *see also Ileto*, 194 F. Supp. 2d 1040, 1052-55 (C.D. Cal. 2002) (failing to find a duty absent the plaintiff's showing that the defendant knew or should have known that its product was heavily used by criminals).

97. *See* Polin, *supra* note 6, § 6 (explaining that the *Casillas* court was predicting the extension of California products liability law).

98. *See id.* (summarizing the reasoning in *Casillas*).

99. 194 F. Supp. 2d at 1052-55 (outlining factors that California courts use to identify a duty as:

> (1) the foreseeability of the harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered an injury; (3) the closeness of the connection between the defendant's conduct and the plaintiff's injury; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the burden on the defendant and the consequences to the community of imposing a duty with resulting liability for breach; and (7) the availability, cost, and prevalence of insurance for the risk involved.).

100. *See id.* at 1050-51 (distinguishing *Casillas* as having alleged that the gun's physical design was particularly suited for "a military style assault").

101. *Id.* at 1051.

102. *Id.* at 1052.

that its product was heavily used in crime.[103] Similarly, *Ileto* supports this rationale in the context of negligent distribution.[104] Thus, California courts may determine the existence of a duty based on a *Hamilton I* approach following the repeal of section 1714.4, provided that sufficient evidence is proffered to demonstrate the foreseeability of injuries resulting from a firearms manufacturer's targeting of criminals in its manufacturing and marketing practices.[105]

B. *Novel Causes of Action*

Strict liability for negligent distribution and marketing practices, public nuisance, and ultrahazardous activity doctrine provide alternative bases for shooting victims to pursue their claims.[106]

1. *Strict Liability for Negligent Distribution and Marketing*

In the absence of section 1714.4, California courts may lend credence to the holding in *Kelley*, allowing a plaintiff to recover against a manufacturer upon a negligent distribution claim alleging that certain types of firearms' attractiveness to criminals outweighs their lawful utility.[107] California courts would be inclined to consider *Kelley* because of the similarity of gun control policies in Maryland and California.[108] Additionally, the decision in *Navegar* will likely no longer be dispositive of California gun manufacturer liability law for having been so strongly bolstered by section 1714.4 and the legislative intent behind it.[109] Without section 1714.4 prohibiting use of the a risk/utility analysis, a suit

103. *See* Polin, *supra* note 6, § 6 (indicating that a plaintiff must introduce evidence indicating that a criminal shooting was sufficiently foreseeable by a manufacturer for a duty to extend to the shooter's victim).

104. *See* 194 F. Supp. 2d at 1053-55 (stating that plaintiffs have not established that the victim's injuries were a foreseeable result of defendant's conduct or that a special relationship existed between themselves and defendants).

105. *See supra* Parts III.A and IV (explaining section 1714.4 and its repeal under Chapter 913).

106. *See* Garrett Sanderson, III, *Common Law Strict Liability Against the Manufacturers and Sellers of Saturday Night Specials: Circumventing California Civil Code Section 1714.4*, 27 SANTA CLARA L. REV. 607, 610 (1987) (indicating that plaintiffs have also predicated strict liability upon a duty of manufacturers to control handgun distribution).

107. *See generally Kelley*, 497 A.2d at 1143 (extending liability to manufacturers of Saturday Night Specials based upon the weapon's lack of legitimate non-criminal use); *see also* Sanderson, *supra* note 106, at 629 (outlining an ideal scenario for a plaintiffs' attorney to pursue a *Kelley*-like cause of action in California courts by arguing for a narrow interpretation of section 1714.4 to apply only to strict liability claims utilizing the *Barker* risk/utility analysis).

108. *See id.* at 634 (noting that the Maryland court decision in *Kelley* may have persuasive value to California courts based on their comparable policy approaches).

109. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 10 (May 14, 2002) (indicating that any suit relying on a risk/utility analysis appropriate for design defects, whether brought on a theory of strict liability or negligence, is clearly not possible); *see also Navegar*, 26 Cal. 4th at 491-92, 28 P.3d at 133-34 (Kennard, J., concurring) (implying that the Court would be compliant with a change in legislative policy regarding section 1714.4 or the statute itself).

predicated on the theory in *Kelley* must make at least two convincing policy arguments: (1) that firearms manufacturers will not be subjected to crushing liability because the suit will target only a class of weapons identified as Saturday Night Specials without legitimate lawful utility, and (2) that such an extension of the common law is confluent with the gun control policies of California and the federal government.[110]

The relevant gun control policies involved in imposing strict liability include deterring crime and compensating victims.[111] It must be established that criminals prefer to use an identifiable classification of firearms before the imposition of a tax on firearms manufacturers can be connected to the deterrence of crime.[112] This is exactly what the court in *Kelley* attempted by defining Saturday Night Special handguns as being too inaccurate, unreliable, poorly made, inexpensive, and easily concealable for legitimate use.[113]

However, even strict proponents of gun control have conceded that the majority of weapons used by criminals fall outside of the *Kelley* court's definition.[114] At least one study indicates that widespread availability of firearms among responsible consumers would result in substantially less violent crime.[115] Further, comparing the number of guns of a particular model used by criminals to the number used by all consumers fails to statistically expose a criminal preference for any particular weapon.[116] Defining a particular weapon by today's criminals' preferences will unlikely deter tomorrow's criminals whose weapons preferences may have changed.[117] Establishing policy based upon such a fluctuating scale is more likely to limit the supply and increase the general price of weapons for legitimate users, than to deter criminals whose demand for firearms is less specific and satisfied through wider avenues of distribution.[118] This effect may lead to increased gun violence in low-income areas where the

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110. *See* Sanderson, *supra* note 106, at 633-34 (citing policy concerns likely to be points of contention for California courts in extending liability under a *Kelley* approach).

111. Bruce H. Kobayashi & Joseph E. Olson, In re 101 California Street: *A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of "Assault Weapons,"* 8 STAN. L. & POL'Y REV. 41, 48 (1997) (arguing generally that, upon a careful analysis, taxing firearms manufacturers for criminal shootings will not accomplish either of the two primary motives for imposing strict liability).

112. *Id.* at 49.

113. 497 A.2d at 1158-59.

114. Kobayashi & Olson, *supra* note 111, at 49 (citing research done by the Maryland Handgun Roster Board "that only 28 out of over 1500 handguns reviewed are unqualified for sale").

115. *Id.* at 48 (citing a study indicating that "[i]f, in 1992, all states had allowed responsible citizens to carry concealed firearms, there would have been over 1500 fewer murders, over 4100 fewer rapes, and over 60,000 fewer aggravated assaults in 1992 alone.").

116. *Id.* at 48-49 (arguing generally that the weapons classified as Saturday Night Specials by the *Kelley* court have legitimate demand among lawful purchasers as well as criminals, blurring any distinction between "good" and "bad" guns).

117. *Id.* at 49.

118. *Id.* at 48-49; *see also Hamilton I*, 62 F. Supp. 2d at 826 (explaining the two most prominent avenues of weapons purchase by criminals to be (1) "straw-purchasers," lawful third-party buyers, and (2) "the falsification of ATF Firearm Transaction Records at the time of purchase.").

risk of gun-related crime is higher and police protection more limited.[119] Thus, with fewer cheap firearms on the market, a criminal user may be inclined to use more lethal, higher caliber weapons to effectuate his goals, and residents in the neighborhood he targets will discover the purchase of defensive handguns to become increasingly financially prohibitive.[120]

The imposition of liability on firearms manufacturers is supported by two notions: (1) manufacturers are in a better position than members of the general public to spread the risk of loss, and (2) manufacturers can more safely control the dispersal of firearms in society.[121] Proponents of tort liability argue that it offers the additional social benefit of public education via litigation.[122] Lawsuits would expose the public to the numerous safety features available to protect against unintended firearm use and create financial incentives for manufacturers to develop safer designs.[123]

While gun manufacturers are more financially solvent than criminals, using tort as a mechanism of victim compensation is criticized as a less economically efficient or rational approach compared to punishing firearm misuse with already established criminal and economic disincentives.[124] Some argue that the financial incentives generated by civil liability are too weak to encourage innovative weapon designs and that liability may discourage manufacturers from risking the placement of new products on the market.[125] Whereas large punitive awards may only threaten the vitality of small gun manufacturers, civil liability coupled with enhanced public awareness could lead to government regulation, thus amplifying the costs to the industry and the corresponding incentives to make safer guns.[126]

Additionally, plaintiffs should consider raising negligent marketing claims under section 389 of the Restatement (Second) Torts which provides:

> [o]ne who supplies directly or through a third person a chattel for another's use, *knowing or having reason to know that the chattel is unlikely to be made reasonably safe before being put to a use* which the supplier should expect it to be put, is subject to liability for physical

119. *See* Kobayashi & Olson, *supra* note 111, at 49-50 (explaining that the social costs of imposing liability on gun manufacturers may exceed the gains because the number of shooting deaths caused by gun misuse by criminals may rise).

120. *Id.* at 50.

121. *Hamilton I*, 62 F. Supp. 2d at 826-27 (discussing the relevant policy factors that lead to the imposition of a duty on the defendant to more responsibly market its firearms).

122. *See* Mark D. Polston & Douglas S. Weil, *Unsafe by Design: Using Tort Actions to Reduce Firearm-Related Injuries*, 8 STAN. L. & POL'Y REV. 13, 17-18 (1997) (exploring the extension of liability for gun related shooting to gun owners and gun manufacturers).

123. *Id.*

124. *See* Kobayashi & Olson, *supra* note 111, at 49 (asserting that scholars have traced the recent expansion and current problems with the tort system to its use as a mechanism for social insurance via liability awards).

125. Polston & Weil, *supra* note 122, at 17-18.

126. *Id.*

> harm caused by such use to those whom the supplier should expect to use the chattel or to be endangered by its probable use, and who are ignorant of the dangerous character of the chattel or whose knowledge thereof does not make them contributorily negligent, although the supplier has informed the other for whose use the chattel is supplied of its dangerous character.[127]

Proponents of this approach, used in tobacco litigation, argue that liability could be imposed upon a showing that a firearm was "unlikely to be make reasonably safe" after leaving the manufacturer's control and that it caused injury to a foreseeable victim.[128] Because neither guns nor cigarettes can be made safe, manufacturers can only avoid liability under this theory by discontinuing marketing of such products.[129] However, it is unlikely that courts would rule in favor of such broad liability given their demonstrated reluctance to impose liability in more restrictive contexts.[130]

2. Public Nuisance Suits

Plaintiffs have begun to introduce litigation based on state law claims, alleging that firearms manufacturers be held liable for the effects of firearm-related violence on the health, safety, and welfare of particular communities or municipalities.[131] The complaint in *City of Camden v. Beretta U.S.A. Corp.*[132] alleged decreases in property values, decreases in tax base, guns were unreasonably dangerous and defective products, and gun manufacturers' conduct provided weapons to criminal markets through gun shows, "straw purchases," and "kitchen table dealers."[133] Public nuisance suits have generally been unsuccessful against firearms manufacturers in California because nuisance law does not apply to the manufacture and sale of non-defective products.[134]

California nuisance law is embodied in section 3479 of the California Civil Code which provides that a court may consider three disjunctive factors in determining whether a defendant's actions support the finding of a public

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127. RESTATEMENT (SECOND) OF TORTS § 389 (1965) (emphasis added).

128. *See* Jerry J. Phillips, *The Relation of Constitutional and Tort Law to Gun Injuries and Deaths in the United States*, 32 CONN. L. REV. 1337, 1348-49 (2000) (comparing firearms litigation to litigation against the tobacco industry).

129. *See id.* (comparing firearms litigation to litigation against the tobacco industry and also noting that asbestos manufacturers were forced to discontinue marketing of their products).

130. *See Ileto*, 194 F. Supp. 2d at 1054-55 (describing the reluctance of courts to impose liability when "the pool of potential plaintiffs is very large—potentially, any of the thousands of victims of gun violence.").

131. *See* Polin, *supra* note 6, § 9 (discussing actions brought on behalf of public entities).

132. 81 F. Supp. 2d 541 (D. N.J. 2000).

133. *See* Polin, *supra* note 6, § 9 (describing plaintiff's complaint in *Beretta*).

134. *Ileto*, 194 F. Supp. 2d at 1058.

nuisance.[135] The *Ileto* court concluded that it did "not have the authority to expand California law in a way not obviously dictated by precedent."[136] Citing to *City of San Diego v. U.S. Gypsum Company*,[137] the *Ileto* court reiterated that while California's "broad statutory definition of nuisance . . . embrace[s] nearly any type of interference with the enjoyment of property . . . ," no California . . . decision [has allowed] recovery for a defective product under [such a theory]."[138] The *Ileto* court reiterated a concern expressed by the Eighth Circuit in *Tioga Public School District #15 v. U.S. Gypsum Company*,[139] that to allow such recovery, "nuisance 'would become a monster that would devour in one gulp the entire law of tort.'"[140] Further, the *Ileto* court stated that both the decision in *Merrill* and section 1714.4 of the California Civil Code were predictive of the California Supreme Court's reluctance to impose liability on firearms manufacturers for distributing their products.[141] Because the trend in California has been to limit the scope of nuisance liability[142] while protecting firearms manufacturers from strict products liability, the *Ileto* court dismissed plaintiffs' claim.[143]

3. *Ultrahazardous Products Liability: Experimental Litigation*

Professor Sayles and Judge Lambden propose that strict liability based on abnormally dangerous activities doctrine[144] is better suited than strict products

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135. *See id.* at 1056-57 (listing the factors relevant for a court's consideration:
(a) [w]hether 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 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.).

136. *Id.* at 1058.

137. 30 Cal. App.4th 575, 35 Cal. Rptr. 2d 876 (1994).

138. *Ileto*, 194 F. Supp. 2d at 1058.

139. 984 F.2d 915, 921 (8th Cir. 1993).

140. *Ileto*, 194 F. Supp. 2d at 1058.

141. *Id.* at 1058-59.

142. *See id.* (indicating that the Court followed the decisions in City of San Diego v. U.S. Gypsum Co., 35 Cal. Rptr. 2d 876 (1994), and Martinez v. Pacific Bell, 275 Cal. Rptr. 878 (1990)).

143. *See Ileto*, 194 F. Supp. 2d at 1061 (holding that "California law does not support [the plaintiffs' claim] and because Plaintiffs have failed to allege facts that would support a finding that Glock was in control of the nuisance at the time the [injury occurred].").

144. *See* RESTATEMENT (SECOND) OF TORTS § 520 (1976) (emphasis added) (stating that the following factors must be considered when "determining whether an activity is abnormally dangerous":
(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.

liability in the firearms litigation arena as a means of compensating injuries and preventing future harm.[145] Abnormally dangerous activities involve risks that cannot be eliminated by the exercise of even the highest standard of care.[146] Proponents of this approach define business activities, such as the sale of small, inexpensive, high-capacity handguns that create an "abnormal" risk of injury to members of the public who are not consumers of the product in question, as within the doctrine's reach.[147] Professor Sayles and Judge Lambden further argue that holding manufacturers strictly liable for injuries caused by their products' misuse will provide manufacturers an incentive to internalize such costs in the price of their products.[148] They urge that higher prices will reduce sales of guns, resulting in fewer injuries from their illegal use.[149] A concern exists, however, that making guns financially prohibitive to lawful firearms users will not abate crime but promote criminal effectiveness.[150]

Guided by section 520 of the Restatement (Second) Torts,[151] courts have refused to accept that selling a product is an "activity" contemplated by the relevant statutes and that guns are not a "matter of common usage."[152] Courts have also been reluctant to apply the doctrine for fear that it would stimulate an explosion in suits against other products that pose risks to society, such as automobiles and alcohol, and the issue of its applicability should be reserved for legislatures.[153] However, proponents maintain that a careful analysis of the Restatement factors exposes the applicability of ultrahazardous activities doctrine

145. *See generally* Sayles & Lambden, *supra* note 22 at 143 (arguing for the resuscitation of abnormally dangerous activities doctrine against gun manufacturers).

146. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 519, 520.

147. *See* Sayles & Lambden, *supra* note 22, at 150 (explaining that when an innocent member of the public is subject to harm due to the business practices of another, the costs should be born by the party that created the risk).

148. *See id.* at 155 (explaining that manufacturers would likely respond to increased liability by either reducing risks in their products or bumping up prices).

149. *See id.* (claiming that holding manufacturers liable could eliminate the public need to subsidize the treatment of gunshot injuries).

150. *See* Kobayashi & Olson, *supra* note 111, at 50 (claiming that in the context of reducing the number of cheap handguns, mortality rates may rise); *see also supra* Part IV.B.1 (discussing the effects of taxing manufacturers that produce Saturday Night Specials).

151. *See* Sayles & Lambden, *supra* note 22, at 152 (citing reasons that courts should reconsider ultrahazardous activities doctrine in the context of firearms litigation); *see also supra* note 141 (listing the factors under section 520 of the Restatement (Second) Torts considered to determine whether an activity is ultrahazardous).

152. *See* Sanderson, *supra* note 106, at 611-12 (indicating that courts have criticized the use of the abnormally dangerous activities doctrine in firearms litigation for blurring the distinction between it and strict products liability by referring to the selling of a product as an activity); *see also supra* Part II.B (explaining that the ultrahazardous activities doctrine has failed in firearms litigation because courts have refused to treat selling or marketing as either abnormally dangerous or activities involving land use within the purview of the doctrine's application).

153. Sayles & Lambden, *supra* note 22, at 152.

to firearms litigation and to the policies underlying the imposition of strict liability.[154]

VI. HIT OR MISS?

Whether Chapter 913 will result in increased liability to firearms manufacturers for harm caused by firearm misuse is uncertain.[155] It is within the traditional purview of the judiciary to extend liability to manufacturers when doing so provides the manufacturers with incentive to take public safety into account in their business decisions.[156] Most states leave determinations to extend such liability to the judiciary.[157] However, courts have proven reluctant to extend such liability to the manufacturer of a product that the Legislature has deemed lawful.[158] While most states have no laws prohibiting liability for gun manufacturers, plaintiffs have rarely been successful in recovering on any of the theories presented above: negligence, strict liability, ultrahazardous activities doctrine, public nuisance, or negligent entrustment.[159] Only the *Kelley* court has imposed liability against a firearms manufacturer on a theory that the risks of a particular class of firearm outweighed its utility and that decision was legislatively overturned.[160]

Because the passage of Chapter 913 will repeal section 1714.4 of the California Civil Code, removing the statutory bar to actions in negligence and strict liability that rely on a balancing of a firearm's risk and utility, firearms manufacturers may be subject to increased litigation costs.[161] However, it is uncertain that such litigation expenses will drive the industry out of business for at least two reasons: (1) case law does not support the extension of liability to firearms manufacturers, thus, making litigation both risky and costly to potential plaintiffs, and (2) firearms manufacturers will be able to manage litigation costs by incorporating them into the cost of their products and altering product design, marketing, and distribution practices so as to diminish criminal access to their products at the headwaters of the commerce stream.[162]

While Chapter 913 has leveled the playing field among the manufacturers of firearms and manufacturers of other lawful products, it has not established a clear line of fire for potential plaintiffs seeking compensation from gun manufacturers

154. *See id.* at 152-55 (arguing each element of section 520 of the Restatement (Second) Torts' applicability to firearms litigation).

155. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 682, at 10 (May 14, 2002).

156. ASSEMBLY FLOOR ANALYSIS, COMMITTEE ANALYSIS OF SB 682, at 3 (May 17, 2002).

157. *Id.* at 2.

158. *Id.* at 3.

159. *Id.* at 2.

160. *Id.* at 2-3.

161. *See supra* Part V (examining the economic impact of Chapter 913).

162. *Id.*

for criminal shootings.[163] Because the extension of liability to gun manufacturers for a weapon's misuse is reflective of the weapon's characterization as lawful, liability is not certain to follow the repeal of section 1714.4 of the California Civil Code.[164] Freed from legislative shackles, California courts can examine gun manufacturer liability issues on a case-by-case basis.[165] Courts thus may be more inclined to extend liability in cases showing that a manufacturer knowingly supplied a criminal market and was in sufficient control of its product to have prevented criminal misuse.[166] However, it seems clear that the California judiciary will continue to wait for legislative guidance before punishing responsible firearms manufacturers for producing products designed to kill.[167]

163. ASSEMBLY FLOOR ANALYSIS, COMMITTEE ANALYSIS OF SB 682, at 3 (May 17, 2002).

164. *Id.* at 2-3.

165. SENATE FLOOR ANALYSIS, COMMITTEE ANALYSIS OF SB 682, at 7 (Aug. 29, 2002).

166. *See supra* Part V.A (exploring the *Hamilton I* decision and its subsequent legislative overruling).

167. ASSEMBLY FLOOR ANALYSIS, COMMITTEE ANALYSIS OF SB 682, at 3 (May 17, 2002).

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