

ARTICLES

A PRODUCTS LIABILITY RESPONSE TO GUN CONTROL LITIGATION

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The firearms industry is under pressure. Congress has limited what products can be sold, anti-firearms activists are filing suits in the courts, and the Clinton administration is applying pressure through such diverse agencies as the Environmental Protection Agency¹ and the State Department.² America's criminal element continues to misuse firearms on a daily basis. The press meanwhile dutifully reports the "daily carnage" and provides a platform for gun control activists.

The single area where the firearms industry has succeeded in holding its ground has been in the area of products liability. Over the past two decades the industry has turned back the tide of suits alleging negligence *per se*, absolute or defectless "strict liability" and "ultrahazardous activities." Many well-intentioned people are working to reverse this trend and they might be successful.

The most recent wave of suits against the firearms industry alleges that the industry is actively conspiring to place its products in

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¹ The Environmental Protection Agency (EPA) is preparing draft regulations to ban certain types of ammunition. See Significant New Uses of Lead, 59 Fed. Reg. 49,484 (1994) (to be codified at 40 C.F.R. § 721). The EPA is investigating the possibility of issuing serious new use rules for certain uses of elemental lead and lead compounds. *Id.* The proposed rules would allow the EPA to survey the intended use of the lead and lead compounds. By evaluating the use, the EPA could examine the associated activities of lead and prevent a potentially unreasonable risk of injury to public health and the environment. *Id.*

² During a February 7, 1995 briefing attended by the author, State Department Official Terri Hunter revealed that the State Department is contacting foreign governments and actively discouraging them from importing any United States firearms products which the Clinton administration does not want sold in the United States.

the hands of criminals, the mentally ill and children. Given the fact that such people are lawfully forbidden to possess firearms, such alleged action by firearms manufacturers would be industrial suicide. One may argue that any company engaging in such conduct should be prosecuted to the fullest extent of the law. The lack of evidence of this conduct has not deterred the plaintiff's bar, however, and the suit filings proceed unabated.

The manufacture and sale of firearms is a lawful business. Firearms serve to provide a means of self protection and pleasure to collectors, hunters and shooting competitors. This article will discuss gun control litigation³ from the industry's perspective and offer a comprised position that will hopefully bring both sides of the argument together.

I. Negligence Theories

The essential elements of negligence, duty, breach, causation and damages have remained unchanged for many decades. Traditional product liability negligence cases allege that the target defendant was negligent in the design, manufacture or packaging and marketing of its product.⁴ Regardless of the specific conduct attacked, the essential legal question remains the same: What duty did defendant owe to plaintiff?

Negligent design and manufacturing cases against manufacturers are numerous. These cases provide a useful public service by highlighting problems associated with products and compensating injured parties. Gun control litigation has primarily focused on the negligent marketing of firearms. Historically, gun control plaintiffs have alleged that the industry's negligent marketing of firearms has caused its products to end up in the hands of potential misusers.

A. Negligence Per Se

Beginning in the early nineteen-seventies, there have been several published opinions alleging negligence *per se* against the fire-

³ Gun control litigation is the prosecution of defectless products liability suits against the firearms industry.

⁴ See generally, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 96 (5th ed. 1984).

arms industry.⁵ The majority of these cases involve defendants that are accused of breaching a duty arising under the nineteen sixty-eight Gun Control Act (hereinafter The Act).⁶

The earliest of these opinions, *Bennet v. Cincinnati Checker Cab*

⁵ Cf. *Phillips v. K-Mart Corp.*, 588 So. 2d 142 (La. Ct. App. 1991) (holding gun control manufacturer did not violate Gun Control Act or any duty owed by selling ammunition to nineteen year old who shot and killed victim); *Peek v. Oshman's Sporting Goods, Inc.*, 768 S.W.2d 841 (Tex. Ct. App. 1989) (holding evidence insufficient to establish negligence per se claim against seller of handgun used to shoot and kill victim); *Love v. Zales Corp., Inc.*, 689 S.W.2d 282 (Tex. Ct. App. 1985) (holding that seller of shotgun used in wrongful death not liable for breach of warranty and firearm transaction record is not a contract); *Ellsworth v. Bishop Jewelry & Loan Co.*, 742 S.W.2d 533 (Tex. Ct. App. 1987), *rehearing denied*, January 18, 1988 (holding plaintiff did not meet burden of establishing gun merchant had cause to know buyer was mentally institutionalized and held that selling handguns not ultrahazardous activity that giving rise to strict liability); *Decker v. Gibson Prod. Co. of Albany, Inc.*, 679 F.2d 212 (11th Cir. 1982) (holding plaintiffs able to have jury consider whether manufacturer's sale of pistol was reasonable under the circumstances); *Hetherton v. Sears, Roebuck & Co.*, 493 F. Supp. 82 (D. Del. 1980) (holding, on remand, Delaware identification statute unconstitutional and therefore Sears did not owe a duty to seek additional identification of gun purchaser); *Hetherton v. Sears, Roebuck & Co.*, 593 F.2d 526 (3d Cir. 1979) (holding question of fact existed as to constitutionality of identification statute); *Hetherton v. Sears, Roebuck & Co.*, 445 F. Supp. 294 (D. Del. 1978) (holding department store sufficiently complied with federal statute in its sale of pistol used in crime of murder); *Bennet v. Cincinnati Checker Cab Co., Inc.*, 353 F. Supp. 1206 (E.D. Ky. 1973) (holding seller of pistol owed no duty to protect victim from criminal attack); *K-Mart Enter. of Florida, Inc. v. Keller*, 439 So.2d 283 (Fla. 1983); *Howard Bros. of Phenix City, Inc. v. Penley*, 492 So.2d 965 (Miss. 1986) (holding store had duty to enforce safety precautions in store setting when customer obtained weapon from clerk and held customers hostage); *Robinson v. Howard Bros. of Jackson, Inc.*, 372 So. 2d 1074 (Miss. 1979) (holding store that sold pistol to minor not liable to victim of minor's criminal act); *Olsen v. Ratzel*, 278 N.W.2d 238 (Wis. Ct. App. 1979) (holding issue of negligence per se resulting from sale of firearm was an issue of fact).

⁶ 18 U.S.C. § 922 (1988 Supp. IV). The statute states that, under the Gun Control Act of 1968, it is unlawful for a licensed dealer, such as K-Mart, to sell ammunition to any individual who a licensee "knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual the licensee knows or has reasonable cause to believe is less than 21 years of age." *Id.* at § 922(b)(1). Further, it is unlawful for a licensed dealer to sell any firearm or ammunition to any individual the dealer knows or has reasonable cause to believe has been adjudicated a mental defective or has been committed to any mental institution. *Id.* at § 922(d)(4). See also, *Phillips*, 588 So.2d at 144. In some instances, the negligence *per se* cases also alleged the breach of state as well as federal statutes. Cf. *Hetherton v. Sears, Roebuck & Co.*, 445 F. Supp. 294 (D. Del. 1978); *Hetherton v. Sears, Roebuck & Co.*, 593 F.2d 526 (3d Cir. 1979); *Hetherton v. Sears, Roebuck & Co.*, 493 F. Supp. 82 (D. Del. 1980); *Hetherton v. Sears, Roebuck & Co.*, 652 F.2d 1152 (3rd Cir. 1981); *Howard Bros. of Phenix City, Inc. v. Penley*, 492 So. 2d 965 (Miss. 1986).

Co., Inc.,⁷ involved a convicted felon employed as a cab driver who robbed a passenger at gun point.⁸ While acknowledging that the Act was promulgated after the sale of the product in question, the court stated that the Act did not impose a duty upon a manufacturer of an otherwise non-defective product to anticipate the possible criminal actions resulting from a misuse of the item.⁹

One of the most recent opinions involving negligence *per se* is *Phillips v. K-Mart Corp.*¹⁰ In *Phillips*, a nineteen year old male purchased ammunition from the defendant and used it three days later in a murder/suicide.¹¹ Since Louisiana law does not recognize negligence *per se*, the plaintiff was constrained to prove a breach of duty, using the Act as a guideline.¹² At the trial level, the case was tried to a jury and resulted in a verdict for K-Mart. On appeal, the Louisiana Court of Appeals affirmed. The appellate court did not find a breach of duty in the sale of the ammunition,¹³ and further announced that K-Mart had no duty to train its employees to identify mental incompetence.¹⁴

In the intervening years, several important negligence *per se* cases were decided. Two of these suits involved a chain of stores incorporated as Howard Brothers. The earliest of the two cases is *Robinson v. Howard Bros. of Jackson, Inc.*¹⁵ In *Robinson*, Howard Brothers sold a pistol and ammunition to a minor.¹⁶ The minor subsequently used the products to murder his estranged lover.¹⁷ Suit was filed and the court articulated the plaintiff's theory as follows:

one who sells a pistol to a minor in violation of [the Act] would

⁷ 353 F. Supp. 1206 (E.D. Ky. 1973).

⁸ *Id.* The passenger alleged that the gun manufacturer owed her an independent duty to see that she was safe from criminal attack. *Id.* at 1209. She further alleged that such duty was breached. *Id.*

⁹ *Id.* at 1210. The *Bennet* case was then dismissed on motion. *Id.* at 1211.

¹⁰ 588 So. 2d 142 (La. Ct. App. 1991).

¹¹ *Id.* at 143-44. The court utilized a duty-risk analysis. Such analysis questions: what duty is owed; was there a breach of that duty; did the risk and harm fall within the protection provided by the duty breached? *Id.* at 144.

¹² *Id.*

¹³ *Id.* at 144.

¹⁴ *Id.* at 145. The court based its decision on the absence of such a duty in the Gun Control Act. *Id.*

¹⁵ 372 So. 2d 1074 (Miss. 1979).

¹⁶ *Id.* The minor provided his driver's license, which indicated he was a minor, and the store sold the minor ammunition. *Id.*

¹⁷ *Id.*

be absolutely liable for any damages inflicted by a minor with the pistol. Stated differently, the seller would be an insurer of the safety of any person injured by a pistol sold to a minor.¹⁸

The *Robinson* court rejected this position and affirmed the directed verdict rendered in the lower court in favor of Howard Brothers.¹⁹ The opinion turned on the question of foreseeability. The court stated that there is virtually no reason to anticipate premeditated and malicious acts before one would anticipate acts that are simply negligent.²⁰

Howard Bros. of Phenix City, Inc. v. Penley,²¹ was decided seven years after *Robinson* and reached a different result. In *Howard Bros.*, the perpetrator seized a gun and ammunition from a store clerk and committed his crime while still in the store.²² The victim filed suit and a jury returned a verdict in his favor. The Supreme Court of Mississippi affirmed this verdict. The opinion is conspicuously lacking any recitation of facts that might have put the clerk on notice of any mental problems with the perpetrator.²³ Nonetheless, the Court noted that Howard Brothers did not provide safety guidelines or train its employees for such situations.²⁴ Because there were no facts which might have put the clerk on notice of a problem, the court was forced to apply a very loose causation analysis in affirming the jury verdict.²⁵

*Decker v. Gibson Products Co. of Albany, Inc.*²⁶ involved an unusual set of facts regarding the effect of a pardon on a felon's right to purchase a firearm. The perpetrator in *Decker* purchased a revolver from the defendant's store. At the time of the sale, the perpetrator

¹⁸ *Id.* at 1075.

¹⁹ *Id.* at 1076.

²⁰ *Robinson*, 372 So.2d at 1076. Citing the 4th edition of the *Law of Torts*, the court further stated that a defendant "may reasonably proceed upon the assumption that others will obey the criminal law." *Id.* (citing PROSSER, LAW OF TORTS, 173-74 (4th ed.)).

²¹ 492 So.2d 965 (Miss. 1986).

²² *Id.* at 966. After asking to see a handgun, the perpetrator fired the gun and held a fellow customer hostage. *Id.*

²³ It is this author's opinion that, without facts to put the clerk on notice, there is no evidence of a breach of duty.

²⁴ *Howard Bros.*, 492 So. 2d at 968.

²⁵ *Id.* at 968-69. The court stated that firearms dealers must have safeguards to ensure that loaded guns are not allowed to rest in the hands of an unknown person until such person is completely investigated. *Id.* at 968. The court therefore concluded that, in the retail marketing of firearms, a dealer must exercise reasonable care and show that he or she recognizes potential danger. *Id.*

²⁶ 679 F.2d 212 (11th Cir. 1982).

informed the sales person that he was a convicted felon but produced a state document showing that his civil rights had been restored.²⁷ The store contacted the sheriff to ask about the legality of such a sale and the sheriff advised that the sale was legal.²⁸ Two days later, the perpetrator shot and killed his wife with the product.

Suit was filed alleging negligence by virtue of the store's sale of a handgun to a felon.²⁹ The trial court granted summary judgment. In reversing summary judgment, the Court of Appeals maintained that it was inaccurate to conclude that the circumstances of the sale did not cause the wife's death as a matter of law.³⁰ The case was remanded to the trial court for the jury to determine the question of foreseeability.³¹

In *K-Mart Enterprises of Florida, Inc. v. Keller*,³² the perpetrator's brother bought a rifle and ammunition at K-Mart. The clerk, not the purchaser, filled out the federal form. Later events revealed that the purchaser was ineligible to purchase the weapon because he was a drug abuser and had a pending felony charge. The purchaser loaned the rifle to his drunken brother six weeks later. A police officer was shot by the drunken brother/perpetrator soon thereafter when the officer responded to a domestic dispute.

K-Mart did not dispute that the original sale violated the Act but took the position that the intervening loan of the rifle caused the shooting. The jury returned a verdict for the plaintiff and the Florida Court of Appeals affirmed. The court dispensed with K-Mart's causation argument by saying:

One who gives matches to a pyromaniac can hardly claim that it

²⁷ *Id.* at 214.

²⁸ *Id.*

²⁹ *Id.* at 213.

³⁰ *Id.* at 215-16.

³¹ *Id.* at 216. The court stated:

Regardless of whether a violation of the Gun Control Act constitutes negligence per se in Georgia, a legal determination we leave to the trial court, plaintiffs are entitled to have the jury consider whether defendant's sale of the pistol to a person known to have been convicted of aggravated assault was reasonable in light of the federal statute, the restoration of civil rights shown to the sales person, the response received from the sheriff, the alleged duty of the corporate defendant to properly instruct its employees concerning these matters, and all of the other facts surrounding the gun transaction.

Id.

³² 439 So. 2d 283 (Fla. Dist. Ct. App. 1983).

could not be exactly foreseen what or whom he might harm or in what strange manner or how long it might take him to light the fire.³³

Negligence *per se* is the area where gun control plaintiffs have had the most success. Plaintiffs will likely experience continued success in cases where retailers sell products in violation of state and/or federal law.

B. *Negligence in Distribution*

Receiving increased attention is the theory that the firearms industry is on notice that its products are being used in crimes and is, therefore, liable in negligence for injuries suffered by victims of crime. Despite the previous existence of negligent distribution suits,³⁴ such suits are undergoing a resurgence. Suits currently in litigation contain allegations that companies are intentionally selling "Saturday Night Specials", with the knowledge that they will be used to commit crimes.³⁵ These suits further allege that the indus-

³³ *Id.* at 287.

³⁴ One of the earliest decisions is *Bennet v. Cincinnati Checker Cab Co., Inc.*, 353 F. Supp. 1206 (E.D. Ky. 1973), *see* discussion *supra* notes 7-9 and accompanying text; *see also* *Linton v. Smith & Wesson*, 469 N.E.2d 339 (1984).

³⁵ The following statements are excerpts from a complaint filed in Tennessee:

11. In October, 1992, the defendant "A" sold and delivered to (the perpetrator) a .25 caliber automatic handgun designed and manufactured by defendant "B" which is commonly known as a "Saturday Night Special".
12. Defendants "A" and "B" design, manufacture, distribute and sell Saturday Night Specials expecting these firearms to reach consumers in the condition in which they are manufactured and sold knowing, or with reason to know, of the firearm's unreasonably dangerous condition and its common use in criminal activity.

. . .

14. At the time of its manufacture and sale, the Saturday Night Special was unreasonably dangerous because of its foreseeable use in criminal activity.

. . .

16. Defendants "A" and "B" knew or should have known of numerous substantially similar prior incidents involving Saturday Night Specials, but did not take adequate measures to remedy the unreasonably dangerous condition.

Murr v. Range Master Supply Co., Inc., No. 94-cv-1062; (Tenn. Ct. App.) (dismissed as to defendant Lorcin Engineering on November 3, 1994.)

In Arkansas, the estate of Stephanie Michelle Jungkind, a victim of a fatal shot allegedly fired from a gun allegedly manufactured by Lorcin Engineering, filed suit primarily against Lorcin Engineering. The complaint alleged negligence as follows:

try has conspired to conceal the distribution of its product, the use of its product in certain crimes, and the number of annual injuries from firearms.³⁶ There are also allegations that the industry is marketing its products to minors³⁷ and has prevented the use of point of purchase and/or purchaser background checks.³⁸

These allegations are generated with limited factual support. To prove these allegations, gun control plaintiffs would, for example, have to identify a particular magazine or electronic media preferred by the criminally insane, and then prove that the target defendant has focused its marketing efforts there. For example, a plaintiff may show that "assault rifle" manufacturers advertise in *Boy's Life* or *Seventeen*: such allegations are insubstantial on their face and do not prove negligent distribution.

C. *The Industry's Response*

As can be ascertained from the negligent distribution cases, the defense primarily focuses on causation.³⁹ The industry's position is that an intervening criminal act relieves the defendant of liability. This defense is most successful where the events of the crime were remote in time and place from the purchase. The most remote set of facts would put the purchase prior to any conduct in violation of the Act. For example, there should be no causation if

X.

[Defendant] was negligent in the following particulars:

1. Deliberately and aggressively manufacturing, promoting and selling cheap handguns, such as [defendant's] Model L380 .38 Caliber Revolver, for distribution and sale to a particular segment of the consumer market, a substantial number of whom [the defendant] knew, or upon the exercise of reasonable diligence should have known, would be prone and/or expected to misuse the product to inflict grievous personal injury and death upon innocent persons such as plaintiff's deceased.

Jungkind v. Lorcin Eng'g, No. 94-3006 (Ark. Ct. App. 1994) (dismissed by the trial court and currently on appeal).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See, e.g., Ellsworth v. Bishop Jewelry & Loan Co., 742 S.W.2d 533 (Tex. Ct. App. 1987) (suit alleging negligence *per se* and proclaiming defense verdict); Robinson v. Howard Bros. of Jackson, Inc., 372 So. 2d 1074 (Miss. 1979) (alleging negligence *per se* resulting in defense verdict); Howard Bros. of Phenix City, Inc. v. Penley, 492 So. 2d 965 (Miss. 1986) (successfully alleging negligence *per se* and resulting in plaintiff's verdict).

the crime at issue is committed by a felon, but the product used in the crime was purchased before the perpetrator became a felon and therefore ineligible to own a gun under the Act.

Criminal acts generally intervene to break a chain of causation:

Under . . . ordinary circumstances, it is not reasonably to be expected that anyone will hurl a television from an apartment building, rob and beat up a boy in a public restroom, forge a check, push another man into an excavation, abduct a woman from a parking lot and rape her, hold up a patron in the parking lot of a bank, or shoot a patron in the parking lot of a restaurant. Although such things do occur, a must be known to anyone who reads the daily papers, they are still so unlikely in any particular instance that the burden of taking continual precautions against them almost always exceeds the apparent risk.⁴⁰

Absent facts placing a defendant on notice of the probability of a crime being committed with a product, there is no foreseeability as a matter of law.

Plaintiff's counsel are now alleging that certain manufacturers are on notice that crimes are being committed with certain products and that the manufacturers of these products are negligent for not stopping criminals from possessing the products.⁴¹ To date, the industry has been successful in defending negligence cases. From an industry perspective, new emphasis is being placed on negligence, causing a shift away from strict liability. A negligence analysis is appropriate from a theoretical point of view, because crime victims are injured by human misuse of a functioning product, not defective products.

II. *Absolute or "Defectless" Strict Liability*

For nearly twenty years, gun control plaintiffs have sought to find a court that declares firearms defective *per se* and holds the industry liable for all damages anyone suffers from misuse of a firearm. Despite their failures, the plaintiffs came close in *Kelley v. R.G. Industries, Inc.*⁴² However, to the extent *Kelley* could be read to allow a cause of action, the Maryland legislature stepped in and

⁴⁰ KEETON ET AL., *supra* note 4, at § 33.

⁴¹ See *infra* notes and accompanying text.

⁴² 497 A.2d 1143 (Md. 1985).

ended further suits.⁴³ Each court that has considered *Kelley* has rejected it.

The gun control cases that have alleged strict liability have either alleged that firearms are “defective” or that the sale of firearms is an “ultrahazardous activity” because they can be used to harm people. The strict liability cases alleging “defect” essentially track the Restatement of Torts 2d Section 402(A). The “ultrahazardous activity” cases are patterned after § 402B of the Restatement. Both theories have failed and will continue to fail, because no product becomes “defective” simply because an individual uses it to commit a crime. By the same token, the simple legal sale of a non-defective product is not an “ultrahazardous activity.” Keeping a wild carnivore in a residential neighborhood is an ultrahazardous activity. Selling a product is not.

Strict liability⁴⁴ works well in cases where a hazard in the firearm causes an injury to another, for example, if a safety fails to function. This author contends that strict liability fails in gun control litigation because there is no such defect in the product.

A. *Plaintiff's Defect and Ultrahazardous Theories*

By definition, people only get hurt when some human actor has done something with the firearm *and it functioned*. That is why gun control cases are often referred to as “defectless product liability” cases. People get hurt when guns are mishandled, and in self-defense situations, when perpetrators try to victimize armed citizens.

A brief survey of opinions in gun control cases illustrates the pitfalls in trying to use a defect theory in a case where the product functioned according to its design. Two published opinions pre-

⁴³ In *Kelley*, the court held the manufacturer of a “Saturday Night Special” strictly liable for its dangerous products when such product was used in a crime in which innocent people were harmed. *Id.* at 1159. See also, Monica Fennell, *Missing the Mark in Maryland: How Poor Drafting and Implementation vitiated A Model State Gun Control Law*, 13 *HAMLIN J. PUB. L. & POL'Y* 37 (1992) (explaining Maryland's statutory response to *Kelley v. R.G. Industries* and detailing its disappointment as expressed by gun control proponents).

⁴⁴ Strict liability is defined as liability without fault. KEETON, ET AL., *supra* note 4, at § 75. Strict liability focuses on the condition of the product, not the conduct of those who come in contact with it. See *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192, 1995-6 (4th Cir. 1982); *Flaminio v. Honda Motor Co., Ltd.*, 733 F.2d 463 (7th Cir. 1984); see also *RESTATEMENT SECOND OF TORTS* § 402A (comment a).

date *Kelley, Mavilla v. Stoeger Indust.*,⁴⁵ and *Martin v. Harrington and Richardson, Inc.*⁴⁶ In *Mavilla*, the plaintiff argued that the pistol used to shoot Anthony Mavilla, Jr. was dangerous, and therefore inherently defective.⁴⁷ On the other hand, the *Martin* plaintiff asserted that the manufacturer of the pistol used to kill Larry Martin was strictly liable because the sale of pistols is an inherently dangerous activity.⁴⁸ Both cases were dismissed on motion.⁴⁹

In affirming the dismissal in *Martin*, the 7th Circuit Court of Appeals stated: "[i]mposing liability for the sale of handguns, which would in practice drive manufacturers out of business, would produce a handgun ban by judicial fiat in the face of the decision by [states] to allow its citizens to possess handguns."⁵⁰

Several important gun control opinions were issued in 1985. Late Spring through Fall of that year saw five opinions issued, including *Kelley. Riordan v. International Armament Corp.*,⁵¹ was decided in April. *Riordan* was the consolidated appeal of two cases both which had been dismissed on motion. In *Riordan*, the plaintiff sought to hold the manufacturer and distributors of the handguns used to murder their descendants liable for negligence and strict liability. The court questioned whether a cause of action exists in tort against the distributors and manufacturers of handguns when injuries are caused due to the criminal misuse of its' handguns.⁵² The court answered that question in the negative, and affirmed the dismissals.

Another important decision is *Patterson v. Gesellschaft*,⁵³ in which the court held that the mother of a robbery victim had no cause of action in Texas. Plaintiff had sought to recover in strict liability under a risk/utility analysis and for defective distribution. The court dismissed plaintiff's argument saying:

. . . Virtually any product can be put to an illegal use: an automobile can be used in order to make a getaway from a bank robbery, or a ship in order to smuggle drugs, yet no one would

⁴⁵ 574 F. Supp. 107 (Mass. 1983).

⁴⁶ 743 F.2d 1200 (7th Cir. 1984).

⁴⁷ *Mavilla*, 574 F. Supp. at 108.

⁴⁸ *Martin*, 743 F.2d at 1201.

⁴⁹ *Id.* at 1205-06; *Mavilla*, 574 F. Supp. at 111.

⁵⁰ *Id.* at 1204.

⁵¹ 477 N.E.2d 1293 (1985).

⁵² *Id.* at 1294.

⁵³ 608 F. Supp. 1206 (N.D. Tex. 1985).

suggest that those products were not performing their intended function of transportation. The argument that a jury should be permitted to subject a product to risk/utility scrutiny merely because it is often used illegally has no logical limit: the manufacturer of any product that is frequently put to illegal use could be called into court to defend his product. (Footnote omitted)⁵⁴

The gun control losses continued to mount⁵⁵ until the *Kelley* opinion was issued in October. *Kelley* is the only case ever cited in support of imposing strict liability upon the manufacturer of a non-defective firearm product. Olen Kelley was a grocery store employee. He was shot during a robbery. The identity of the assailant is unknown, however a revolver manufactured by R.G. Industries was identified as the weapon used in the crime.

Kelley was decided by the Maryland Court of Appeals on a certified question.⁵⁶ The general question posed was whether a handgun manufacturer can be liable to the victim of a crime committed using its product.⁵⁷ The Court said no:

In our view, generally to impose strict liability upon the manufacturers or marketers of handguns for gunshot injuries resulting from the misuse of handguns by others, would be contrary to Maryland public policy as set forth by the Legislature.⁵⁸ The court, however, went on to discuss whether the manufacturer of "Saturday Night Specials"⁵⁹ might be liable. At length, the

⁵⁴ *Id.* at 1213 (citing Note, *Handguns and Product Liability*, 97 Harv. L. Rev. 1912, 1917).

⁵⁵ See *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985) (holding risk/utility analysis not applicable because handguns functioned according to design); *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118 (1985) (holding design and manufacturing of handgun does not give rise to strict liability).

⁵⁶ . . . we have rephrased the questions as follows:

- 1) Is the manufacturer or marketer of a handgun, in general, liable under any strict liability theory to a person injured as a result of the criminal use of its product?
- 2) Is the manufacturer or marketer of a particular category of small, cheap handguns, sometimes referred to as "Saturday Night Specials," and regularly used in criminal activity, strictly liable to a person injured by such handgun during the course of a crime?
- 3) Does the Rohm Revolver Handgun Model RG38S, serial number 0152662, fall within the category referred to in question 2?

Kelley v. R.G. Indus., Inc., 497 A.2d 1143, (Md. 1985).

⁵⁷ *Id.* at 1144.

⁵⁸ *Id.* at 1153.

⁵⁹ "Saturday Night Specials are generally characterized by short barrels, light weight, easy conceivability, low cost, use of cheap quality materials, poor manufacture,

court set forth a *prima facie* case for "Saturday Night Special" strict liability. To recover, plaintiff must prove:

1. The plaintiff has suffered injury or death from gunshot;
2. The plaintiff was the victim of a crime;
3. The gun used is a "Saturday Night Special."⁶⁰

The court admitted that the term "Saturday Night Special" was not subject to any easy definition and whether a particular pistol was a "Saturday Night Special" would always be a question of fact.⁶¹

The flaw in *Kelley* is that the product worked. Olen Kelley did not contend that there were any mechanical defects. The plaintiff's real complaint was that the manufacturer knew or should have known that its products were favored by criminals. *Kelley* is based upon the notion that criminals prefer "Saturday Night Specials."

However, a Department of Justice study has found that criminals prefer high quality handguns as opposed to "Saturday Night Specials."⁶² This evidence undermines the entire premise of *Kelley*. The analysis then reverts away from the product and back to the conduct of the perpetrator and/or the industry. The problem plaintiffs complain of involves human conduct, *i.e.*, the knowing sale of products to criminals because human conduct triggers a negligence analysis, not strict liability.⁶³

The *Kelley* court's analysis focused on design defect, principally the choice of materials used by the manufacturer. However, the analysis departs from traditional strict liability analysis, because, as evidenced in the *Kelley* case, there is no evidence of product defect. The courts have rejected *Kelley*.⁶⁴ In addition, the Maryland legislature

inaccuracy and unreliability. These characteristics render the Saturday Night Special particularly attractive for criminal use and virtually useless for the legitimate purpose of law enforcement, sport, and protection of persons, property and businesses." *Id.* at 145-46. This is an interesting definition for the court to impose. The application of this definition means that the poor are effectively prohibited from purchasing a non-defective firearm product for self-defense.

⁶⁰ *Id.* at 1160.

⁶¹ *Kelley*, 497 A.2d at 1159-60.

⁶² Joseph F. Sheley, P.h.D., and James D. Wright, P.h.D., *Gun Acquisition and Possession in Selected Juvenile Samples*, National Institute of Justice Office of Juvenile Justice and Delinquency Prevention (December 1993) (describing survey conducted on gun possession and ownership).

⁶³ *Flaminio v. Honda Motor Co., Ltd.*, 733 F.2d 463, 469 (7th Cir. 1984).

⁶⁴ *Rejected By: Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (N.M. 1987). *Disagreed With By: Richardson v. Holland*, 741 S.W. 2d 751 (Mo. Ct. App. 1987). *Declined to Follow By: Delahanty v. Hinckley*, 564 A.2d 758 (D.C. 1989); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530 (S.D. Ohio 1987); *Knott v. Liberty Jewelry & Loan, Inc.*, 748

passed a law that overruled the *Kelley* decision.⁶⁵

As expected, the latter half of the nineteen-eighties saw a wave of *Kelley* cases,⁶⁶ which continued into the nineteen-nineties.⁶⁷ None of the plaintiff's efforts were successful in these cases. The only result achieved by the *Kelley* gun control suits was that several states enacted legislation prohibiting them. The Texas statute is a good example:

§ 82.006. Firearms and Ammunition

(a) In a products liability action brought against a manufacturer or seller of a firearm or ammunition that alleges a design defect in the firearm or ammunition, the burden is on the claimant to prove, in addition to any other elements that the claimant must prove, that:

(1) the actual design of the firearm or ammunition was defective, causing the firearm or ammunition not to function in a manner reasonably expected by an ordinary consumer of firearms or ammunition; and

(2) the defective design was a producing cause of the personal injury, property damage, or death.

(b) The claimant may not prove the existence of the defective design by a comparison or weighing of the benefits of the firearm or ammunition against the risk of personal injury, property damage, or death posed by its potential to cause such injury, damage or death when discharged.⁶⁸

The enactment of prohibitory statutes and the impossibility of identifying a defect in a properly working product has led gun control proponents to change tactics. As discussed in § III below, the focus has shifted back to human conduct.

P.2d 661 (1988); *Addison v. Williams*, 546 So. 2d 220 (La. Ct. App. 1989); *King v. R. G. Indus., Inc.*, 451 N.W.2d 874 (Mich. Ct. App. 1990).

⁶⁵ See § 4(B) *infra*.

⁶⁶ *Cf. Addison v. Williams*, 546 So. 2d 220 (La. Ct. App. 1989); *Armijo v. Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530 (S.D. Ohio 1987); *Clancy v. Zales Corp.*, 705 S.W.2d 820 (Tex. Ct. App. 1986); *Coulson v. DeAngelo*, 493 So. 2d 98 (Fla. Dist. Ct. App. 1986); *Delahanty v. Hinckley*, 564 A.2d 758 (D.C. 1989); *Diggles v. Horwitz*, 765 S.W.2d 839 (Tex. Ct. App. 1989); *Ellsworth v. Bishop Jewelry & Loan Co.*, 742 S.W.2d 533 (Tex. Ct. App. 1987); *King v. R. G. Indus., Inc.*, 451 N.W.2d 874 (Mich. Ct. App. 1990); *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326 (9th Cir. 1986); *Richardson v. Holland*, 741 S.W. 2d 751 (Mo. Ct. App. 1987); *Robertson v. Grogan Invest. Co.*, 710 S.W.2d 678 (Tex. Ct. App. 1986); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Strickland v. Fowler*, 499 So. 2d 199 (La. Ct. App. 1986).

⁶⁷ *King v. R. G. Indus., Inc.*, 451 N.W.2d 874 (Mich. Ct. App. 1990).

⁶⁸ TEX. CIV. CODE ANN. § 82.006 (West Supp. 1995).

B. *The Industry's Response*

Strict liability has been a failure for gun control plaintiffs. Courts simply refuse to apply strict liability to cases involving the criminal misuse of non-defective products. Likewise, the sale of non-defective goods in a lawful manner to buyers legally entitled to own and possess them is not a hazardous activity.

The firearms industry is likely to continue to successfully defend strict liability cases where the only basis of liability is criminal misuse by a third party. Gun control activists should examine their claims closely. The injuries they complain of are not caused by the product. The injuries are caused by the criminal misuse of the product by actors who are beyond the control of the firearms industry or the government.

III. *The New Approach: Deliberate Indifference and Intentional Acts*

Historically, plaintiffs have used negligence and/or some derivation of strict liability as the basis for gun control suits. However, in recent cases, allegations of deliberate indifference and intentional actions are becoming more popular. To illustrate this point, excerpts from the briefs of recent cases are reproduced below:

[Defendant] was negligent in the following particulars:

1. Deliberately and aggressively manufacturing, promoting and selling cheap handguns, such as [defendant's] Model L380 .38 Caliber Revolver, for distribution and sale to a particular segment of the consumer market, a substantial number of whom the defendant knew, or upon the exercise of reasonable diligence should have known, would be prone and/or expected to misuse the product to inflict grievous personal injury and death upon innocent persons such as plaintiff's deceased.
2. Failing to develop and/or publish . . . its chain of supply a safe-sales policy including known descriptions of the point-of-purchase appearance/conduct "profiles" of prospective purchasers whom it knew, or upon the exercise of reasonable diligent should have known, would be most likely to misuse its handgun products to inflict death and grievous personal injury upon others.⁶⁹

* * *

⁶⁹ Jungkind v. Lorcin, No. 94-3006 (Ark. Ct. App. 1994).

124. Defendants, individually and jointly, conspired together to keep information regarding the dangers of their handguns and the numbers of injuries and deaths caused by handguns each year from the public.
125. Defendants, individually and jointly, conspired to prevent the institution of safeguards and checks on the sale, distribution and on the ownership of these products despite their knowledge of the dangerous and hazards of unchecked distribution.⁷⁰

With respect to the above statements, it is possible that the true reason for these new allegations is to provide a basis for discovery aimed at obtaining industry documents related to market research. Also, it is possible that these allegations are intended only to inflame the public.

Unfortunately for the plaintiffs, alleging intentional acts has two immediate disadvantages. First, insurers for the target defendants may defend under a reservation of rights and deny coverage if any intentional acts are proven. For a plaintiff this may mean no compensation. Second, plaintiff must prove that the target defendants are engaged in corporate suicide since the actions alleged, if proven, would be violations of RICO,⁷¹ anti-trust,⁷² conspiracy⁷³ and fraud laws. Plaintiffs will have difficulty finding evidence of suicidal marketing strategies in one of America's most regulated and scrutinized industries.

This is not to say that some businesses do not engage in self destructive conduct. The plaintiffs bar has ferreted out similar conduct in other industries. The present allegations go beyond a single product such as the Ford Pinto. Using the logic of the current allegations, the plaintiffs would, for example, have the entire automobile industry conspiring to build cars that could only be used to kill pedestrians or for "get-away" cars.

The new allegations may provide vitality to the gun control movement but will lead nowhere. An essential element of plaintiff's proof will be intent and/or actual knowledge of specific future criminal conduct.⁷⁴ Plaintiffs in these cases will be forced to come forward with

⁷⁰ Hamilton, et al v. ACCU-TEK, et al., CV-95-0049 (E.D.N.Y. 1995).

⁷¹ 18 U.S.C. § 1961 *et seq.* (1988).

⁷² 15 U.S.C. § 1 *et seq.* (1988).

⁷³ 18 U.S.C. § 371 (1988).

⁷⁴ KEETON ET. AL., *supra* note 4, at § 8.

evidence to show that the target defendants are in league to produce goods that can only be used for criminal purposes. So long as it remains legal to use firearms in self-defense and for sporting purposes, the "intent" theory in gun control litigation will fail. Any firearm can be used for self-protection and most can be used in competition or hunting. Until there is an outright ban on private ownership of *all* firearms, suits brought under the new theories will likely end in adverse summary judgments.

IV. Defendant's Options To Discourage Gun Control Litigation

The industry has several options open to it to discourage gun control litigation. Some of these options, might presently succeed, but these options will have long-term adverse consequences.

A. Educate the Public

Like it or not, firearms exist and are being misused by elements of society. The two elements of society causing the most harm to the industry are criminals and ignorant consumers. It is in everyone's interest to reduce crime, whether the crimes involve firearms or not. However, ignorant consumers are peculiarly an industry problem.

Both problems however are susceptible to improvement through education. Consumers and those who have incidental contact with firearms including non-shooting family members, co-workers of armed guards, military members, neighbors of firearms owners, etc. can all benefit from knowing how to safely handle and secure a firearm. Knowledge is power and, in this case, safety. Children can learn to safely use firearms on the range under instruction or they can learn to misuse them on the streets and in our neighborhoods. The choice is ours. A firearm safely handled and secured from theft will not harm anyone and still permits its owner to legitimately use and enjoy their firearms.

B. Legislation

Gun control litigation seeks to shift responsibility for violence away from the perpetrator to the maker of a simple tool.⁷⁵ Legisla-

⁷⁵ See *Raines v. Colt Indus., Inc.*, 757 F. Supp. 819 (E.D. Mich. 1991). The *Raines* court concluded that the gun manufactured by the defendant, and that killed the plaintiff's son when fired by the son's friend, was a "simple tool and that any duty that

tion to insure individual responsibility can protect any legitimate industry, the firearms industry included. Some states have taken steps to see that the responsibility remains with the person, and not the manufacturer of the product.

In the wake of *Kelley*, the Maryland legislature enacted Commercial Law Code Annotated § 27-36I(h) which states:

§ 36-I. Manufacture, sale or offer for sale of handguns not included on handgun roster; obliteration, removal, etc. of manufacturer's identification mark.

(h) Liability for damages. — (1) 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 to commit, or willfully aided, abetted, or caused the commission of the criminal act in which the firearms was used.

Other states including California,⁷⁶ Colorado,⁷⁷ Idaho,⁷⁸ Montana,⁷⁹ Texas,⁸⁰ North Carolina,⁸¹ and Washington⁸² have enacted laws that force gun control plaintiffs to prove an actual defect in order to recover.

C. *Discovery*

Discovery fights are almost never productive and are frowned upon by courts. Nonetheless, the industry and its antagonists appear destined for a conflict. The gun control plaintiffs seem intent on searching for evidence to support a conspiracy theory within the industry. The firearms industry, on the other hand, appears well postured to undertake discovery to determine if a cause of action exists against its antagonists.⁸³ The discovery battle outlined

defendant owed to plaintiff was obviated by the open and obvious dangers associated with the use of a gun." *Id.* at 826.

⁷⁶ CAL. CIV. CODE § 1714.4.

⁷⁷ COLO. REV. STAT. § 13-21-501.

⁷⁸ IDAHO CODE § 6-1410 (1990).

⁷⁹ MONT. CODE ANN. § 27-1-720 (1979).

⁸⁰ N.C. GEN. STAT. § 99B-11 (1994).

⁸¹ TEX. CIV. CODE ANN. § 82.006 (West Supp. 1995).

⁸² WASH. REV. CODE § 7.72.030.

⁸³ See *National Org. for Women*, 114 S. Ct. at 798 (women's rights organization instituted suit against coalition against abortion groups, alleging these groups were mem-

above would be a terrible waste of resources but may be inevitable unless some political solution to the gun control debate is found.

D. Counterclaims

The gun control proponents have made it clear that their goal is to put the firearms industry out of business. In an interview aired on National Public Radio's *Morning Edition*, on November 28, 1994, Michael Beer, the President of the Coalition to Stop Gun Violence, acknowledged that product liability suits would be part of that effort. Similar statements were made on a Bill Moyers special produced by WNET in Boston and aired on public television.

Despite the fact that the gun control plaintiffs bar and its supporters are now publicly acknowledging that their litigation goals are not limited to obtaining compensation for injury or even deterring future conduct, prosecution of these suits arguably constitutes a tort under *National Organization for Women v. Scheidler*.⁸⁴ Since the tort would arise from the same nucleus of operative facts as plaintiffs' claim, the counterclaim would be compulsory.⁸⁵

E. Sanctions

Prior to December 1993, Federal Rule of Civil Procedure 11 provided, at least on its face, for sanctions in cases without legal or factual merit.⁸⁶ Revised Rule 11 reflects the federal judiciary's reluctance to enforce the rule.⁸⁷ The original Rule Eleven is still the

bers of conspiracy to close clinics through activity prohibited by the Racketeer Influenced and Corrupt Organizations Act (RICO)).

⁸⁴ *Id.*

⁸⁵ See FED. R. CIV. P. 13(a).

⁸⁶ FED. R. CIV. P. 11. The rule states:

The signature of an attorney . . . constitutes a certificate by the signer that the signer has read the pleading, . . . ; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, (the allegation) well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Id.

⁸⁷ See FED. R. CIV. P. 11 (1994). The note accompanying the revised rule acknowledges that "[t]he revision . . . places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. [t]he revision removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37." FED. R. CIV. P. 11.

law in some states.⁸⁸ In those states, sanctions may be worth exploring. In addition, some states have found that the surge in baseless litigation (real or perceived) required a statutory response beyond traditional malicious prosecution actions.⁸⁹ In those states, gun control suits may meet stiff resistance. In any event, seeking sanctions in gun control suits will be expensive and difficult for all concerned.

V. *Proposals for Agreement*

There is no question that there is substantial disagreement among the parties on either side of the gun control issue. Like any political dispute discussions must be initiated to reach a compromise. It is this author's opinion that any compromise should begin with the following proposals:

FIRST: *The problem concerns human conduct.*

Whether you are a "gun grabber" a "gun selling child killer" or somewhere in the middle, you must necessarily agree that gun control cases are about human conduct. The cases involve either the marketing conduct of the industry or the criminal conduct of the perpetrators or, in some cases, the plaintiff's conduct. The product itself functions as intended, otherwise, no one would get hurt.

SECOND: *Strict liability does not apply.*

Strict liability in its traditional sense concerns the product itself, not the conduct of persons involved with its creation or sale.⁹⁰ Gun control cases, as contrasted with cases where a plaintiff has been injured because of a defect, concern human conduct. Absent human use or misuse, a firearm is no more dangerous than a brick or an ax, both of which can be, and are, used to hurt people. Strict liability has no place in gun control cases.

THIRD: *If firearms industry members are engaged in crimes, they should be out of business and in jail.*

⁸⁸ Cf. TENN. R. CIV. P. 11; ARK. R. CIV. P. 11.

⁸⁹ Cf. O.C.G.A. 51-7-81; 9-15-14.

⁹⁰ *Flaminio v. Honda Motor Co., Ltd.*, 733 F.2d 463, 469 (7th Cir. 1984).

Current gun control litigation theory holds that there is an industry-wide conspiracy to sell handguns to classes of customers prohibited from owning the product (*i.e.* criminals, the mentally ill, and children). Anyone engaged in such conduct would obviously be in violation of many state and federal statutes.⁹¹ If the industry is engaged in such a conspiracy, it would necessarily lead to the end of the industry. If some members of the industry are engaged in maladaptive illegal behavior, that behavior harms the standing and reputation of the whole industry. It is in the interest of both the firearms industry and society to weed out anyone acting against the interest of the industry.

FOURTH: *Some people on both sides of the issue will never compromise.* The firearms issue stirs deep feelings on both sides. Victims of gun violence fix their attention on the "product" that they believe caused their injury. Citizens who feel threatened or have been crime victims in the past know that policemen are simply historians who record crime, not actors who prevent crime.⁹² Only stupid criminals ply their trade in front of the police. Many on both sides of the issue have lost loved ones. Convictions run deep. It is important to understand that a compromise cannot be reached on every issue.

VI. Conclusion

Gun control litigation is the method chosen by firearms industry opponents for promoting their cause outside of the political arena. Litigation is expensive and probably counterproductive for both sides. It appears that gun control has moved into the civil litigation arena because it has proven difficult for anti-industry forces to achieve their goal through legislation. Anti-industry forces expect a fight because their goal appears to be to put the industry out of business and limit the right to own firearms.

Gun control litigation is really about providing crime victims a method to vent their rage and sense of violation. The difficulty is that criminals operate outside of the ordered society in which victims live and industries operate. Criminals are untouchable by the civil justice system in which plaintiffs seek compensation. Nothing

⁹¹ See *supra* notes 61-63 and accompanying text.

⁹² As the joke goes, "call for a cop and call for a pizza. See who gets there first."

will be solved by holding a “deep pocket” such as a gun manufacturer liable for injuries caused by criminals. This author contends that the solution to this problem lies beyond the law of torts.