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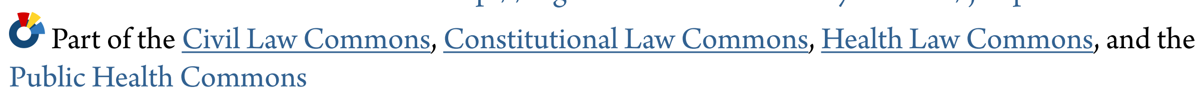
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Articles

MUNICIPALITIES' SUITS AGAINST GUN MANUFACTURERS — LEGAL FOLLY

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Introduction

Since 1995, more than 20 municipalities, including cities and counties in fifteen states and the District of Columbia[1], have initiated civil suits against firearms manufacturers and others.[2] A central claim

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1. Recently, the state of New York has also filed a complaint against firearms manufacturers and others. *See* Complaint, New York v. Sturm, Ruger & Co. (N.Y. Sup. Ct. 2000) (No.402-586). In addition, several individuals have sued firearms manufacturers, distributors and dealers in complaints filed in Illinois, New York and the District of Columbia. While the claims alleged by New York State and the individuals are in many respects similar to the claims alleged by the municipalities, analysis of these is beyond the scope of this article.

2. The following municipalities have filed complaints: Bridgeport, Conn. (Ganim v. Smith & Wesson Corp., No. CV 990153198S, 1999 WL 1241909 (Conn. Super. Ct. Dec. 10, 1999)); Chicago, Ill. (City of Chicago v. Beretta U.S.A. Corp., No. 98 CH 015596 (Cook County Cir. Ct. 1998)); Cincinnati, Ohio (City of Cincinnati v. Beretta U.S.A. Corp., No. C-990729 (Ohio Ct. App. Aug. 11, 2000)); Cleveland, Ohio (White v. Smith & Wesson Corp., 97 F. Supp. 2d 816 (N.D. Ohio Mar. 14, 2000)); Detroit, Mich. (Archer v. Arms Tech., Inc., No. 99-912658 NZ (Wayne County Cir. Ct. 1999)); New Orleans, La. (Morial v. Smith & Wesson Corp., No. 98-18578 (Orleans Parish Dist. Ct. 1998)); St. Louis, Mo. (City of St. Louis v. Cernicek, No. 992-01209 (St. Louis Cir. Ct. 1999)); Wayne County, Mich. (McNamara v. Arms Technology, Inc., No. 99-912662 NZ (Wayne County Cir. Ct. 1999)); City of Los Angeles (The People of the State of California v. Arcadia Machine & Tool, No. BC 210894 (Los Angeles Super. Ct. 1999)); San Francisco, Ca. (The People of the State of California v. Arcadia Machine & Tool, No. BC 303753 (Los Angeles Super. Ct. 1999)); Los Angeles County, Ca. (The People of the State of California v. Arcadia Machine & Tool, No. BC 214794 (Los Angeles Super. Ct. 1999)); Newark, N.J. (James v. Arcadia Machine & Tool, No. L-6059-99 (Essex County Super. Ct. 1999)); Atlanta, Ga (City of Atlanta v. Smith & Wesson Corp., No. 99VS0149217J (Fulton County Ct. 1999)); Camden, N.J. (City of Camden v. Beretta U.S.A. Corp., No. L-4510-99 (Camden County Super. Ct. 1999)); Boston, Mass. (City of Boston v. Smith & Wesson Corp., No. SUCV1999-02590-C (Suffolk County Super. Ct. 1999)); Camden County, N.J. (Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., No. 99cv-2518 (D.N.J.2000)); Miami, Fl. (Penelas v. Arms Tech., Inc., No. 99-01941, 1999 WL 1204353 (Miami-Dade County Cir. Ct. 1999)); Gary, Ind. (City of Gary v. Smith & Wesson Corp., No. 45D02-9908-CT355 (Lake Super. Ct. 1999)); Wilmington, Del. (Sills v. Smith & Wesson Corp., No. 99C-09-283-FSS (New Castle County Super. Ct. 1999)); Washington, D.C. (District of Columbia v. Beretta U.S.A. Corp., No. 00-CA-428 (D.C. Super. Ct. 2000)); Philadelphia, Pa. (City of Philadelphia v. Beretta U.S.A.

is that the manufacturers "saturate the market"[3] with too many firearms and fail to ensure that their distributors and retailers prevent the firearms from falling into the wrong hands.[4] In this manner, it is alleged, the manufacturers contribute to an "illegal secondary market"[5] involving the wrongful acquisition, possession and use of the firearms.[6]

While these lawsuits are based upon a variety of legal theories, claims of negligent distribution and public nuisance are common among the majority.[7] The municipalities seek compensatory damages for the increased costs of providing police, fire, medical, and emergency services in response to gun violence,[8] as well as broad injunctive relief to change the way the defendants design, distribute, and market their products.[9] For example, the municipalities seek to enjoin the manufacturers from selling firearms without "appropriate safety devices,"[10] such as chamber-load indicators, magazine disconnects, and "'personalized' gun technology",[11] and to implement standards for monitoring and controlling the distributors and dealers to prevent guns from reaching the so-called "illegal secondary market."[12]

The authors submit that these lawsuits are legally deficient.[13] The litigation is no more than an ill-conceived effort by the municipalities to shift blame for criminal and accidental misuse of non-defective firearms to those who lawfully manufacture and sell them. Essentially, the municipalities are asking the courts to make policy decisions,

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Corp., No. 00-04-01-442 (Philadelphia County Ct. 2000)); New York City, N.Y. (City of New York v. Arms Tech. Inc., No. CV 00 3641 (E.D.N.Y. 2000).

3. Plaintiffs' 2d Amended Complaint, ¶ 59, *City of Chicago* (No. 98 CH 015596).

4. *See id.*

5. Plaintiffs' 1st Amended Complaint at 32, *City of Boston* (No. SUCV1999-02590-C).

6. *See, e.g., id.*; Plaintiffs' Amended Complaint at 52-53, *City of Camden* (No. CAM-L-4510-99).

7. Other claims alleged are unjust enrichment, defective design, failure to warn, strict liability, civil conspiracy, fraud, and state statutory claims. *See generally,* Plaintiffs' Complaint at 20-37, *Ganim,* (No. CV 99 0361279); Plaintiffs' 1st Amended Complaint, ¶¶ 77-128, *City of Boston* (No. SUCV1999-02590-C); Plaintiffs' Amended Complaint, ¶¶ 117-186, *City of Camden* (No. CAM-L-4510-99).

8. *See, e.g.,* Plaintiffs' 1st Amended Complaint at 33, *City of Boston* (No. SUCV1999-02590-C); Plaintiffs' Complaint at 35, *City of Gary,* (No. 45D02-9908-CT355).

9. *See, e.g.,* Plaintiffs' Amended Complaint at 52-53, *City of Camden* (No. CAM-L-4510-99); Plaintiffs' Complaint at 34-35, *City of Gary* (No. 45D02-9908-CT355).

10. Plaintiffs' 1st Amended Complaint at 32, *City of Boston* (No. SUCV1999-02590-C).

11. *Id.* ¶ 64.

12. Plaintiffs' Complaint at 34, *City of Gary* (No. 45D02-9908-CT355). *See also,* Plaintiffs' Amended Complaint at 52-53, *City of Camden* (No. CAM-L-4510-99) (referring to the secondary market as an "illegitimate market"); Plaintiffs' 1st Amended Complaint at 32, *City of Boston* (No. SUCV1999-02590-C).

13. The authors represent a firearms manufacturer in the lawsuits in question.

which should be made by the legislature.[14] The manufacture, distribution, and sale of firearms have been regulated by Congress since 1968.[15] Indeed, there are more than 20,000 laws regulating firearms in effect today.[16] These laws govern what types of firearms may be manufactured and sold, who may sell them, where they may be sold, who may purchase them and under what circumstances, and how these transactions must be conducted and documented.[17] In addition, many states and municipalities have enacted comprehensive laws regulating the distribution and sale of firearms within their borders.[18] The municipalities fail to allege that any specific manufacturers have violated any of these laws. Rather, they seek to regulate through litigation rather than legislation.

This article will focus upon the plaintiffs' principal theories of recovery: public nuisance and negligent distribution.[19] Generally speaking, both claims are foreclosed by two well-established principles. First, the principle of remoteness forecloses these claims because, as a matter of law, the alleged harm to the municipalities is too remote from the defendants' alleged wrongdoing to permit recovery.[20] Second, the principle against municipal cost recovery bars these claims because, as a matter of law, a municipality may not recover costs of providing governmental services unless a statute authorizes recovery.[21] In addition to these overarching deficiencies, the

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14. *See, e.g.*, Forni v. Ferguson, No. 132994/94, slip. op. at 14-15 (N.Y. Super. Ct. Aug. 2, 1995) (granting the defendants' motion to dismiss and stating that "[a]t oral argument, I told counsel that I personally hated guns and that if I were a member of the legislature, I would lead a charge to ban them. However, I do not hold that office. Rather I am a member of the Judiciary, and must respect the separation of [powers] function"), *aff'd*, 648 N.Y.S.2d 73 (1996).

15. *See* 18 U.S.C. §§ 921-930 (1994 & Supp. IV 1998). *See also* Huddleston v. United States, 415 U.S. 814, 824 (1974) (noting that the purpose of the Gun Control Act of 1968 was to restrict public access to firearms).

16. *See* BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEP'T OF TREASURY, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE (2000); BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEP'T OF TREASURY, STATE LAWS AND PUBLISHED ORDINANCES-FIREARMS (Dept. of Treas. B.A.T.F., 21st ed. 1998).

17. *See* 18 U.S.C. §§ 921-930 (1994 & Supp. IV 1998); 26 U.S.C. § 5801 (1994); 27 C.F.R. pts. 178, 179 (2000).

18. *See, e.g.*, IND. CODE ANN. § 35-47 (Michie 1998 & Supp. 2000); 430 ILL. COMP. STAT. 65 (West 1993 & Supp. 2000); MASS. GEN. LAWS ANN. ch. 140 §§ 121-131P (West 1991 & Supp. 2000); N.J. STAT. ANN. §§ 2C:39, 58 (West 1995 & Supp. 2000).

19. This article analyzes the plaintiffs' theories from the defendant manufacturers' perspective. Accordingly, a number of the arguments and legal theories set forth on behalf of the manufacturers in court are presented here.

20. *See* discussion *infra* notes 24-81 and accompanying text.

21. *See* discussion *infra* notes 82-116 and accompanying text.

claims also fail because vital elements are missing.[22] Lastly, the relief sought by the municipalities amounts to the regulation of interstate commerce and violates the Commerce and Due Process Clauses of the United States Constitution.[23]

I. THE PRINCIPLE OF REMOTENESS BARS THE MUNICIPALITIES' CLAIMS

A. *The Basic Principle*

The municipalities seek damages and injunctive relief solely on the basis of actual or potential harm to others from the illegal or accidental misuse of firearms.[24] In the eyes of the law, this type of harm is too indirect – too remote from the alleged wrongdoing – to support standing to sue or proximate causation.

The principle of remoteness was established at least as early as 1846, in the seminal case of *Anthony v. Slaid.*[25] Anthony, who had contracted to support the town's poor, sued Slaid, whose wife had assaulted a pauper in the town, resulting in an increase in Anthony's medical expenditures for the poor.[26] The Massachusetts Supreme Judicial Court held that Anthony could not recover because his secondary injury was "too remote and indirect."[27] The court specifically foresaw and sought to avoid the possibility of municipal suits arising from crimes against residents: "If such a principle be admitted, we do not see why the consequence would not follow, . . . that in a case where an assault is committed, or other injury is done to the person or property of a town pauper, . . . the town might maintain an action . . . for damages."[28] The United States Supreme Court soon after applied the principle of *Anthony* in *Insurance Co. v. Brame,*[29] to bar an insurer's

22. *See* discussion *infra* notes 117-169 and accompanying text.

23. *See* discussion *infra* notes 171-185 and accompanying text.

24. *See, e.g.,* Plaintiffs' 1st Amended Complaint, ¶ 79, City of Boston v. Smith & Wesson Corp. (Suffolk County Super. Ct. 2000) (No. SUCV1999-02590-C) ("residents of Boston have been and will continue to be killed and injured by these firearms and residents of Boston will continue to fear for their health, safety and welfare"); Plaintiffs' 1st Amended Complaint, ¶ 35, City of Chicago v. Beretta U.S.A. Corp. (Cook County Cir. Ct. 2000) (No. 98 CH 015596) ("[illegal firearms] are often used to injure or kill Chicago residents"); Plaintiffs' Amended Complaint, ¶ 1, City of Camden v. Beretta U.S.A. Corp., No. CAM-L-4510-99 (Camden County Super. Ct. 1999) ("[e]ach year, Camden residents are killed, maimed, and injured with guns").

25. 52 Mass. (11 Met.) 290 (1846).

26. *See id.* at 290-91.

27. *Id.* at 291.

28. *Id.*

29. 95 U.S. 754 (1877).

attempt to recover the amount paid under a life insurance policy from the murderer of its insured.[30]

The remoteness doctrine has withstood the test of time. Relying on its common law foundation, the Supreme Court has applied the doctrine in recent years to limit standing to assert claims under the antitrust laws[31] and the federal RICO statute.[32] In *Holmes v. Securities Investor Protection Corp.*,[33] customers of stock broker-dealers were harmed when the broker-dealers became insolvent as a result of losses caused by stock manipulation by insiders.[34] The Securities Investor Protection Corporation, which reimbursed the customers for their losses, stood in the place of the customers and sued the insiders under RICO.[35] The Court rejected the claim, holding that the harm to the customers derived from the harm to the broker-dealers and was therefore too remote from the insiders' wrongdoing to sustain recovery.[36] Applying common law principles, the Court held that "a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover."[37]

The courts recognize two legal consequences of the remoteness bar. First, where there is no direct injury, a plaintiff has no standing to sue.[38] Without standing, a court does not have subject matter jurisdiction.[39] Second, as a matter of law, a plaintiff cannot establish proximate cause absent a direct relation between the injury asserted and the injurious conduct alleged.[40] Only those harms that are direct, proximate, and not remote are actionable.[41] A plaintiff who cannot establish "'some direct relation between the injury asserted and the

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30. *See id.* at 758-59 (holding that the secondary harm to the insurer was "an incidental circumstance, a remote and indirect result, no[t] necessarily or legitimately resulting from the act of killing").

31. *See* Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 533-34 (1983).

32. *See* Holmes v. Sec. Investor Protection Corp., 503 U.S. 258, 276 (1992).

33. 503 U.S. 258 (1992).

34. *See id.* at 262-63.

35. *See id.*

36. *See id.* at 271 ("the link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers").

37. *Id.* at 268-69.

38. *See* Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 239, 244 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000).

39. *See id.*

40. *See id.* at 239.

41. *See Holmes*, 503 U.S. at 266-67 nn. 10, 11.

injurious conduct alleged'"[42] fails to plead a "key element for establishing proximate causation, independent of and in addition to other traditional elements of proximate cause."[43]

The doctrine of remoteness has been applied recently in litigation brought by various health insurers and union welfare funds against tobacco companies to recover damages for medical expenses arising from smoking related injuries to the plan participants and for other costs. The courts of appeals in five different federal circuits (every appellate court to consider the issue) have applied the principle of remoteness to bar the insurers' and union welfare funds' claims.[44] Because the doctrine is rooted in common law principles of proximate causation, those courts applied it not only to the antitrust and RICO claims at issue in *Associated General Contractors*[45] and *Holmes*,[46] but also to a variety of common law and state statutory claims.[47]

In an effort to overcome the remoteness hurdle, the union welfare funds in the tobacco cases attempted to portray the harm they had allegedly suffered as direct, rather than indirect, by alleging that they suffered direct injuries to their "infrastructure, financial stability, [and] ability to project costs."[48] The courts rejected these efforts, holding that the harm alleged to be direct was "entirely derivative of

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42. *Laborers Local 17*, 191 F.3d at 235 (quoting *Holmes*, 503 U.S. at 268).

43. *Id.*

44. *See id*; *see also* Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 918 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000); Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc., 199 F.3d 788, 789-90 (5th Cir. 2000); Coyne *ex rel.* Ohio v. Am. Tobacco Co., 183 F.3d 488, 495 (6th Cir. 1999); Int'l Bhd. of Teamsters Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818, 825-26 (7th Cir. 1999); Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 966 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000).

45. *See* Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519 (1983).

46. *See* Holmes v. Sec. Investor Protection Corp., 503 U.S. 258 (1992).

47. *See, e.g.*, *Laborers Local 17*, 191 F.3d at 242-43 (dismissing New York common law fraud and special duty claims on remoteness grounds); *Oregon Laborers-Employers*, 185 F.3d at 968-69 (dismissing Oregon Unfair Trade Practices Act, fraud; and conspiracy claims); *Steamfitters Local Union No. 420*, 171 F.3d at 934-37 (dismissing state common law claims of fraud, unjust enrichment, negligence, strict liability, and breach of warranty, as well as federal antitrust and RICO claims); N.J. Carpenters Health Fund v. Philip Morris, Inc., 17 F. Supp. 2d 324 (D.N.J. 1998) (recognizing the doctrine of remoteness, under New Jersey law, as one of "two distinct inquiries" for "any tort claim").

48. *Laborers Local 17*, 191 F.3d at 239; *see also* Tex. Carpenters Health Benefit Fund v. Philip Morris Inc., 21 F. Supp. 2d 664, 670-71 (E.D. Tex. 1998), *aff'd* 199 F.3d 788 (5th Cir. 2000); *Int'l Bhd. of Teamsters*, 196 F.3d at 826; *Oregon Laborers-Employers*, 185 F.3d at 963-64; *Steamfitters Local Union No. 420*, 171 F.3d at 927-28.

the harm suffered by plan participants as a result of using tobacco products," and therefore barred by remoteness.[49]

As in the union welfare fund cases, the municipalities in the firearms cases claim direct harm by alleging, among other things, that they suffer damages even if guns are not used to commit crimes.[50] But such allegations cannot obscure the fact that the crime problem at the heart of the municipalities' claims does not arise from the mere manufacture and existence of firearms; rather, it arises from the fact that firearms are actually or potentially used to injure city residents. Any efforts a city makes to interdict illegally possessed guns before they are used in crime are made only because those guns might be used in crime. Without the past misuse (giving rise to the threat of future misuse) of firearms by persons (who are not defendants in the lawsuits and with whom the named defendants have no connection) against other persons (who are not plaintiffs in the lawsuits), the municipalities would incur none of the expenses they claim as damages. Any harm to the municipalities (for costs of police, jails, prosecutors and the like) is derived exclusively from harm or potential harm to persons, and, therefore, is too remote.

B. Policy Considerations

The Court in *Holmes* identified three policy reasons for the direct injury requirement that lie at the heart of the remoteness doctrine.[51] First, "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors."[52] The more "links in the chain of causation,"[53] the stronger the policy reason to bar the claim.[54] In the tobacco cases brought by the union welfare funds,[55]

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49. *Laborers Local 17*, 191 F.3d at 239.

> Without injury to the individual smokers, the funds would not have incurred any increased costs in the form of the payment of benefits, nor would they have experienced the difficulties of cost prediction and control that constituted the crux of their infrastructure harms. Being purely contingent on harm to third parties, these injuries are indirect. Consequently . . . plaintiffs lack standing.

Id.

50. *See, e.g.*, Plaintiffs' Opposition to Motion to Dismiss at 39, City of Chicago v. Beretta U.S.A. Corp. (Cook County Cir. Ct. 1998) (No. 98 CH 015596) (asserting that the city would incur costs for expenses such as the confiscation of firearms from criminals and juveniles, even if those firearms are never used in a crime).

51. *See* Holmes v. Sec. Investor Protection Corp., 503 U.S. 258, 269 (1992).

52. *Id.*

53. *Steamfitters Local Union No. 420*, 171 F.3d at 930.

54. *See id.*

55. *See supra* notes 44, 47.

the courts noted the virtual impossibility of sorting out the various causes of the funds' alleged injuries, including conduct of the tobacco manufacturers, steps the funds might have taken to reduce smoking-related health costs, and the myriad of reasons why the fund participants smoked.[56] Similar problems are present in the suits brought by the municipalities against firearms manufacturers. There are a myriad of independent factors that may intervene between the conduct of gun manufacturers and those injured by firearms, such as the criminal or reckless misconduct of third parties, and the effectiveness of municipal and social services in curtailing that conduct.[57] Any attempt to adjudicate the municipalities' claims would require the court - or jury - to sort out the contributing roles played, not only by numerous third parties, but also by social problems such as illegal drug use, inadequate public education, economic disadvantage, community deterioration, and prior failures of the criminal justice system. The difficulty of ascertaining the municipalities' "damages attributable to the [manufacturers] violation, as distinct from other, independent factors"[58] is sufficient, in itself, to justify dismissal of the municipalities' claims.

The second policy reason for limiting standing to the directly injured is that "recognizing claims by the indirectly injured would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries."[59] The risk of multi-

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56. *See* Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 239, 244 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000); *see also Steamfitters Local Union No. 420*, 171 F.3d at 930.

57. Indeed, the chain of causation necessary to connect the manufacturers' alleged conduct with the cities' claims for municipal costs is actually longer and more convoluted than the "tortured path" rejected by the Third Circuit as a matter of law in the *Steamfitters* tobacco case. In *Steamfitters*, the court identified five basic causal steps necessary to connect the defendants' alleged conduct to the funds' alleged injury and, in finding no standing as a matter of law, observed that "[t]he sheer number of links in the chain of causation . . . [is] greater than in any case we can find in which this court or the Supreme Court has found antitrust standing." *Steamfitters Local Union No. 420*, 171 F.3d at 930. In the municipal firearms cases, the causal chain necessarily involves at least six steps: (1) defendants manufacture firearms; (2) they sell those firearms legally (subject to extensive regulation of the distribution system); (3) some of those firearms are diverted into an illegal firearms market by others; (4) some of those diverted firearms are subsequently used in the various cities to commit intentional, criminal acts; (5) city residents are injured by that intentional conduct of others; and (6) the cities claim that they expend funds as a result of that criminal conduct.

58. Holmes v. Sec. Investor Protection Corp., 503 U.S. 258, 269 (1992).

59. *Laborers Local 17*, 191 F.3d at 236-37 ("the more indirect an injury is, the more difficult it becomes to determine the amount of plaintiff's damages attributable to the wrongdoing as opposed to other, independent factors . . . .") (citing *Holmes*, 503 U.S. at 269-70).

ple recoveries against the firearms manufacturers is real because, in addition to the suits brought by the municipalities, the defendants could face suits brought by individuals directly injured by the misuse of firearms, as well as insurance companies, health and benefit funds, and the various states.

The third policy reason for requiring direct injury according to the *Holmes* Court is that "the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely."[60] Those directly injured by the use of firearms can and do sue specific manufacturers if they believe they can state a viable tort claim. The fact that such suits do not exactly duplicate the relief sought by the municipalities does not justify allowing the municipalities to pursue their claims to recover damages for remote harm.[61]

Perhaps the strongest consideration weighing against granting standing to remotely injured parties like the municipalities was not even at issue in *Holmes* but was recognized by the Seventh Circuit in *International Board of Teamsters Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc*:

> The outcome of smokers' suits is why the Funds and Blues want to sue in their own names; they choose antitrust and RICO because, in the Blues' words, "assumption of the risk, contributory negligence and similar defenses are not pertinent." This is exactly why plaintiffs must lose . . . [N]o rule of law requires persons whose acts cause harm to cover all of the costs, unless these acts were legal wrongs. If . . . [a defendant] has committed civil wrongs . . . then the way to establish this is through tort suits, rather than through litigation in which the plaintiffs seek to strip their adversaries of all defenses.[62]

Like the union welfare funds, the municipalities are improperly attempting to bypass their burden of pleading and proving the existence of a tort. This problem is compounded by the municipalities'

60. *Holmes*, 503 U.S. at 269-70.

61. *See Laborers Local 17*, 191 F.3d at 241 (holding that the third *Holmes* factor applied even though individual smokers could not bring RICO claims); *see also* Callahan v. A.E.V., Inc., 182 F.3d 237, 265-67 (3d Cir. 1999) (holding that governmental victims of fraud could not bring RICO action but could vindicate law through other enforcement methods).

62. Int'l Bhd. of Teamsters Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818, 822-23 (7th Cir. 1999).

generalized allegations against multiple defendants. By avoiding any identification of the victims of individual gun crimes, the perpetrators of those crimes, the circumstances of the guns' distribution, or even the specific manufacturers allegedly at fault, the municipalities plainly hope to dodge the difficulty of proving the basic elements of a direct tort claim and of responding to individualized defenses.

C. Decisions In Municipality Cases

Applying these previously discussed principles, courts in three of the municipal firearms cases have held that the municipalities' claims were barred as derivative and too remote.[63] In *City of Cincinnati*,[64] the court dismissed all of the claims, in part based on the conclusion that "[t]he claims of the City are premised on injuries which have occurred to its citizens, and as such are barred by the doctrine of remoteness."[65] Similarly, in the lawsuit brought by Miami-Dade County, Florida, the court concluded that "the County is without standing to proceed in this lawsuit because the damages it seeks are purely derivative of damages suffered by third parties and are therefore too remote to be recoverable by the County."[66]

A superior court in Connecticut dismissed the lawsuit brought by the mayor and city of Bridgeport for lack of subject matter jurisdiction based on the plaintiffs' lack of standing.[67] The court found persuasive the reasoning used by the federal appellate courts in dismissing the union funds' lawsuits against the tobacco companies.[68] The court concluded that "[d]amages that are derivative of harm suffered by third parties, being the citizens of Bridgeport in this case, are indirect and too remote to be recoverable by these plaintiffs under common law tort principles."[69]

Courts in other jurisdictions have failed to dismiss the municipalities' claims against firearms manufacturers on remoteness grounds.[70]

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63. *See* City of Cincinnati v. Beretta U.S.A. Corp., No. C-990729, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000); Ganim v. Smith & Wesson Corp., No. CV 990153198S, 1999 WL 1241909 (Conn. Super. Ct. Dec. 10, 1999), *appeal pending*, Penelas v. Arms Tech., Inc., No. 99-1941 CA-06, 1999 WL 1204353 (Fla. Cir. Ct. Dec. 13, 1999), *appeal pending*.

64. No. A9902369, 1999 WL 809838 (Ohio Ct. C.P. Oct. 7, 1999), *aff'd*, No. C-990729, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000).

65. *Id.* at *3.

66. *Penelas*, 1999 WL 1204353 at *2.

67. *See Ganim*, 1999 WL 1241909 at *2.

68. *See id.* at *7-9.

69. *Id.* at *10.

70. *See* Archer v. Arms Tech., Inc., No. 99-912658 NZ (Wayne County Cir. Ct. May 16, 2000), *petition for interlocutory appeal pending*; City of Atlanta v. Smith & Wesson Corp., No. 99VS0149217J (Fulton County Ct., Oct. 27, 1999), *appeals in related cases pending*; City of

In the Cleveland case, *White v. Smith & Wesson Corp.*,[71] the court acknowledged basic standing principles and that the concept of remoteness "comes into play in determining standing and proximate causation,"[72] but then focused almost exclusively on the injury-in-fact aspect of standing rather than the required causal connection.[73] Moreover, although the claims in *White* arise under Ohio state law, the federal court made no reference at all to the contrary, previous decision by an Ohio state court judge in *City of Cincinnati.*[74] In the combined cases of Detroit and Wayne County, Michigan, *Archer v. Arms Tech., Inc.*,[75] the court rejected defendants' remoteness argument, in part by confusing the legal remoteness principle with the fact-based issue of foreseeability.[76] The defendants have applied for interlocutory appellate review of that decision.[77] A state court in Massachusetts recognized that the remoteness principle applies in these cases but concluded that at least some of the city's claims are direct.[78] In *City of Atlanta v. Smith & Wesson Corp.*,[79] the court denied the defendants' motion to dismiss but did not comment specifically on the remoteness arguments.[80]

Because of the principle of remoteness, the municipal plaintiffs lack standing to sue, and, as a matter of law, cannot establish proximate causation.[81] Therefore, their actions must fail.

Boston v. Smith & Wesson Corp., No. 1999-02590 (Suffolk County Super. Ct. July 13, 2000); White v. Smith & Wesson Corp., 97 F. Supp. 2d 816 (N.D. Ohio 2000).

71. 97 F. Supp. 2d 816 (N.D. Ohio 2000).

72. *Id.* at 823 n.10.

73. *See id.* at 824-26.

74. *See supra* notes 64-65 and accompanying text.

75. No. 99-912658NZ (Wayne County Cir. Ct. May 16, 2000), *petition for interlocutory appeal pending.*

76. *See id.* slip. op. at 17-18.

77. *See* Joint Application for Leave to Appeal by Certain Manufacturer Defendants at ix, *Archer* (No. 99-912658NZ).

78. *See* City of Boston v. Smith & Wesson Corp., No. 1999-02590, slip op. at 9-16 (Suffolk County Super. Ct. July 13, 2000). The manufacturers are seeking an interlocutory appeal.

79. No. 99VS0149217J (Fulton County Ct. Oct. 27, 1999), *appeals in related cases pending.*

80. *See id.* slip. op. at 1-2. The authority of government officials to maintain the suit was challenged in related cases that are currently on appeal.

81. *See* Holmes v. Sec. Investor Protection Corp., 503 U.S. 258, 286-87 (1992) (Scalia, J., concurring) ("The ultimate question here is statutory standing: whether the so-called nexus . . . between the harm of which this plaintiff complains and the defendant's so-called predicate acts is of the sort that will support an action under civil RICO."); Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 239 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000) ("because defendants' alleged misconduct did not proximately cause the injuries alleged, plaintiffs lack standing to bring RICO claims against defendants").

II. A MUNICIPALITY CANNOT RECOVER THE COSTS OF TAX-SUPPORTED SERVICES IT PROVIDES AS PART OF ITS GOVERNMENTAL FUNCTIONS

A. *The Basic Principle*[82]

The claims for damages asserted by the municipalities fail for the independent reason that a governmental entity is prohibited from recovering the costs of performing tax-supported governmental services in the absence of a statute authorizing such recovery.[83] The rationale for the prohibition of municipal cost recovery was articulated by Justice (then Judge) Kennedy in *City of Flagstaff v. Atchison, Topeka and Santa Fe Railway Co.*:

> [W]e conclude that the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service. Where such services are provided by the government and the costs are spread by taxes, the tortfeasor does not expect a demand for reimbursement. This is so even though the tortfeasor is fully aware that private parties injured by its conduct, who cannot spread their risk to the general public, will have a cause of action against it for damages proximately or legally caused. . .. Here governmental entities themselves currently bear the cost in question, and they have taken no action to shift it elsewhere. If the government has chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates fiscal policy; the legislature and its public deliberative processes rather, than the court, is the appropriate forum to address such fiscal concerns.[84]

Because the rule against municipal cost recovery is rooted in the legislative policy of taxing citizens generally to pay for basic governmental services, courts are reluctant to permit recovery of municipal costs in the absence of specific statutory permission for such recov-

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82. This rule against municipal cost recovery prevents a municipality from recovering damages. Therefore, to the extent damages are an element of other claims, they fail as well.

83. *See* Koch v. Consol. Edison Co., 468 N.E.2d 1, 8 (N.Y. 1984), *cert. denied,* 469 U.S. 1210 (1985); District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1079-80 (D.C. Cir. 1984) (stating that the prohibition against municipal cost recovery is the "general common-law rule in force in other jurisdictions").

84. City of Flagstaff v. Atchison, Topeka & Sante Fe Ry. Co., 719 F.2d 322, 323-24 (9th Cir. 1983) (citation omitted).

ery.[85] No such statutes apply in the municipal firearms cases. As one court explained, "[i]t is critically important to recognize that the government's decision to provide tax-supported services is a legislative policy determination. It is not the place of the courts to modify such decisions."[86] This principle has been applied in courts in numerous jurisdictions to prohibit recovery of the costs of performing municipal services,[87] including the costs of preventing and detecting crime.[88]

In attempting to overcome the rule against municipal cost recovery, some of the municipalities have asserted that the rule should apply only when the occurrence that creates the cost to be recovered is a "discrete incident,"[89] but not when the "problem is caused by ongoing misconduct."[90] This position finds no support in the case law.[91] The rule, by its terms, applies generally to the recovery of costs for performing governmental functions.[92] There is no principled distinction between a "discrete incident" requiring governmental services and a series of problems requiring those same governmental services.

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85. *See Air Florida*, 750 F.2d at 1080.

86. *Id.*

87. *See, e.g*, Township of Cherry Hill v. Conti Constr. Co., 527 A.2d 921, 922 (N.J. Super. Ct. 1987) (denying recovery of police overtime costs after gas line ruptured); City of Pittsburgh v. Equitable Gas Co., 512 A.2d 83, 84 (Pa. Commw. Ct. 1986), *appeal denied*, 520 A.2d 1386 (Pa. 1987) (police services following natural gas explosion were not recoverable); County of San Luis Obispo v. Abalone Alliance, 223 Cal. Rptr. 846, 851 (Cal. Ct. App. 1986) (barring recovery of costs of responding to demonstrations at a nuclear power plant construction site); *Koch*, 468 N.E.2d at 8 (barring recovery of increased costs for municipal police, fire sanitation, and hospital personnel resulting from a blackout); Kodiak Island Borough v. Exxon Corp., 991 P.2d 757, 760-61 (Ala. 1999) (assuming no recovery of costs of responding to oil spill in absence of statute).

88. *See, e.g.*, City of Bridgeton v. B.P. Oil, Inc., 369 A.2d 49, 54 (N.J. Super. 1976) ("[T]here remains an area where the people as a whole absorb the cost of such services – for example, the prevention and detection of crime. No one expects the rendering of a bill (other than a tax bill) if a policeman apprehends a thief.").

89. Plaintiffs' Memorandum in Response to Motions to Dismiss Second Amended Complaint at 36, City of Chicago v. Beretta U.S.A. Corp. (Cook County Cir. Ct. 1998) (No. 98 CH 015596).

90. *Id.*

91. Indeed, in *Town of Freetown v. New Bedford Wholesale Tire, Inc.*, 423 N.E.2d 997, 997-98 (Mass. 1981), the court held that a municipality could not recover the costs it incurred in fighting a fire on the defendant's property, even though the fire was caused by the defendant's ongoing misconduct (illegally accumulating more than 750,000 used tires on the site).

92. *See* City of Flagstaff v. Atchison, Topeka, & Santa Fe Ry. Co., 719 F.2d 322, 324 (9th Cir. 1983).

B. *The Public Nuisance Exception*

The municipalities have also asserted that their claims fall within a "public nuisance" exception to the municipal cost recovery bar.[93] This argument is similarly lacking in merit. All three of the cases cited in *City of Flagstaff* to illustrate a public nuisance exception involved land-based conditions – two involving water pollution and the third abandoned piers.[94] As discussed *infra,* the tort of public nuisance does not, and should not, extend to product-based claims.[95] As a consequence, the municipalities cannot allege a public nuisance and cannot fit within a public nuisance exception to the municipal cost recovery rule.

Moreover, like the other exceptions recognized in *City of Flagstaff,*[96] the public nuisance exception is narrow, one of several "distinct, well-defined categories *unrelated to the normal provision of police, fire, and emergency services.*"[97] In the public nuisance cases cited in *City of Flagstaff,* abating the land-based nuisances was not part of "the normal provision of police, fire, and emergency services."[98] By contrast, the municipalities in the firearms cases seek to recover, not the specific and unusual costs of remediating pollution at a particular site or removing an obstruction to navigation or travel, but a broad subsidy of general governmental operations in responding to third parties' misuse of the defendants' products.[99]

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93. *See, e.g.,* Plaintiffs' Opposition to Motion by Manufacturing Defendants to Dismiss the Complaint at 37, City of Boston v. Smith & Wesson Corp. (Suffolk County Super. Ct. 2000) (No. SUCV1999-02590-C).

94. *See City of Flagstaff,* 719 F.2d at 324.

95. *See infra* notes 143-169 and accompanying text.

96. *See City of Flagstaff,* 719 F.2d at 324 (noting that governmental entities can recover costs of their services when recovery is authorized by statute or regulation or required to effect the intent of federal legislation, when the governmental entity incurs expenses to protect its own property, and when the acts of a private party created a public nuisance which the government seeks to abate).

97. *Id.* (emphasis added).

98. *Id.*

99. *See, e.g.,* Plaintiffs' 1st Amended Complaint, ¶ 6-7, City of Boston v. Smith & Wesson Corp. (Suffolk County Super. Ct. 2000) (No. SUCV1999-02590-C) (seeking recovery for law enforcement, emergency rescue services, increased security at public schools and public buildings, pensions, disability benefits, and unemployment benefits). According to *City of Chicago,*

> [Plaintiffs are seeking recovery for] significant increased costs . . . in order to enforce the law and to treat the victims of firearms crime . . . [including] additional personnel, resources, time and money to provide emergency medical services and health care to additional victims of firearms violence; trace the additional firearms recovered in the City of Chicago; investigate and prosecute those who have possessed or used firearms illegally, as a direct result of defendants' conduct; fund the criminal justice system in which such prosecutions take

In short, the municipalities are attempting to shift to the firearms manufacturers the costs of virtually every aspect of their criminal justice system. If the municipalities were allowed to recover from the firearms manufacturers costs for such inherently governmental functions, the potential liability of manufacturers of other products for the costs incurred by a city as a result of the misuse of their lawful products would be virtually unlimited. For example, a municipality could sue the automobile industry for the costs of traffic enforcement (because automakers make and market cars that can far exceed the speed limits), the liquor industry for the costs of stopping drunk drivers (because distillers make a product that can be abused with disastrous consequences), and the beverage and fast food and candy industries for the costs of sweeping up litter and operating landfills (because any of those manufacturers could reduce the waste stream associated with their products).[100] Any such radical upheaval of the common law must come, if at all, from the legislature, not the courts.

C. Decisions In Municipality Cases

Courts in three jurisdictions have recently applied the rule against municipal cost recovery as one of the grounds for dismissal of the municipalities' claims against the firearms defendants.[101] In *City of Cincinnati v. Beretta U.S.A. Corp.*,[102] the court held that "absent statutory authorization, the City may not recover for expenditures for ordinary public services which it has the duty to provide. There being no authorizing statute, the City's attempt to recover such expenditures must be denied."[103] In *Penelas v. Arms Technology, Inc.*,[104] the court concluded that "the [Miami-Dade] County's claim for damages, based on the costs to provide 911, police, fire and emergency services effec-

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> place; detain and imprison those who have used firearms unlawfully; and, through its law enforcement officers, attempt to maintain the peace and protect the health, safety and welfare of their residents.

Plaintiffs' 2d Amended Complaint, ¶ 95, City of Chicago v. Beretta U.S.A. Corp. (Cook County Cir. Ct. 1998) (No. 98 CH 015596).

100. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 388-408. For example, "[g]ood whiskey is not unreasonably dangerous merely because it will make some people drunk . . . ." § 402A, cmt. i.

101. *See* City of Cincinnati v. Beretta U.S.A. Corp., No. A9902369, 1999 WL 809838 (Ohio Ct. C. P. Oct. 7, 1999), *aff'd*, No. C-990729, 2000 WL 1133078 (Ohio App. Aug. 11, 2000); Ganim v. Smith & Wesson Corp., No. CV 990153198S, 1999 WL 1241909 (Conn. Super. Ct. Dec. 10, 1999), *appeal pending*; Penelas v. Arms Tech., Inc., No. 99-1941 CA-06, 1999 WL 1204353 (Fla. Cir. Ct. Dec. 13, 1999), *appeal pending*.

102. No. A9902369, 1999 WL 809838 (Ohio Ct. C.P. Oct. 7, 1999), *aff'd*, No. C-990729, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000).

103. *Id.* at *3.

104. No. 99-1941 CA-06, 1999 WL 1204353 (Fla. Cir. Ct. Dec. 13, 1999), *appeal pending*.

tively seeks reimbursement for expenditures made in its performance of governmental functions" and hence was barred.[105] In *Ganim v. Smith & Wesson Corporation*,[106] the court cited, in support of its conclusion that the city of Bridgeport lacked authority to maintain its suit, the "general rule prohibiting recoupment of municipal expenditures."[107]

The courts in three other suits brought by municipalities against firearms manufacturers have held that the rule against municipal cost recovery did not apply.[108] In *White v. Smith & Wesson Corp.*,[109] the federal district court, while purporting to apply Ohio law, completely ignored the prior decision of the Ohio state court that dismissed virtually identical claims in *City of Cincinnati v. Beretta U.S.A. Corp.*[110] In *Archer v. Arms Technology, Inc.*,[111] the court allowed the plaintiff to proceed with its public nuisance claim because it found that the rule against municipal cost recovery was subject to the public nuisance exception.[112] In *City of Boston v. Smith & Wesson Corp.*,[113] the court recognized the general rule prohibiting municipal cost recovery,[114] but concluded that the rule was limited to cases involving "discrete incidents" of a sort "the municipality reasonably could expect might occur."[115] The court found the plaintiffs' case different in that "[p]laintiffs allege wrongful acts which are neither discrete nor of the sort a municipality can reasonably expect."[116]

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105. *Id.* at *2.

106. No. CV 990153198S, 1999 WL 1241909 (Conn. Super. Ct. Dec. 10, 1999), *appeal pending*.

107. *Id.* at *6 n.7.

108. *See* Archer v. Arms Tech., Inc., No. 99-912658 NZ (Wayne County Cir. Ct. May 16, 2000), *petition for interlocutory appeal pending*; City of Boston v. Smith & Wesson, No. 1999-02590 (Suffolk County Super. Ct. July 13, 2000); White v. Smith & Wesson, 97 F. Supp. 2d 816 (N.D. Ohio 2000).

109. 97 F. Supp. 2d 816 (N.D. Ohio Mar. 14, 2000).

110. *See id.; see also* City of Cincinnati v. Beretta U.S.A. Corp., No. C-990729, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000).

111. No. 99-912658 NZ (Wayne County Cir. Ct. May 16, 2000), *petition for interlocutory appeal pending*.

112. *See id.* slip op. at 14. The public nuisance claims are discussed *infra* notes 142-169 and accompanying text.

113. No. 1999-02590 (Suffolk County Super. Ct. July 13, 2000).

114. *See id.* slip op. at 16-19.

115. *Id.* at 18.

116. *Id.*

III. THE MUNICIPALITIES FAIL TO STATE A VALID CLAIM FOR NEGLIGENCE

The suits brought by the municipalities allege that the firearms manufacturers are negligent in the sale, marketing, and distribution of their products.[117] The municipalities further allege that this negligent distribution creates and fosters an illegal secondary market for firearms and increases the risk that unauthorized people, such as criminals and minors, will gain access to firearms and misuse them.[118] These claims, however, are legally deficient because the municipalities cannot establish two of the fundamental prerequisites of a negligence claim – the existence of a duty on the part of the firearms manufacturers and causation.

A. *There Is No Duty*

In order to prevail on a negligence claim, a plaintiff must plead and prove that the defendant owed a duty of care.[119] Whether such a duty exists is a question of law for the court.[120] It is well established that a defendant has no duty to prevent the criminal, intentional, or reckless behavior of a third party unless there is a special relationship between either the defendant and the injured party or the defendant and the third party (e.g., the person who actually shot the gun).[121]

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117. *See, e.g,* Plaintiffs' Amended Complaint, ¶ 137, 161, City of Camden v. Beretta U.S.A. Corp. (Camden County Super. Ct. 2000) (No. CAM-L-4510-99); Plaintiffs' 1st Amended Complaint, ¶ 86, City of Boston v. Smith & Wesson Corp. (Suffolk County Super. Ct. 2000) (No. SUCV1999-02590-C); Plaintiffs' Complaint, ¶ 77, City of Gary v. Smith & Wesson Corp. (Lake Super. Ct. 1999) (No. 45D02-9908-CT355).

118. *See, e.g.,* Plaintiffs' 1st Amended Complaint, ¶ 86, *City of Boston* (No. SUCV1999-02590-C); Plaintiffs' Complaint, ¶ 77, *City of Gary* (No. 45D02-9908-CT355).

119. *See* Bergendahl v. Mass. Elec. Co., 701 N.E.2d 656, 662 (Mass. App. Ct. 1998), *review denied,* 707 N.E.2d 1078, *cert. denied,* 528 U.S. 929 (1999); Benton v. Oakland City, 721 N.E.2d 224, 232 (Ind. 1999); City of Indianapolis Hous. Auth. v. Pippin, 726 N.E.2d 341, 345 (Ind. Ct. App. 2000) (holding that absent a duty, there can be no actionable claim for negligence).

120. *See* Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991).

121. *See* Basicker v. Denny's Inc., 704 N.E.2d 1077, 1079-80 (Ind. Ct. App. 1999); Foley v. Boston Hous. Auth., 555 N.E.2d 234, 236-37 (Mass. 1990); Port Auth. v. Arcadian Corp., 991 F. Supp. 390, 403 (D.N.J. 1997) *aff'd,* 189 F.3d 305, 313-14 (3d Cir. 1999); Barnes v. Washington, 305 N.E.2d 535, 536 (Ill. 1973); *see also* RESTATEMENT (SECOND) OF TORTS § 315 (1965). Special relationships between defendants and plaintiffs have been held to include "employers-employees, owners and occupiers of premises, common carriers and their patrons, and hosts who serve alcoholic beverages to their guests, among others." Einhorn v. Seeley, 525 N.Y.S.2d 212, 215 (N.Y. App. Div.1988). Special relationships between defendants and third-party wrongdoers have been found to exist where the defendant has the ability to control the third-party's conduct, as in the case of a master and servant or parent and child. *See, e.g.,* Purdy v. Pub. Adm'r., 526 N.E.2d 4, 7 (N.Y. 1988); Pulka v. Edelman, 358 N.E.2d 1019, 1021 (N.Y. 1976).

Under this principle, a manufacturer of firearms has no duty to protect a municipality from the misuse of firearms by criminals or others in the absence of a special relationship between the manufacturer and the municipality or between the manufacturer and the criminals or others. The municipalities have not alleged – and cannot allege – any such relationship.

Nearly every court in the country which has considered a negligent marketing and distribution claim against a manufacturer of firearms or ammunition has rejected it.[122] To impose a duty on manufacturers to prevent the criminal misuse of their products would "expose [the manufacturers] to limitless liability and make [them] insurer[s] against criminal activity."[123] Such a radical change in tort law must come, if at all, from the legislature, not the courts.[124]

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122. *See, e.g.*, McCarthy v. Olin Corp., 119 F.3d 148, 157 (2d Cir. 1997) ("New York courts do not impose a legal duty on manufacturers to control the distribution of potentially dangerous products such as ammunition.") (relying on, *inter alia*, Forni v. Ferguson, 648 N.Y.S.2d 73, 74 (N.Y. App. Div. 1996) (rejecting negligent marketing claim against handgun manufacturer)); First Commercial Trust Co. v. Colt's Mfg. Co., 77 F.3d 1081, 1083 (8th Cir. 1996) (rejecting claim that gun manufacturer negligently promoted cheap guns, failed to develop "safe-sales" policy, and failed to warn retailers about "probable misusers" of guns); Leslie v. United States, 986 F. Supp. 900, 911-12 (D.N.J. 1997) (rejecting claim that ammunition manufacturer had duty to refrain from using marketing techniques which highlighted product's destructive characteristics or to ensure against product's criminal misuse), *aff'd*, 178 F.3d 1279 (3d Cir. 1999); Caveny v. Raven Arms Co., 665 F. Supp. 530, 533 (S.D. Ohio 1987) (rejecting claim that gun manufacturer negligently marketed and distributed guns to persons it knew would use them unlawfully), *aff'd*, 849 F.2d 608 (6th Cir. 1988); Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 775 (D.N.M. 1987) (court would not impose duty on manufacturers to refrain from selling firearms because they have potential to be criminally misused); Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1208-09 (N.D. Tex. 1985) (rejecting "defect in distribution" claim against gun manufacturer); Resteiner v. Sturm, Ruger & Co., 566 N.W.2d 53, 55 (Mich. Ct. App. 1997) (manufacturer not liable for marketing high power revolver to public); Delahanty v. Hinckley, 564 A.2d 758, 762 (D.C. 1989) (rejecting claim that gun manufacturer negligently failed to screen purchasers of its guns to prevent criminal misuse); Knott v. Liberty Jewelry and Loan, Inc., 748 P.2d 661, 663-64 (Wash. Ct. App. 1988) (rejecting claims that gun manufacturer and distributor negligently failed to provide retailers with safe marketing guidelines and retailer negligently failed to go beyond statutory minimums in handgun marketing in order to prevent sales to criminals); Riordan v. Int'l Armament Corp., 477 N.E.2d 1293, 1295 (Ill. App. Ct. 1985) (rejecting claim that gun manufacturers and distributors had duty to determine whether their retailers had taken all reasonable measures to screen prospective purchasers and to terminate retailers with histories of sales to criminals). *But see* Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 824-27 (E.D.N.Y. 1999) (upholding negligent marketing claim against handgun manufacturers, refusing to follow controlling precedent of *McCarthy* and *Forni*), *appeal pending*.

123. *Leslie*, 986 F. Supp. at 913.

124. *See, e.g.*, Linton v. Smith & Wesson, Inc., 469 N.E.2d 339, 340 (Ill. App. Ct. 1984) ("No Illinois decision has imposed a duty upon the manufacturer of a non-defective firearm to control the distribution of that product to the general public[,] such regulation having been undertaken by Congress, the Illinois General Assembly, and several local legis-

The requirement of a special relationship arises out of the recognition that there can be no liability in the absence of control, whether it is the ability to protect the injured party or the ability to control the conduct of a third party.[125] In *O'Sullivan v. Hemisphere Broadcasting Corp.*,[126] a radio station sponsored a promotional event on a club's premises.[127] Miller Brewing Company agreed to provide free beer for the event.[128] An individual at the promotion drank too much beer and later injured the plaintiff in a car accident.[129] The plaintiff sued Miller and lost.[130] The Supreme Judicial Court of Massachusetts affirmed judgment for Miller, stating that "[t]he fatal weakness in the plaintiff's entire case . . . is the defendants' total lack of control and right to control the distribution of the free beer."[131]

Just as Miller could not control the distribution of the beer once it had delivered it to the promotion site, the firearms manufacturers cannot directly control the individual point-of-sale transactions or supervise private transfers after the initial retail sale. Once the defendant firearms manufacturers sell their firearms to federally-licensed distributors and dealers, they no longer have control over the firearms. In the absence of a special relationship between the parties, and in the absence of control over the firearms themselves, the manufacturers owe no duty to the municipalities, and therefore their claims of negligence are insufficient as a matter of law.

B. *There Is No Causation*

In addition to the absence of a duty, the municipalities' claims of negligence must fail because the alleged harm to the municipalities is the result of superseding criminal acts (i.e., the illegal use of guns)

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lative bodies."); *Patterson*, 608 F. Supp. at 1216 ("the question of whether handguns can be sold is a political one, not an issue of products liability law – and that this is a matter for the legislature, not the courts"); Nelson v. Int'l Armament Corp., No. 432, slip op. at 5 (Md. App. Dec. 22, 1986), *cert. denied*, 309 Md. 49 (1987) ("In essence, appellants are asking us to impose a duty on manufacturers and marketers of handguns to control their sale to the general public to an extent beyond that required by federal and state law. We decline to do so.") (citations omitted).

125. *See, e.g.*, O'Sullivan v. Hemisphere Broad. Corp., 520 N.E.2d 1301, 1302-03 (Mass. 1988); Ebbinghouse v. Firstfleet, Inc., 693 N.E.2d 644, 648 (Ind. Ct. App. 1998); Whitten v. Ky. Fried Chicken Corp., 570 N.E.2d 1353, 1356 (Ind. Ct. App. 1991) (finding no negligence where defendant had no special relationship with plaintiff and no control over actual instrumentality that caused plaintiff's injury).

126. 520 N.E.2d 1301 (Mass. 1988).

127. *See id.* at 1302.

128. *See id.*

129. *See id.*

130. *See id.* at 1303.

131. *Id.* at 1302.

which breaks the chain of causation. In order to succeed in a claim for negligence, a plaintiff must prove that the defendant's act (or failure to act) proximately caused the plaintiffs' injury.[132] Virtually every court that has considered the viability of a tort claim asserted against a firearms manufacturer predicated on the criminal misuse of a firearm has concluded, as a matter of law and sound public policy, that the "criminal misuse of a handgun . . . is not reasonably foreseeable,"[133] thus breaking the casual chain between a manufacturer's alleged actions and the injuries.[134]

C. *Decisions In Municipality Cases*

Applying these principles, three of the courts that have considered the municipalities' claims against the firearms manufacturers have rejected the plaintiffs' negligence claims as a matter of law.[135] In *City of Cincinnati*, *Penelas*, and *Archer*, the courts concluded that there was no duty of care because there was no special relationship between the manufacturers and the municipalities or between the manufacturers and the criminal misusers of firearms.[136] As the court stated in *Archer*, "the actual duty advanced by Plaintiffs is essentially one of crime prevention . . . . Crime prevention, however, is simply not a

132. *See* Port Auth. v. Arcadian Corp., 991 F. Supp. 390, 405-08 (D.N.J. 1997) *aff'd*, 189 F.3d 305, 317-19 (3d Cir. 1999) (holding that acts of the defendant-fertilizer manufacturers, whose products were used to bomb the World Trade Center, were not the proximate cause of the bombing).

133. Martin v. Harrington & Richardson, Inc. 743 F.2d 1200, 1205 (7th Cir. 1984) (citing Bennet v. Cincinnati Checker Cab Co., 353 F. Supp. 1206 (E.D. Ky. 1973)).

134. *See id.*; *see also* First Commercial Trust Co. v. Colt's Mfg. Co., 77 F.3d 1081 (8th Cir. 1996); Rodriguez v. Glock, Inc., 28 F. Supp. 2d 1064, 1073 (N.D. Ill. 1988); McCarthy v. Sturm, Ruger & Co., 916 F. Supp. 366, 372 (S.D. N.Y. 1996), *aff'd sub nom.* McCarthy v. Olin Corp., 119 F.3d 148 (2d Cir. 1997); Eichstedt v. Lakefield Arms, Ltd., 849 F. Supp. 1287 (E.D. Wis. 1994); Adkinson v. Rossi Arms Co., 659 P.2d 1236 (Ala. 1983); Hulsman v. Hemmeter Dev. Corp., 647 P.2d 713 (Haw. 1982); Robinson v. Howard Bros., Inc., 372 So. 2d 1074 (Miss. 1979); Hulsebosch v. Ramsey, 435 S.W.2d 161 (Tex. App. 1968). *But see*, Hamilton v. Accu-Tek, 62 F. Supp. 2d 802 (E.D.N.Y. 1999) (upholding negligent marketing claim against handgun manufacturers), *appeal pending*.

135. *See* City of Cincinnati v. Beretta U.S.A. Corp., No. C-990729, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000); Penelas v. Arms Tech., Inc., No. 99-1941 CA-06, 1999 WL 1204353 (Fla. Cir. Ct. Dec. 13, 1999), *appeal pending*; Archer v. Arms Tech., Inc., No. 99-912658 NZ (Wayne Co. Cir. Ct. May 16, 2000) (granting defendants' motion to dismiss plaintiffs' negligence claims, but denying motion to dismiss pubic nuisance claims), *petition for interlocutory appeal pending*. In *Ganim v. Smith & Wesson Corp.*, the court dismissed the city of Bridgeport's lawsuit for lack of subject matter jurisdiction on the ground that the city lacked standing to sue. As a consequence, the court did not reach the merits of Bridgeport's negligence claims. *See* Ganim v. Smith & Wesson Corp., No. CV 990153198S, 1999 WL 1241909 (Conn. Super. Ct. Dec. 10, 1999), *appeal pending*.

136. *See City of Cincinnati*, 1999 WL 809838 at *2; *Penelas*, 1999 WL 1204353 at *3; *Archer*, No. 99-912658NZ, slip op. at 7.

cognizable legal duty owed by these Defendants to these Plaintiffs."[137] Two of the courts in the municipality cases have held to the contrary.[138] The court in *City of Boston* found a duty of care based on the city's allegations of affirmative misconduct by the defendants and foreseeabilty of harm.[139] In doing so, the court essentially ignored the fact that the city's negligence claim was predicated on the criminal misuse of firearms by third parties with whom the manufacturers had no relationship and over whom they had no control. The court in *White* also concluded that the existence of a duty for purposes of the city's negligence claim was a factual issue which turned on the foreseeability of the city's harm.[140] These results cannot be reconciled with overwhelming authority to the contrary.[141]

IV. THE MUNICIPALITIES FAIL TO STATE A VALID CLAIM FOR PUBLIC NUISANCE

The law does not recognize a cause of action in public nuisance against a manufacturer engaged in the lawful sale and distribution of non-defective products simply because third parties beyond the manufacturer's control mishandle or misuse some of those products.[142] To hold otherwise would create a crushing scheme of absolute liability. In urging the courts to recognize the public nuisance claims against the firearms manufacturers, the municipalities are advocating a radical expansion of public nuisance law with far-reaching consequences.

A. *Traditional Settings of Public Nuisance*

Traditionally, courts have recognized public nuisance claims only in two settings: (1) cases in which the nuisance had a connection

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137. *Archer*, No. 99-912658NZ, slip op. at 4, 7.

138. *See* City of Boston v. Smith & Wesson, No. 1999-02590 (Suffolk County Super. Ct. July 13, 2000); White v. Smith & Wesson, 97 F. Supp. 2d 816 (N.D. Ohio 2000).

139. *See City of Boston*, No. 1999-02590, slip op. at 33-34.

140. *See White*, 97 F. Supp. 2d at 828-29. The court in *City of Atlanta* denied the manufacturers' motion to dismiss, but did not explain its reasoning. *See* City of Atlanta v. Smith & Wesson Corp., No. 99VS0149217J (Fulton County Ct., Oct. 27, 1999), *appeals in related cases pending*.

141. *See supra* note 122.

142. *See, e.g.*, City of Bloomington v. Westinghouse Elec. Corp., 891 F.2d 611, 613 (7th Cir. 1989) (court found no action for public nuisance against manufacturer of PCB's which were inappropriately handled by Westinghouse after it purchased them from the manufacturer); Northern Ind. Pub. Serv. Co. v. Vesey, 200 N.E. 620, 625 (Ind. 1936) (neither the manufacture and distribution of electric power nor electric power itself were nuisances, although operation of a power plant could be a nuisance).

with, or effect on, specific real property,[143] and (2) cases in which the nuisance violated a specific statute or ordinance.[144] In cases of land-based conditions and statutory violations, the defendants have control over the nuisance and the capacity to abate it.[145]

In the firearms cases, the municipalities do not allege that the manufacturers' conduct has had an effect on, or involves the misuse of, real property.[146] Nor do the municipalities allege that the manufacturers have violated any of the substantial laws regulating the manufacture, distribution, and sale of firearms.[147] Instead, they allege that the manufacturers have created a public nuisance by failing to prevent the illegal transfer or misuse of their products by individuals over whom the manufacturers have no control.[148] Public nuisance law has never been extended to such product-based claims.[149] In *Tioga Public School District v. United States Gypsum Co.*,[150] the Eighth Circuit recognized that the absence of decisions applying nuisance law to product liability claims supported the inference that nuisance law was not intended to apply to such claims.[151] Otherwise, the court concluded, nuisance law would "become a monster that would devour in one gulp the entire law of tort."[152] Other courts have agreed.[153]

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143. *See, e.g.*, Indiana Pipe Line Co. v. Christensen, 143 N.E. 596 (Ind. 1924); Shell Oil Co. v. Meyer, 684 N.E.2d 504 (Ind. Ct. App. 1997); New Jersey Dep't of Env't. Protection v. Ventron Corp., 468 A.2d 150 (N.J. 1983); Div. of Health, Dep't of Health & Welfare v. Rogers, 432 A.2d 135 (N.J. Super. Ct. 1981).

144. *See, e.g.*, Columbian Athletic Club v Indiana *ex. rel.* McMahan, 40 N.E. 914 (Ind. 1895); Lindsey v. Massios, 360 N.E.2d 631, 635 (Mass. 1977) (holding that under Massachusetts law, "common or public nuisance refers to a common law doctrine prohibiting conditions on private property which dangerously affect the public domain, and permitting recovery for personal injuries sustained on public property because of such property conditions"); New Jersey v. Friedman, 697 A.2d 947 (N.J. Super. Ct. App. Div. 1997); Colon v. Tedesco, 311 A.2d 393 (N.J. Super. Ct. 1973).

145. *See* Belanger v. Massachusetts, 673 N.E.2d 56, 58 n.3 (Mass. App. Ct. 1996); New Jersey Dep't of Env't. Protection v. Exxon Corp., 376 A.2d 1339, 1349 (N.J. Super. Ct. 1977).

146. *See* Plaintiffs' Complaint, City of Gary v. Smith & Wesson Corp. (Lake Super. Ct. 1999) (No. 45D02-9908-CT355); Plaintiffs' 1st Amended Complaint, City of Boston v. Smith & Wesson Corp. (Suffolk County Super. Ct. 2000) (No. SUCV1999-02590-C).

147. *See generally*, Plaintiffs' Complaint, *City of Gary* (No. 45D02-9908-CT355); Plaintiffs' 1st Amended Complaint at 32, *City of Boston* (No. SUCV1999-02590-C).

148. *See* Plaintiffs' Complaint, ¶ 71, *City of Gary* (No. 45D02-9908-CT0355); Plaintiffs' 1st Amended Complaint, ¶ 79, *City of Boston* (No. SUCV1999-02590-C); Plaintiffs' Amended Complaint, ¶¶ 117-24, City of Camden v. Beretta U.S.A. Corp. (Camden County Super. Ct. 2000) (No. CAM-L-4510-99); Plaintiffs' 2d Amended Complaint, ¶¶ 85, 88, City of Chicago v. Beretta U.S.A. Corp. (Cook County Cir. Ct. 2000) (No. 98 CH 015596).

149. *See* Tioga Pub. Sch. Dist. #15 v. United States Gypsum Co., 984 F.2d 915 (8th Cir. 1993).

150. *Id.*

151. *See id.* at 920-21.

152. *Id.* at 921.

B. Policy Considerations

The refusal to extend public nuisance law to product-based claims rests on sound policy reasons. There are specific and separate bodies of tort law (i.e., product liability and negligence) that provide redress to those injured by defective products or by the reckless or criminal misuse of non-defective products. Unlike land-based conditions and statutory violations (the traditional bases for public nuisance claims) which are within the perpetrator's control and can be abated, it would be virtually impossible for the manufacturers of firearms to abate the illegal acquisition and misuse of firearms by criminals beyond the manufacturers' control at sites across the country.

Moreover, extending public nuisance liability to manufacturers of lawful products, based on others' misuse of those products, would have far-reaching consequences. Car manufacturers could be held liable for municipal costs incurred by cities across the country because their dealers sell cars to unlicensed individuals, the legally blind, or incompetent drivers who increase the risk of harm to the general driving public. Distillers could be held liable in public nuisance for selling a product that can be illegally acquired and abused by under-aged drinkers with tragic results. Any manufacturer of a product that has the potential for misuse – or that falls out of favor with a segment of the population – would become the next target of a public nuisance lawsuit. The courts should not countenance such a radical expansion and distortion of the law.

C. The Elements of Public Nuisance

In addition to the conceptual defects in the municipalities' effort to apply public nuisance law to the manufacture of legal products, the municipalities cannot satisfy the basic elements of a public nuisance claim. The first such element is that the defendant must have control

153. *See, e.g.*, City of Bloomington v. Westinghouse Elec. Corp., 891 F.2d 611, 614 (7th Cir. 1989) (unable to find a single Indiana case "holding manufactures liable for public or private nuisance claims arising from the use of their product subsequent to the point of sale," and rejecting public nuisance claim against manufacturer of PCBs based on buyer's mishandling of them); Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) ("manufacturers, sellers or installers of defective products may not be held liable on a nuisance theory for injuries caused by the defect"; rejecting nuisance claim because "[t]o hold otherwise would significantly expand, with unpredictable consequences, the remedies already available to persons injured by products"), *appeal denied*, 512 N.W.2d 318 (Mich. 1993); City of San Diego v. United States Gypsum Co., 35 Cal. Rptr.2d 86 (Cal. Ct. App. 1994) (rejecting nuisance claim in cost recovery action against asbestos manufacturers; "nuisance cases 'universally' concern the use or condition of property, not products") (citation omitted).

of the nuisance at the time it causes injury.[154] If the manufacturer of a product that causes a public nuisance does not have control of the product *at the time it becomes a nuisance*, then the manufacturer cannot be liable for creating the public nuisance.[155] The municipalities in the firearms cases assert that the public nuisance is the illegal transfer and use of firearms,[156] not the mere presence of firearms within the boundaries of the municipality.[157] However, the manufacturers do not have control over the firearms at the time they are illegally acquired or criminally misused by third parties against city residents. Once the manufacturers sell their firearms to federally-licensed distributors and dealers, they lose both physical and legal control of the products.

The second required element of public nuisance law is that there must be an underlying tort committed by the defendant.[158] As discussed above, the negligence claims brought by the municipalities must fail as a matter of law.[159] Without an underlying negligence ac-

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154. *See* Town of Kirklin v. Everman, 28 N.E.2d 73, 75 (Ind. 1940): Belanger v. Commonwealth, 673 N.E.2d 56, 58 n.3 (Mass. App. Ct. 1996) (holding that in an action for nuisance, liability depends upon whether the defendant controls the property through ownership or otherwise); Commonwealth v. Pace, 616 F. Supp. 815, 821 (D. Mass. 1985); N. J. Dep't of Env't. Protection v. Exxon Corp., 376 A.2d 1339, 1349 (N.J. Super. Ct. 1977) ("[a] person is not civilly liable for a nuisance caused or promoted by others over whom he has no control"); Maisenbach v. Buckner, 272 N.E.2d 851, 854 (Ind. Ct. App. 1971); City of Chicago v. Stern, 421 N.E.2d 260, 262 (Ill. App. Ct. 1981) (holding that in the absence of proof of defendant's ownership, operation or control of the premises, equity could not intervene to order defendant to abate nuisance on the premises).

155. *See, e.g., City of Bloomington*, 891 F.2d at 614 (holding that a manufacturer of PCBs which were sold to Westinghouse, who disposed of them improperly causing injury to the plaintiffs, was not liable for creating a public nuisance for selling the PCBs to Westinghouse, because it did not retain the right to control the PCBs beyond the point of sale to Westinghouse); City of Manchester v. National Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986); Beard v. Michigan, 308 N.W.2d 185, 187 (Mich. Ct. App. 1981).

156. *See generally*, Plaintiffs' 1st Amended Complaint at 32, City of Boston v. Smith & Wesson Corp. (Suffolk County Super. Ct. 2000) (No. SUCV1999-02590-C); Plaintiffs' Amended Complaint at 52-53, City of Camden v. Beretta U.S.A. Corp. (Camden County Super. Ct. 2000) (No. CAM-L-4510-99).

157. *See, e.g.*, Plaintiffs' Amended Complaint, ¶ 123, *City of Camden* (No. CAM-L-4510-99); Plaintiffs' 2d Amended Complaint, ¶¶ 9-14, 19-21, City of Chicago v. Beretta U.S.A. Corp. (Cook County Cir. Ct. 2000) (No. 98 CH 015596).

158. *See* RESTATEMENT (SECOND) OF TORTS § 821B, cmt. e (explaining that public nuisance is not an independent basis for tort liability, and defendant may be liable in public nuisance only if "his interference with the public right was intentional or was unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities"); RESTATEMENT (SECOND) OF TORTS § 821A, cmt. c; Pritchard v. Mabrey, 260 N.E.2d 712, 717 (Mass. 1970); New Jersey Dep't of Env't. Protection v. Exxon Corp., 376 A.2d 1339, 1349 (N.J. Super. Ct. 1977) ("liability for nuisance must be premised upon a showing that the conduct in question was intentional or negligent, or that it came within the principle of strict liability").

159. *See supra* notes 117-141 and accompanying text.

tion (or any other viable alleged tort), the claim of public nuisance must also fail.

In addition to the required elements of public nuisance law enumerated above, it is generally held that conduct that is authorized by federal and/or state legislatures cannot create a public nuisance.[160] Even if the specific conduct in question has not been authorized by the legislature, "if there has been established a comprehensive set of legislative acts . . . governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations."[161] The manufacture, sale, and distribution of firearms is governed by a comprehensive set of federal laws and regulations.[162] In addition, many states have enacted additional laws and regulations governing the sale and distribution of firearms.[163] The municipalities do not allege that the manufacturers have violated any of these laws. Instead, the municipalities assert just the opposite—that the distribution practices are in compliance with these laws.[164]

D. *Decisions in Municipality Cases*

In the municipal firearms cases, two courts have confirmed that public nuisance does not apply to the design, manufacture, and distribution of a lawful product.[165] The courts in three other jurisdictions

160. *See, e.g,* RESTATEMENT (SECOND) OF TORTS § 821B cmt f. ("conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability"). *See also,* Borough of Westville v. Whitney Home Builders, 108 A.2d 660, 663 (N.J. Super. Ct. Ch. Div. 1954), *aff'd,* 122 A.2d 233 (N.J. Super. Ct. App. Div. 1956); Meyers v. Kissner, 594 N.E.2d 336, 340 (Ill. 1992) ("While a lawful act will not constitute a public nuisance, it can nonetheless constitute a private nuisance."); Fisher v. Pa. R.R. Co., 263 F.2d 781, 783 (7th Cir. 1959).

161. RESTATEMENT (SECOND) OF TORTS § 821B cmt f.

162. *See, e.g.,* 18 U.S.C. §§ 921-930 (1994 & Supp. IV 1998); 26 U.S.C. § 5801 (1994); 27 C.F.R. pts. 178, 179 (2000). *See generally,* BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEP'T OF TREASURY, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE (2000); BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEP'T OF TREASURY, STATE LAWS AND PUBLISHED ORDINANCES- FIREARMS (Dept. of Treas. B.A.T.F., 21st ed. 1998).

163. *See, e.g.,* IND. CODE ANN. § 35-47 (Michie 1998 & Supp.2000); 430 ILL. COMP. STAT. 65 (West 1993 & Supp. 2000); MASS. GEN. LAWS ANN. ch. 140 §§ 121-131P (West 1991 & Supp. 2000); N.J. STAT. ANN. §§ 2C:39, 58 (West 1995 & Supp. 2000).

164. *See, e.g.,* Plaintiffs' 1st Amended Complaint, ¶ 81, City of Boston v. Smith & Wesson Corp. (Suffolk County Super. Ct. 2000) (No. SUCV1999-02590-C).

165. *See* City of Cincinnati v. Beretta U.S.A. Corp, No. A9902369, 1999 WL 809838 at *2 (Ohio Ct. C. P. Oct. 7, 1999), *aff'd,* No. C-990729, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000) (holding that public nuisance simply does not apply to the design, manufacture and distribution of a lawful product); Penelas v. Arms Tech., Inc., No. 99-1941 CA-06, 1999 WL 1204353 at *4 (Fla. Cir. Ct. Dec. 13, 1999), *appeal pending* ("Public nuisance does not apply to the design, manufacture, and distribution of a lawful product."). A third court also

have allowed the municipalities' public nuisance claims to proceed against the firearms manufacturers.[166] In *Archer*, the court acknowledged that no Michigan court had applied public nuisance law to products, and recognized that the Michigan Court of Appeals had rejected private nuisance theory in the product context, but simply refused to follow this and other applicable precedent.[167] In *White*, the federal court ignored the *City of Cincinnati* decision and concluded that the city's nuisance claim would stand or fall on the same basis as its negligence claim.[168] In *City of Boston*, the court found that the city's "legal theory is unique in the Commonwealth but . . . that is not reason to dismiss at this stage of the proceedings."[169] The manufacturers intend to challenge these rulings on appeal.

V. THE RELIEF REQUESTED BY THE MUNICIPALITIES WOULD VIOLATE THE UNITED STATES CONSTITUTION

It is a fundamental principle that no state, let alone a municipality,[170] may regulate conduct wholly outside its borders.[171] Under the Commerce Clause of the United States Constitution, only Congress is permitted to regulate commerce on a national basis.[172] In addition to being an affirmative grant of authority to Congress, the Commerce Clause is "a substantive 'restriction on permissible state regulation' of interstate commerce."[173] As the Supreme Court has explained:

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denied plaintiffs' public nuisance claims, but based its ruling primarily on the fact that plaintiffs lacked standing because the claims were remote, and because, under Connecticut law and Bridgeport's charter, plaintiffs did not have authority to achieve their remedies by litigation, rather than by ordinance. *See* Ganim v. Smith & Wesson Corp., No. CV 990153198S, 1999 WL 1241909 at *12-13 (Conn. Super. Ct. Dec. 10, 1999), *appeal pending*.

166. *See* Archer v. Arms Tech., Inc., No. 99-912658 NZ (Wayne County Cir. Ct. May 16, 2000), *petition for interlocutory appeal pending*; White v. Smith & Wesson Corp., 97 F. Supp. 2d 816 (N.D. Ohio 2000); City of Boston v. Smith & Wesson Corp., No. 1999-02590 (Suffolk County Super. Ct. July 13, 2000).

167. *See Archer*, No. 99-912658NZ, slip op. at 10.

168. *See White*, 97 F. Supp. 2d at 828-29.

169. *City of Boston*, No. 1999-02590, slip. op. at 32.

170. Municipalities do not enjoy the same deference given to states under our federal constitutional system. *See* Community Communications Co. v. City of Boulder, 455 U.S. 40, 50 (1982) ("[W]e are a Nation of States, a principle that makes no accommodation for sovereign subdivisions of States. . . . 'Cities themselves are not sovereign.'") (citation omitted).

171. *See* Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881) ("No state can legislate except with reference to its own jurisdiction.").

172. Article I, Section 8, Clause 3 of the U.S. Constitution grants Congress the power to "regulate commerce with foreign nations, and among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3.

173. Dennis v. Higgins, 498 U.S. 439, 447 (1991) (citing Hughes v. Oklahoma, 441 U.S. 322, 326 (1979)).

> [T]he "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State,". . . The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State . . . [T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.[174]

In the suits brought by the municipalities against the firearms manufacturers, the municipalities seek to regulate commerce, not through the legislature, but through the judicial system. In *BMW of North America, Inc. v. Gore*,[175] the Supreme Court recognized that "[s]tate power may be exercised as much by a jury's [or judge's] application of a state rule of law in a civil lawsuit as by a statute."[176] The Court in *Gore* rejected an effort by one state to impose economic sanctions under its tort law as a means of changing the tortfeasor's lawful conduct in other states.[177]

In addition to violating the Commerce Clause of the Constitution, the municipalities' attempt to outlaw conduct that is lawful in other jurisdictions violates the firearms manufacturers' due process rights.[178] As the Court in *Gore* opined, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."[179] The municipalities may not im-

174. Healy v. Beer Inst., 491 U.S. 324, 336-37 (1989) (citations omitted).

175. 517 U.S. 559 (1996).

176. *Id.* at 572 n.17 (1996) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) and San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)).

177. *See Gore*, 517 U.S. at 571 (holding that a state may not establish "policy for the entire Nation . . . or even impose its own policy choice on neighboring States . . . . Similarly, one State's power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce . . . but is also constrained by the need to respect the interests of other States . . . .").

178. The Fourteenth Amendment of the U.S. Constitution holds that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

179. *Gore*, 517 U.S. at 573 n.19 (citation omitted).

pose economic sanctions on the firearms manufacturers to deter conduct that is entirely lawful in other jurisdictions.[180]

These long-settled principles have recently been applied in *Knoll Pharmaceutical Co. v. Sherman*,[181] where the federal district court held that Illinois' attempt to restrict a pharmaceutical manufacturer's national advertising campaign for its new diet drug violated the Commerce Clause.[182] The *Knoll* Court held that

> [i]n practical effect, the State of Illinois seeks to impose its own policy against advertising prescription drugs classified as controlled substances on other states . . . . The Commerce Clause invalidates a state law that in practical effect regulates markets outside the state's borders, even if the extraterritorial reach was unintended by the state legislature . . . Illinois may not impose its policy choices on other states.[183]

Similarly, the court considering the City of Cincinnati's suit against the firearms industry relied upon these principles to reject the City's claims,[184] stating that,

> the City's request that this Court abate or enjoin the defendants' lawful sale and distribution of their products outside the City of Cincinnati exceeds the scope of its municipal powers and, to the extent it asks this Court to regulate commercial conduct lawful in other states, violates the Commerce Clause of the United States Constitution.[185]

There can be no doubt that the intent and practical effect of the claims brought by the municipalities, and the relief sought, are to control the commercial conduct of firearm manufacturers beyond the municipalities' borders. If the municipalities were to succeed in these claims, the firearms manufacturers would be forced to abate their lawful distribution practices around the country in an effort to somehow prevent their products from reaching those municipalities that have initiated these suits. The United States Constitution does not permit the municipalities to regulate the national firearms industry through the imposition of piecemeal extraterritorial measures in this fashion.

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180. *See id.* at 572-73 ("it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States").

181. 57 F. Supp. 2d 615 (N.D. Ill. 1999).

182. *See id.* at 625-26.

183. *Id.* at 623-24.

184. *See* City of Cincinnati v. Beretta U.S.A. Corp., No. A9902369, 1999 WL 809838 at *1 (Ohio Ct. C. P. Oct. 7, 1999), *aff'd*, No. C-990729, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000).

185. *Id.*

CONCLUSION

The legal insufficiency of the lawsuits filed by the municipalities against the firearms manufacturers has been chronicled above. However, it is worth commenting on the futility of the suits' effectiveness as a matter of policy and common sense. It has been estimated that seventy-five million hand guns are currently on the streets of the United States.[186] Even if the municipalities win all of their cases against the firearms manufacturers, does anyone really believe that their success will have any material impact on stopping the violence that is, or can be, committed with the guns already on the streets?

The issue of gun control and the right of the people of the United States to "keep and bear arms" is one of the most fervently debated topics in this country today. Every year, new legislation on this topic is considered by the federal government and the legislatures of many, if not all, of the states. Whether or not such legislation is enacted should be left to the process of a democratic government – with the representative branch of the government (whether state or federal) making the decisions that will effect the people. A handful of individuals (i.e., the mayors or other representatives of municipalities) should not be allowed to use the judicial system to override the policy decisions of the federal and state legislatures.

186. *See* Thomas W. Waldron, *For Attorney General, Battle Over Gun Control Nothing New*, BALT. SUN, Oct. 21, 1999, at 1B.