THE TORTIOUS MARKETING OF HANDGUNS: STRICT LIABILITY IS DEAD, LONG LIVE NEGLIGENCE

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I. Introduction

Regrettably, rumors of the death of strict liability as a viable theory for suing handgun[1] manufacturers have not been greatly exaggerated. Courts have rejected strict liability.[2] Legislatures have rejected it.[3] Influential commentators have rejected it.[4] And,

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[1] The tort liability debate has centered around handguns. Long-guns (i.e., rifles and shotguns) have for the most part escaped attention. I have argued elsewhere that long-guns are properly exempt from strict liability because they have greater utility than handguns for most legitimate purposes and present considerably less risk because they are not easily concealable. *See* Andrew J. McClurg, *Handguns as Products Unreasonably Dangerous Per Se*, 13 U. ARK. LITTLE ROCK L.J. 599, 613-17 (1991) [hereinafter McClurg, *Handguns as Products Unreasonably Dangerous Per Se*]. Assault weapons, some of which resemble long-guns, and some of which resemble handguns, constitute a third category of firearms. Assault weapons have drawn considerable recent attention in the tort liability and gun control debate. *See* Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488 (1992); Markus Boser, *Go Ahead, Make Them Pay: An Analysis of Washington D.C.'s Assault Weapon Manufacturing Strict Liability Act*, 25 COLUM. J.L. & SOC. PROBS. 313 (1992); Robert O'Hare, Note, *An Uncertain Right: The Second Amendment and the Assault Weapon Legislation Controversy*, 66 ST. JOHNS L. REV. 179 (1992); *infra* notes 142-66 and accompanying text (discussing prominent lawsuits pending against manufacturer of the Tec-DC9 semiautomatic assault pistol). In 1994, Congress passed legislation banning several models of assault weapons. 18 U.S.C.A. § 921(a)(30)(West Supp. 1994)(defining "semiautomatic assault weapon"), § 922(v)(1) (banning manufacture, transfer and possession of semiautomatic assault weapons).

[2] *See infra* note 33 (citing cases).

[3] *See, e.g.*, CAL. CIV. CODE § 1714.4 (West 1985) ("In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of the injury posed by its potential to cause serious injury, damage, or death when discharged"). *See also infra* notes 22 and 32 (quoting other statutes which preclude the imposition of strict liability upon gun sellers).

unless changed, the proposed Restatement (Third) of Torts: Products Liability will also reject it.[5]

While prospects for any short-term change in this situation are bleak, advocates of strict liability against gun sellers should not give up the fight. I have argued[6] and will continue to argue that both existing products liability principles and public policy support the imposition of strict liability on handgun manufacturers when their properly functioning products[7] are used to kill or maim. However, reality dictates that, at least for the present, victims of gun violence and their lawyers should refocus their sights on the more prosaic liability theory of common law negligence. In other words, it is time to go back to basics.

This article advances three different negligent marketing theories for suing handgun manufacturers: (1) negligence in marketing unusually dangerous weapons such as assault weapons and

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[4] *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1297-1326 (1991) [hereinafter Henderson & Twerski, *The Rejection of Liability Without Defect*] (arguing against "product category liability"; that is, strict liability for products, such as firearms, which cannot be made safer). Professors Henderson and Twerski are the Reporters to the proposed *Restatement (Third) of Torts: Products Liability*. They also have published numerous influential products liability articles and are the authors of a leading products liability textbook. As a teacher of courses in torts and products liability law, I have benefitted tremendously from their knowledge and insights.

[5] *See infra* notes 35-44 and accompanying text.

[6] *See* McClurg, *Handguns as Products Unreasonably Dangerous Per Se*, *supra* note 1, at 611-16 (arguing for strict liability under a risk-utility balancing theory). Risk- utility balancing is one of two tests available for determining whether a product is unreasonably dangerous, the other being the consumer expectation test. *Id.* at 605. Risk-utility balancing requires that the risk of the product be weighed against the utility of the product to determine whether it is in a defective condition or unreasonably dangerous. My colleague, Professor Philip Oliver, disagreed with my advocacy of strict liability for gun manufacturers in a well-written rebuttal. Philip D. Oliver, *Rejecting the "Whipping-Boy" Approach to Tort Law: Well-Made Handguns Are Not Defective Products*, 14 U. ARK. LITTLE ROCK L.J. 1 (1991). Oliver calls judicially-imposed strict liability for gun suppliers a very bad idea. *Id.* at 11. He offered three principal objections: (1) deference to legislatures, (2) the shortcomings of the common-law approach to policy making, and (3) that strict liability is unsupportable under principles and precedents of products liability law. *Id.* at 11-35. I responded to these objections in a reply piece. *See* Andrew Jay McClurg, *Strict Liability for Handgun Manufacturers: A Reply to Professor Oliver*, 14 U. ARK. LITTLE ROCK L.J. 511, 512 (1992).

[7] This article is concerned with tort liability for injuries inflicted by guns which are properly manufactured and perform as intended. There is no controversy about imposing liability when a firearm malfunctions and causes injury because of a manufacturing or design defect.

Saturday Night Special-type handguns;[8] (2) negligence in promoting the sale of handguns to criminal consumers;[9] and (3) negligence in failing to take reasonable precautions to minimize the risk of handguns being sold to those likely to misuse them.[10] The strengths and weaknesses of each theory will be extensively analyzed. However, before addressing these negligent marketing theories, it is necessary to explain why it has become vital to resort to them: the unanimous rejection of strict liability as a basis for imposing tort liability on gun makers.

II. The Death of Strict Liability

Two distinct strict liability theories once held promise for plaintiffs suing handgun manufacturers: (1) a risk-utility balancing theory grounded in the argument that handguns are unreasonably dangerous because their risk outweighs their societal utility; and (2) the argument that the sale of handguns constitutes an "abnormally dangerous activity" under provisions of the Restatement (Second) of Torts.[11]

A. *Risk-Utility Analysis.*

Risk-utility analysis is the dominant method of determining the existence of a defect in product design litigation.[12] The adoption of risk-utility balancing is mandated by the absence of any other means for determining defectiveness in a product that was manufactured as intended. In cases of non-generic defects (manufacturing flaws), a comparative standard for evaluating defectiveness already exists in the manufacturer's products of the same type which did not malfunction and cause injury. It is easy to conclude that an exploding soft drink bottle is defective because we can compare it to the billions of soft drink bottles which do not explode.

Defects that result from conscious design choices, however,

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8 *See infra* notes 101-30 and accompanying text.

9 *See infra* notes 144-69 and accompanying text.

10 *See infra* notes 170-85 and accompanying text.

11 RESTATEMENT (SECOND) OF TORTS §§ 519-20 (1977).

12 JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 740 n.1 (9th ed. 1994) ("Most jurisdictions use some form of risk utility analysis for design defect cases."). *See also* Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 183 (Mich. 1984) (explaining that most courts use some form of risk-utility balancing in deciding defective design cases).

are far more difficult to evaluate. There is no external standard for determining the existence of a defect in a product that was manufactured precisely as intended. All products present *some* risk of injury, even the most innocuous ones. For example, a cotton ball may catch fire or a sheet of paper may cause a paper cut. Any small object, if swallowed, may cause choking. Thus, when addressing design defects, the only way to separate the defective product from the non-defective product is to evaluate and balance the risk of the product design against the utility of the product design.

The "risk" side of the ledger requires assessment of the probability and severity of the harm posed by the product design. To determine the "utility" of a product design, most courts focus on whether there is an alternative feasible design.[13] To constitute an alternative feasible design, the proposed alternative: (1) must be safer than the challenged design; (2) must be technologically feasible; (3) must be economically feasible; (4) must not impair the usefulness of the product for its intended purpose; and (5) must not create other risks equal to or greater than the risk which manifested itself in injury to the plaintiff.[14]

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[13] WADE, *supra* note 12, at 742 n.7.

[14] The Model Uniform Product Liability Act, proposed by the U.S. Department of Commerce in 1979 for adoption by the states, includes a similar list of factors to be considered in determining whether a product design is "unreasonably safe":

> (a) Any warnings and instructions provided with the product;
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> (b) The technological and practical feasibility of a product designed and manufactured so as to have prevented claimant's harm while substantially serving the likely user's expected needs;
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> (c) The effect of any proposed alternative design on the usefulness of the product;
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> (d) The comparative costs of producing, distributing, selling, using, and maintaining the product as designed and as alternatively designed; and
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> (e) The new or additional harms that might have resulted if the product had been so alternatively designed.

MODEL UNIFORM PRODUCT LIABILITY ACT § 104 (1979), *reprinted in* 44 Fed. Reg. 62, 714 (1979). Courts apply the same factors. *See also* Barker v. Lull Engineering Co., 573 P.2d 443, 455 (Cal. 1978) (noting that in weighing the utility of challenged design against the risk, jury may consider "the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design"); Wilson v. Piper Aircraft Corp., 577 P.2d 1322, 1326 (Or. 1978) (recognizing that the plaintiff in a design defect case must prove an alternative, safer design that is practicable in terms of cost and technological feasibility and which does not impair usefulness of the product).

What has been said so far is generally accepted products liability doctrine.[15] The obstacle for those who advocate strict liability for handgun manufacturers under a risk-utility analysis has been a refusal by courts to extend the analysis to dangerous products which cannot be made safer; that is, to products for which there is no alternative feasible design. The tort system has accepted (wrongly, I believe[16]) that handguns cannot be made safer without

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[15] This is not to say that risk-utility analysis in design defect litigation is without problems. It has been justifiably criticized on the ground that it is too open-ended to furnish a rational, workable standard. *See* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973). Writing in the early stages of the development of design defect standards, Professor Henderson argued that courts are incapable of adjudicating cases involving conscious design choices. *Id.* at 1534. Under risk-utility analysis, we permit lay jurors to, in effect, redesign complex products ranging from automobiles to aircraft by applying their own notions of the proper trade-offs among factors such as safety, cost, comfort, convenience, reliability, etc. Thus, instead of relying on the judgment of expert product designers who have devoted their lives to studying science and engineering, we give the final say on product safety standards to the butcher, baker and candlestick maker who happen to be selected to sit on the jury. *See also* Dawson v. Chrysler Corp., 630 F.2d 950, 962-63 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (upholding jury determination that automobile frame design was defective, but questioning whether it is appropriate to delegate such decisions to lay jurors); Lewis v. Coffing Hoist Div., 528 A.2d 590, 596 (Pa. 1987) (Hutchison, J., dissenting) ("I am compelled, in the words of a popular song, to 'speak out against the madness.' The instant madness is a creeping consensus among us judges and lawyers that we are more capable of designing products than engineers. A courtroom is a poor substitute for a design office.").

Moreover, risk-utility balancing under strict liability is subject to attack on the basis that it is identical to the risk-utility analysis used to assess the reasonableness of risks under negligence law. For example, in Prentis v. Yale Mfr. Co., 365 N.W.2d 176, (1984), the court explained that "[a]lthough many courts have insisted that the risk-utility tests they are applying are not negligence tests because their focus is on the *product* rather than the manufacturer's *conduct*, . . . the distinction on closer examination appears to be nothing more than semantic." *Id.* at 184 (citations omitted). As such, a separate risk-utility analysis under strict liability adds little to the law except confusion for both judges and juries. *See infra* notes 101-03 and accompanying text for discussion of this point.

[16] Firearms manufacturers have little incentive to make their products safer. Certainly, the tort system has not placed much pressure on them to do so. Moreover, firearms are exempt by law from regulation by the Consumer Product Safety Commission. *See* Scott Shane, *Taking Aim at the Gun as Threat to Public Health*, BALT. SUN, May 29, 1994, at 1A ("The commission has the right to regulate the safety of toy guns, but not real ones.").

Obviously, firearms cannot be rendered completely safe without destroying their utility. They will always remain highly dangerous products. However, they could be made safer. For example, prototypes have long existed of devices that would make it possible for only the authorized user of a firearm to fire the weapon. *Id.* (discussing the development of the patented "Magna-Trigger" in the early 1970s, an invention

destroying their utility. When guns are used to kill or injure human beings, guns are performing precisely as intended.

The argument in favor of strict liability is that handguns are defective as a class because the risk they present to society outweighs their social utility, regardless of whether they can be made safer.[17] In other words, they are unreasonably dangerous *per se*.[18]

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that requires the authorized user of a handgun to wear a magnetic ring to discharge the gun). Such devices would disable the weapon in the hands of burglars, teenagers intent on suicide, children and other unauthorized users. One can predict the cries of naysayers that it would be impossible to produce a practically and economically feasible version of such a device. But those cries have been heard and proved wrong before. For example, prototype airbags in automobiles cost $20,000. Now they cost about $200. *Id.*

[17] No one on either side of the debate has been heard disputing the risk of handguns. The only legitimate area for disagreement is their utility. Keeping up with the horrific statistics of death and injury caused by handguns is not easy because the inventory mounts daily. No debate concerning guns and gun violence would be complete without some statistics. Here are some figures concerning gun violence in America gathered from some recently published sources:

* In 1992, 13,200 handgun murders occurred in the United States, a 24 percent increase over the five-year average. Violent crimes committed with handguns reached a record 930,700 in the same year. *Handgun Crime Hits Record High*, ATL. J. &. CONST., May 16, 1994, at A1.
* Compared to the 13,200 handgun homicides which occurred in the United States, handgun murders in 1992 totalled only 128 in Canada, 33 in Great Britain, 36 in Sweden, 97 in Switzerland and 60 in Japan. On a per capita basis, this translates to 51 handgun murders in the United States per one million residents, 14 per million residents in Switzerland, 4 per million residents in Canada and Sweden, and less than 1 per million residents in Great Britain and Japan. David D. Porter, *Guns; Americans Have a Love-Hate Relationship with Firearms. Guns Are Everywhere — 211 Million Across the Country. Many See Them as Protectors; Many as the Root of Destruction. What Role Do Guns Play in America?*, ORL. SENT., Apr. 10, 1994, at G1.
* Fourteen hundred accidental handgun deaths occur in the United States each year. Peter Hecht, *Joy, Annoyance as Gun Safety Law Takes Effect*, SACRAMENTO BEE, Apr. 1, 1994, at A1.
* Handgun homicides have risen 160 percent in the last 10 years. Handgun suicides have risen 400 percent since 1950. Dan Riggs, *Children's Health Is on the Firing Line*, ST. PETE. TIMES, Sept. 30, 1994, at 4D.
* More than 100,000 teenagers bring guns to school every day. In 1991, 5356 children and teenagers were killed with guns. The murder rate for teens in the United States is seven times higher than that of any nation in Western Europe. In 1991, 1.1 million years of potential life (assuming the victims would have lived to age 65) were extinguished by gun violence. Derrick Z. Jackson, *What Are We Waiting For? Get Handguns out of Children's Reach*, FT. LAUD. SUN-SENT., Sept. 17, 1994, at 23A.
* Homicide is the leading cause of death for young black males and the second leading cause (behind automobiles) for all young males. Susan

This theory of strict liability, which Professors Henderson and Twerski have labeled "product category liability,"[19] found its earliest and clearest judicial support in O'Brien v. Muskin Corp..[20] In *O'Brien,* the New Jersey Supreme Court held that a jury could find an above-ground swimming pool to be defective in design under a risk-utility approach even if the plaintiff was unable to prove an alternative feasible design.[21] However, *O'Brien* was effectively overruled by legislation.[22]

Duerksen & Nancy Cleeland, *The Mounting Toll of Hostility Threatens to Leave Our Health Care System in Critical Condition,* SAN DIEGO UNION-TRIB., Mar. 20, 1994, at A1.

See also Andrew Jay McClurg, *The Rhetoric of Gun Control,* 42 AM. U. L. REV. 53, 57 n.11 (1992) (quoting additional gun violence statistics).

Sadly, as a society, we have reached the point where the risk of handguns helps support the argument in favor of their utility. In other words, the greater the risk that a handgun will be used against an innocent person in a criminal attack, the stronger the argument in favor of their utility for purposes of self-defense.

To unload a nagging feeling of hypocrisy, I confess that I find myself thinking about purchasing a handgun to protect the ones I love. That my eight-year-old daughter openly expresses fear of being murdered is a crime in itself. I tell her such a thing will never happen (as I say a silent prayer), but she seems reassured only when I add my promise to always protect her. But how does an unarmed person back up such a promise in a society where more than 200 million firearms circulate with little regulation? *See* Erik Eckholm, *Ailing Gun Industry Confronts Outrage over Glut of Violence,* N.Y. TIMES, Mar. 8, 1992, at A1 (reporting this figure). My daughter is not alone in her fears. In a 1993 survey conducted by the Harvard School of Public Health, 62 percent of the parents surveyed reported that the ready availability of guns was causing their children to worry about their safety at school. Riggs, *supra,* at 4D.

18 *See* McClurg, *Handguns As Products Unreasonably Dangerous Per Se, supra* note 1, at 611 (arguing that the risk of handguns outweighs their utility). I adopted the terminology "unreasonably dangerous per se" from the Louisiana Supreme Court's decision in Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986). In this asbestos case, the *Halphen* court recognized a separate class of defective products deemed "unreasonably dangerous per se." *Id.* at 113.

19 *See* Henderson & Twerski, *The Rejection of Liability Without Defect, supra* note 4, at 1298.

20 463 A.2d 298 (N.J. 1983).

21 *Id.* at 305-06.

22 In 1987, the New Jersey Legislature passed a statute making it a defense to a design defect claim that "there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product." N.J. STAT. ANN. § 2A:58C-3a(1) (West 1987). The Legislature did create a narrow exception for products which are "egregiously unsafe or ultra-hazardous." *Id.* § 2A:58C-3b(1). However, the exception applies only if the ordinary user can not be expected to know of the risk or if "[t]he product has little or no usefulness." *Id.* § 2A:58C-3b(2), b(3). This definition precludes strict liability against handgun sellers because the risks are well-known and, though many would dispute it, handguns have recognized social utility.

A similar fate befell the only judicial decision ever to impose strict liability upon a gun seller. In Kelley v. R.G. Indus., Inc.,[23] an assailant shot the plaintiff in the chest with a cheap handgun during a robbery of a convenience store.[24] The plaintiff sued the manufacturer of the gun.[25] The Court of Appeals of Maryland, while rejecting traditional tort theories, held that strict liability could properly be imposed against manufacturers of so-called "Saturday Night Specials,"[26] which the court described as cheap, easily concealable handguns used in criminal activity.[27]

The reasoning offered in support of the holding was, to put it kindly, murky. The court imposed liability "as a matter of public policy,"[28] stating that "[t]o impose strict liability . . . would not be contrary to the policy embodied in [state legislation regulating firearms]".[29] The court purported to reject liability under a risk-utility analysis.[30] However, close scrutiny of the opinion reveals that risk-utility balancing played a crucial role in the decision. In justifying its different treatment of Saturday Night Specials as a matter of public policy, the court essentially relied on the fact that such weapons present an unusually high risk of being used for criminal activity and have low utility for most legitimate purposes.[31] Unfor-

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23 497 A.2d 1143 (Md. 1985).

24 *Id.* at 1144.

25 *Id.* at 1145.

26 *Id.* at 1159.

27 *Id.* at 1153 n.8. The court noted that Saturday Night Specials are characterized by "short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability." *Id.* at 1153-54.

28 *Id.* at 1153.

29 *Id.*

30 *Id.* at 1148-50. The court held that a risk-utility standard can be applied only "when something goes wrong with a product." *Id.* at 1149.

31 This is revealed by the following excerpt:

> [S]aturday Night Specials are largely unfit for any of the recognized legitimate uses sanctioned by the Maryland gun control legislation. They are too inaccurate, unreliable and poorly made for use by law enforcement personnel, sportsmen, homeowners or businessmen. . . . The chief "value" a Saturday Night Special handgun has is in criminal activity, because of its easy concealability and low price.

Id. at 1158. The court also injected elements of negligent entrustment into its discussion. *Id.* at 1158-59 (discussing that manufacturers of Saturday Night Specials know or should know that their products will be used primarily for criminal activities).

Several courts have characterized *Kelley* as standing for a separate "Saturday Night Special theory" of strict liability. *See* Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 775 (D.N.M. 1987); Caveny v. Raven Arms Co., 665 F. Supp. 530, 533 (S.D. Ohio 1987);

tunately, the Maryland legislature subsequently condemned *Kelley* to join *O'Brien* in the graveyard of judicial obsolescence by passing legislation prohibiting the imposition of strict liability for gun sellers.[32]

No other court has flirted with permitting a risk-utility claim to proceed against the maker of a properly functioning firearm. Indeed, every court that has addressed the theory has expressly rejected it.[33] The usual explanation is that the risk-utility analysis cannot be applied unless there is "something wrong" with the product.[34] However, this conclusion in one sense begs the question. Under a risk-utility analysis the argument is that there *is* something wrong with a product if the overall risk of the product to society outweighs its utility.

With courts and legislatures uniformly rejecting strict liability for handgun sellers, one might think that matters could not get any worse for proponents of tort liability. However, the most damaging blow to the long-term liability prospects may be yet to come. The first Preliminary Draft of the proposed Restatement (Third) of Torts: Products Liability defines product defect in a manner that

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King v. R.G. Indus., Inc., 451 N.W. 2d 874, 875 (Mich. Ct. App. 1990). However, properly read, the *Kelley* opinion is best understood in terms of risk-utility analysis.

[32] MD. CODE ANN., CRIMES AND PUNISHMENTS § 36-I(h)(1)(1992).

> [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 any 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 firearm was used.

Id.

[33] *See, e.g.*, Miles v. Olin Corp., 922 F.2d 1221, 1225 (5th Cir. 1991) (stating that the determination of whether a shotgun is unreasonably dangerous per se should be left for the legislature to decide); Moore v. R.G. Ind., Inc., 789 F.2d 1326, 1327 (9th Cir. 1986) (concluding that there is no need to distinguish between different varieties of handguns); Perkins v. F.I.E. Corp., 762 F.2d 1250, 1272 (5th Cir. 1985) (clarifying that "there must be 'something wrong' with a product before risk-utility analysis may be applied"); Caveny v. Raven Arms Co., 665 F. Supp. 530, 532-33 (S.D. Ohio 1987) (stating that the test only applies when the handgun has functioned improperly); Patterson v. Gesellschaft, 608 F. Supp. 1206, 1210-12 (N.D. Tex. 1985) (handgun); Mavilla v. Stoeger Ind., 574 F. Supp. 107, 109-10 (D. Mass. 1983) (handgun); Delahanty v. Hinckley, 564 A.2d 758, 762 (D.C. Ct. App. 1989) (handgun); Riordan v. Int'l Armament Corp., 477 N.E. 2d 1293, 1298-99 (Ill. Ct. App. 1985) (handgun); Addison v. Williams, 546 So. 2d 220, 224-25 (La. Ct. App. 1989) (assault rifle); Koepke v. Crosman Arms Co., 582 N.E. 2d 1000, 1001 (Ohio Ct. App. 1989) (BB gun).

[34] *See, e.g., Perkins*, 762 F.2d at 1272; *Patterson*, 608 F. Supp. at 1211; *Addison*, 546 So. 2d at 224.

precludes strict liability for gun manufacturers.[35] The Preliminary Draft limits strict liability to instances of manufacturing defects,[36] design defects[37] and inadequate warnings.[38] Most significant for those concerned with tort liability for gun sellers, the Preliminary Draft restricts liability for design defects to instances where "the foreseeable risks of harm presented by the product could have been reduced by the adoption of a reasonable, safer design . . . ."[39] By requiring proof of an alternative, safer design, the proposed Restatement revisions would foreclose courts from finding handguns to be defective products.

Almost immediately, salvos were fired at the requirement that products liability plaintiffs prove a reasonable, safer design.[40] At a meeting in May 1994, the American Law Institute (ALI) amended the comments to the Preliminary Draft to leave open the possibility that some products featuring "low social utility and high degree of danger" might be found to be defective despite the absence of a reasonable alternative design.[41] Advocates of handgun seller liabil-

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35 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 101 (Reporters' Preliminary Draft No. 1, Apr. 20, 1993), *excerpts reprinted in* M. Stuart Madden, *The Preliminary Draft of a Proposed Restatement (Third) of Torts: Products Liability*, 15 J. OF PROD. AND TOXICS LIAB. 163, 164 (1993).

36 *Id.* § 101(2)(a).

37 *Id.* § 101(2)(b).

38 *Id.* § 101(2)(c).

39 *Id.* § 101(2)(b). The full text of section 101 reads as follows:

> (1) One engaged in the business of selling products who sells a product in a defective condition is subject to liability for harm to persons or property caused by the product defect.
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> (2) Liability under Subsection (1) may be based on
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> (a) manufacturing defect in the form of a departure from the product's intended design even though all possible care was exercised in the preparation and marketing of the product;
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> (b) a design defect if the foreseeable risks of harm presented by the product could have been reduced by the adoption of a reasonable, safer design by the seller or predecessor in the commercial chain of distribution; or
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> (c) a defect consisting of failure to instruct or warn if the foreseeable risks of harm presented by the product could have been reduced by the adoption of reasonable instructions or warnings by the seller or predecessor in the commercial chain of distribution.

Id.

40 *See* Howard A. Latin, *The Preliminary Draft of a Proposed Restatement (Third) of Torts: Products Liability — Letter*, 15 J. PROD. AND TOXICS LIAB. 169, 169-72 (1993) (citing examples where it would be inappropriate to apply such a requirement).

41 Henry J. Reske, *New Torts Restatement Debated*, A.B.A. J., Aug. 1994, at 24.

ity would argue strenuously that handguns are the preeminent example of such a product. However, handguns are not what the ALI had in mind in passing the amendment.[42] The comments to the section defining design defect explicitly state:

> [t]he requirement . . . that plaintiff prove a reasonable alternative design applies even though the plaintiff alleges that the category of product sold by the defendant is so dangerous that is should not have been sold at all. Thus common and widely distributed products such as alcoholic beverages, tobacco, *small firearms* and above-ground swimming pools may be found defective only upon proof [satisfying the definitions of defect for manufacturing flaws, design defects or failure to warn.][43]

The new Restatement products liability provisions, while not binding on any court, undoubtedly will be very influential. Section 402A of the Restatement (Second) of Torts, which first imposed strict liability for defective products, is the most often cited section of any Restatement.[44] One may reasonably expect that its successor provisions will also carry great weight.

In sum, absent a wholesale revision in the attitude of courts, legislatures, and commentators, strict liability for handgun sellers under a risk-utility analysis is a dead letter.

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42 The example offered by the Institute of a product that would fit within the amendment is a "toy gun that shoots hard rubber pellets with sufficient velocity to cause injury to children." Fax from Professor James A. Henderson, Jr. to author (Nov. 9, 1994) (containing revisions to comments elaborating on the definition of design defect under the proposed *Restatement (Third) of Torts: Products Liability*) (on file with author). Such a product could be found defective in the absence of proof of a reasonable safer design because, given its high degree of danger and negligible utility, "no rational adult . . . would choose to use or consume the product." *Id.* However, the comments suggest that, unless the capacity of the toy gun to injure is defined as the intended utility of the product, it would be possible to find the product defective in design without having to abandon the requirement of a reasonable, safer design, since "toy guns that project ping pong balls, soft gelatin pellets, or water might be found to be reasonable alterative designs to a toy gun that shoots hard pellets." *Id.*

43 *Id.* (emphasis added).

44 James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORN. L. REV. 1512, 1512 n.1 (1992) (quoting letter from Marianne M. Walker, Restatement Case Citations Editor for the American Law Institute). A WESTLAW search of the ALLSTATES and ALLFEDS libraries shows that section 402A has been cited in 3,364 judicial opinions. Search of WESTLAW, Allstates and Allfeds libraries (Sept. 9, 1994) (search terms: Restatement /s 402A).

B. *Abnormally Dangerous Activities*

A second strict liability theory that once had potential in the fight against handgun sellers is that the manufacturing of handguns constitutes an abnormally dangerous activity within the meaning of sections 519-20 of the Restatement (Second) of Torts.[45] Section 519 provides strict liability for "one who carries on an abnormally dangerous activity . . . for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."[46] The rationale behind the section is that some activities, though having sufficient social utility that it is not negligent merely to engage in them, present such unusual risks of danger that they should pay their own way in society.[47]

Section 520 of the Restatement lists six factors to be considered in determining whether an activity is abnormally dangerous: (a) the existence of a high risk of harm; (b) a likelihood that the resulting harm will be great; (c) the inability to use reasonable care to eliminate the risk; (d) the extent to which an activity is not a matter of common usage; (e) the inappropriateness of the activity to the locality; and (f) the extent to which the danger of the activity outweighs its usefulness to the community.[48] The determination of

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45 RESTATEMENT (SECOND) OF TORTS, *supra* note 11, §§ 519-20. *See generally* Andrew O. Smith, Comment, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369 (1987) (advocating this theory of liability).

46 RESTATEMENT (SECOND) OF TORTS, *supra* note 11, § 519.

47 *Id.* § 519 cmt. d.

> [Liability] is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur. The defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.

Id.

48 *Id.* § 520. Some jurisdictions continue to adhere to the test from the first RESTATEMENT OF TORTS, which imposed strict liability for "ultra-hazardous" activities. *See* RESTATEMENT OF TORTS § 520 (1938). The first RESTATEMENT defined an ultra-hazardous activity as one which: "(1) necessarily involves a risk of serious harm which cannot be eliminated by the exercise of the utmost care; and (2) is not a matter of common usage." *Id.* Because this test does not allow for the weighing of such open-ended factors as the inappropriateness of the activity to the place where it is carried on and the value of the activity to the community, strict liability is, in effect, "stricter" under the first RESTATEMENT.

whether an activity is abnormally dangerous depends on the interplay of these factors. It is not necessary that all of the factors weigh in favor of strict liability. However, the Restatement comments state that ordinarily several of them will be present.[49]

In the case of handguns, it is indisputable that they present a tremendously high risk of great harm. Moreover, sellers are unable to eliminate the risk by the exercise of reasonable care. Finally, persuasive arguments can be made that the danger of handguns outweighs their value to the community. Thus, the manufacturing and marketing of handguns would appear to be strong candidates for classification as abnormally dangerous activities.

However, courts have consistently rejected efforts by the victims of gun violence to impose strict liability on handgun sellers under this theory.[50] The principal rationale was articulated in Perkins v. F.I.E. Corp.,[51] notable as the only case in which a gun victim suing under an abnormally dangerous activity theory escaped from the trial court without a summary disposition in favor of the defendant. Unfortunately, the victory was short-lived.

Kathy Newman, a third-year medical student at Tulane University, was robbed, raped, and then fatally shot by a man wielding a .38 caliber handgun manufactured by the defendant Charter Arms Corporation (Charter).[52] Her mother sued Charter in federal

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49 *Id.* at § 520 cmt. f.

50 *See, e.g,* Armijo v. Ex Cam, Inc., 843 F.2d 406, 407 (10th Cir. 1988) (handgun); Shipman v. Jennings Firearms, Inc., 791 F.2d 1532, 1534 (11th Cir. 1986) (handgun); *Perkins*, 762 F.2d at 1254-69; Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1203-04 (7th Cir. 1984) (handgun); *Caveny*, 665 F. Supp. at 531-32; *Patterson*, 608 F. Supp. at 1214-15; Hammond v. Colt Ind. Operating Corp., 565 A.2d 558, 562 (Del. Super. 1989) (holding that strict liability shall not be applied to claims involving the sale of a product even if it is inherently dangerous); *Delahanty*, 564 A.2d at 761 (rejecting the application of strict liability to gun manufacturers or sellers); Coulson v. DeAngelo, 493 So. 2d 98, 99 (Fla. Ct. App. 1986) (handgun); *Addison*, 546 So. 2d at 223-24; Richardson v. Holland, 741 S.W.2d 751, 754-55 (Mo. Ct. App. 1987) (handgun); Burkett v. Freedom Arms, Inc., 704 P.2d 118, 119-22 (Or. 1985) (handgun); Diggles v. Horwitz, 765 S.W.2d 839, 841 (Tex. Ct. App. 1989) (handgun).

51 762 F.2d 1250 (5th Cir. 1985).

52 *Id.* at 1253. *Perkins* actually involved two cases consolidated for appeal. The companion case involved a defective product claim by Joseph Perkins, who became paralyzed as a result of being shot in a bar fight with a .25 caliber handgun manufactured by the defendant F.I.E. Corporation. *Id.* at 1252. The trial court granted summary judgment to the defendant on plaintiff's claim that "the hazard of injury to human beings exceed[ed] the utility of the pistol . . . ." *Id.* at 1252-53. The court of appeals affirmed the summary judgment. *Id.* at 1275.

court for wrongful death, asserting that Charter's manufacture and sale of the gun constituted an "ultra-hazardous" activity under Louisiana law.[53] Charter moved for summary judgment, but the district court, applying the test for abnormally dangerous activities from the Restatement (Second) of Torts, determined that material issues of fact existed and denied the motion.[54] In so ruling, the court became the first and only court ever to hold that the victim of a handgun attack could state a strict liability claim against a gun manufacturer under an abnormally dangerous activity theory.

The Fifth Circuit Court of Appeals reversed.[55] Most of the court's opinion was devoted to explaining why the marketing of handguns did not constitute an ultra-hazardous activity under peculiarities of the Louisiana civil code.[56] However, in an oft-cited footnote, the court rejected liability under an abnormally dangerous activity theory on the basis that the *marketing* of a handgun, as distinguished from its *use*, is not an abnormally dangerous activity.[57] Only activities that are dangerous "in and of themselves and that can *directly* cause harm" are encompassed by the Restatement.[58] Other courts have agreed.[59]

Even if plaintiffs were able to overcome this hurdle, they would face other judicial obstacles to prevailing on claims grounded in the abnormally dangerous activities doctrine. Some courts have rejected abnormally dangerous activity claims against handgun manufacturers by focusing on the doctrine's historical tie to activities related to land.[60] Courts have held that only dangerous land-based activities that threaten neighboring land owners qualify

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53 *Id.* at 1253.

54 *Id.*

55 *Id.* at 1275. The court of appeals held the defendant was entitled to summary judgment. *Id.*

56 *Id.* at 1254-69.

57 *Id.* at 1265 n.43.

58 *Id.* (emphasis in original). The court drew this conclusion from the language of comment d to Restatement section 519, which states that "liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity." RESTATEMENT (SECOND) OF TORTS, *supra* note 11, at § 519 cmt. d.

59 *See, e.g., Martin*, 743 F.2d at 1203-4; *Caveny*, 665 F.2d at 531-32; *Delahanty*, 564 F.2d at 761.

60 Strict liability for abnormally dangerous activities is an outgrowth of the famous English case, Rylands v. Fletcher, 3 H.L. 330 (1868). In *Rylands*, Lord Cairns' opinion for the House of Lords imposed strict liability for damages caused by unusually dangerous activities which constituted a "nonnatural" use of property in relation to the surroundings. *Id.*

for treatment under the doctrine.[61] Still other courts have concluded that the widespread marketing of handguns fails the Restatement requirement that the activity not be a matter of common usage.[62] Accordingly, the abnormally dangerous activities doctrine offers little hope for tort plaintiffs suing gun sellers.

C. *Strict Liability, We Hardly Knew You*

It is probably inaccurate to talk about the death of strict liability for handgun manufacturers, since, for the most part, it existed only in the minds of hopeful commentators. If one stands back and looks at the tort system from a broad perspective, the refusal to impose strict liability seems topsy turvy. The societal death and injury toll from handguns is staggering,[63] as is the monetary cost which accompanies it. Firearm injuries cost the medical system at least $4 billion per year.[64] The average cost of medical treatment for a gunshot wound is $14,400.[65] Because most victims are unin-

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61 *See, e.g.*, Shipman v. Jennings Firearms, Inc., 791 F.2d 1532, 1534 (11th Cir. 1986); Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1147 (Md. Ct. App. 1985).

62 *See* Henderson & Twerski, *The Rejection of Liability Without Defect*, *supra* note 4, at 1320-21 (citing cases).

63 *See supra* note 17 (citing gun violence statistics).

64 Martin Kasindorf, *Health Plan Hinges on Controlling Access to Guns, Clinton Says*, ARK. DEM.-GAZETTE, Oct. 9, 1993, at 7A. Other estimates range as high as $20 billion per year. Riggs, *supra* note 17, at 4D.

65 Duerkson & Cleeland, *supra* note 17, at A1. Duerkson and Cleeland tracked the medical expenses of one gunshot victim:

> The medical costs of Manuel Cortez's injury will last all his life.
>
> In the year since the shooting, his care already has cost more than $73,000, mostly paid by the federal and state Medi-Cal program.
>
> Minutes after the bullet tore into his back, Cortez was taken by Life Flight helicopter, at a cost of $4,049, to Palomar Medical Center in Escondido. His 2 1/2 weeks there produced a bill of $34,205, plus $2,303 in doctor's fees.
>
> From Palomar, Cortez took a $488 ambulance ride to the Sharp Rehabilitation Center, where he spent 15 days at a cost of $21,724. The cost of his continuing outpatient rehabilitation is up to $4,062 and climbing. Medi-Cal pays $136 for a special van to take him to each of his outpatient visits, for a total so far of $2,448.
>
> His wheelchair and other equipment, purchased from donations to the rehab center, cost $1,175. His braces, purchased by Medi-Cal, $3,673.
>
> At least $5,150 more in rehabilitation is already scheduled, and Cortez will have long-term medical needs because of his partial paralysis, doctors said. He will always be at high risk for bladder and kidney infections, bone fractures, blood clots and pressure sores, said Dr. Kevin Gerhart, medical director of the Sharp rehab center.

Id.

sured, the public bears more than 80 percent of this cost.[66] Of course, medical expenses alone do not account for the full cost of gun injuries. Gun violence inflicts many other societal costs, tangible and intangible. These costs include lost wages and productivity from both the victims and family members who must care for them, physical and mental pain and suffering, police resources, funeral expenses, and the psychological insecurity we all suffer from living in a gun-infested society.

The dual purposes of the tort system are compensation and deterrence. To further these purposes in the area of products liability, strict liability for defective products shifts the costs of product-related injuries from innocent users or bystanders to the sellers of such products, who are in a better position both to absorb and spread the cost of the loss and to take measures to prevent injuries from occurring.[67]

Strict liability deters accidents in two important ways. First, it gives manufacturers an incentive to make products safer.[68] I have already asserted that our tort system has been too quick to accept the proposition that handguns cannot be made safer.[69] However, even if that proposition were true, a second type of deterrence — market deterrence — is relevant to handgun sellers. Market deterrence is furthered by requiring manufacturers to internalize the costs of injuries caused by risky products, forcing them to incorporate the costs into the selling price of the product.[70] At higher prices, consumers will be discouraged from buying risky products and injury costs will be reduced.[71]

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66 Riggs, *supra* note 17, at 4D.

67 *See* James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 931-32 (1981).

68 *Id.*

69 *See supra* note 16 and accompanying text.

70 Henderson, *supra* note 67.

71 *See* Henderson, *supra* note 67, at 933 (explaining market deterrence). The Fifth Circuit Court of Appeals summed up the market deterrence theory in Bynum v. EMC Corp., 770 F.2d 556 (5th Cir. 1985):

> [S]trict liability should be imposed on producers in order to force them to incorporate accident costs into the price of their products. The theory is that increased prices will then discourage users purchasing risky products and thereby lower total accident costs to society. Further, imposing the costs of accidents generally on manufacturers and consumers allows the costs of product-caused injuries to be spread over a class of users.

Id. at 571.

Most manufacturers are required to internalize the costs of injuries inflicted by their dangerous products, at least in part. Every day in this country, courts routinely shift the cost of personal injuries to the manufacturers of useful and benign products such as ladders, football helmets, space heaters, small aircraft, playground equipment, hair dryers, water skis, lawnmowers, nuts, bolts, just about anything except for handguns. All too often the only "defect" in these products is the failure to warn of risks that most people would consider to be obvious[72] or by giving of a warning which, in hindsight, a jury concludes could have been marginally improved by adding or changing a few words.[73]

But we are told a different result is commanded for the makers of a product which has as its only purpose the infliction of exactly what the tort system is designed to prevent: injury to human beings. By refusing to impose tort liability, current law, in effect, subsidizes the handgun industry. The cost of handguns does come close to reflecting their true cost to society. The rejection of tort liability for gun sellers means that the victims of handguns, who very often are bystanders who enjoy no benefit from the product, absorb the brunt of injury costs. The portion of the loss which they

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72 *See* Corbin v. Coleco Indus., 748 F.2d 411, 421 (7th Cir. 1984) (genuine issue of fact existed as to whether danger of serious spinal cord injury from diving into shallow above-ground pool was open and obvious); Jiminez v. Sears, Roebuck & Co., 482 P.2d 681, 684 (Cal. 1971) (determining that a jury might conclude reasonable care required warning that ladder should not be used on soft ground); Strain v. Mitchell Mfg. Co., 534 So. 2d 1385, 1388-89 (La. Ct. App. 1988) (concluding there was sufficient evidence for jury to find liability for failure to warn of dangers of folding cafeteria tables weighing 315 pounds, a task plaintiff had been performing for four years); Butz v. Werner, 438 N.W.2d 509, 512 (N.C. 1989) (holding that the following dangers were not obvious when plaintiff was injured while riding on a "Super Tube" pulled behind a boat when the tube collided with a submerged boat: that the tube should not be pulled above a certain speed, that the tube would accelerate and arc around corners, that the rider would have no control over speed, and that the rider's vision would be impaired by the spray of the tube); Lewis v. Watling Ladder Co., No. 104, 1986 WL 13960, at 4-5 (Tenn. Ct. App. Dec. 12, 1986) (reversing summary judgment against plaintiff in case where ladder slipped on wet concrete; held genuine issue of fact existed with respect to adequacy of warning and defectiveness of design).

73 *See* Salmon v. Parke, Davis & Co., 520 F.2d 1359, 1363 (4th Cir. 1975) (warning that aplastic anemia is "known to occur after administration" of defendant's antibiotic was defective because, although doctor testified the warning informed her that the product "can cause" aplastic anemia, it did not inform her that it "could cause" such illness); MacDonald v. Ortho Pharmaceutical Corp., 475 N.E.2d 65, 71 (Mass. 1985) (upholding jury verdict finding extensive oral contraceptive warnings to be inadequate for failing to include the word "stroke," even though product booklet warned of fatal cerebral blood clots (i.e., stroke)).

cannot bear is shifted, not to the dangerous enterprise that facilitated the harm, but to the nation's health care system.[74]

Compare handguns to asbestos, that most hated and dreaded of all products known to tort law. Asbestos is a natural fiber with certain unique, desirable properties: high tensile strength, flexibility and resistance to temperature and corrosive chemicals. These properties make it an excellent thermal and acoustic insulator for buildings, homes, and ships.[75] Asbestos once was hailed as a " 'miraculous mineral' and a boon to mankind."[76] It is estimated that eighty percent of the buildings constructed in the United States before 1979 contain asbestos.[77] Unfortunately, while asbestos fulfills important societal needs as an insulator, it presents a collateral, unintended risk to human health when airborne fibers from the product become lodged in a person's lungs.

Despite the fact that asbestos is a beneficial product that admirably fulfills its intended purpose, and even though it cannot be made any safer, asbestos manufacturers are sued and held strictly liable more often than the manufacturers of any other product in the world. There are almost 90,000 asbestos cases pending in state and federal courts.[78] Asbestos manufacturers have been held strictly liable even where courts accept that the risks of asbestos were unknown and scientifically unknowable at the time the product was manufactured and distributed.[79]

How does one explain wreaking tort liability havoc upon the makers of asbestos and other universally used, socially beneficial products which present unintended risks of harm while rejecting

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74 *See supra* notes 64-66 and accompanying text (discussing the public health costs of gun injuries).

75 *See generally* Barbara A. Wetzel, Comment, *Asbestos in the Work Place: What Every Employee Should Know*, 31 SANTA CLARA L. REV. 423, 425-28 (1991) (describing properties of asbestos).

76 Donald A. Brenner, *Recovering Asbestos Abatement Costs in Tort Actions*, 19 COLO. LAW. 659 (1990).

77 *Id.*

78 Patricia Zimand, Note, *National Asbestos Litigation: Procedural Problems Must Be Solved*, 69 WASH. U. L.Q. 899, 902 (1991).

79 *See, e.g.*, Halphen v. Johns-Mansville Sales Corp., 484 So. 2d 110, 118 (La. 1986); Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539, 549 (N.J. 1982). Many recent asbestos lawsuits allege that the manufacturers knew about the risks associated with asbestos but failed to warn of them or even actively concealed them. Marina C. Appleton, Comment, *Asbestos Manufacturers: The Pathway to Punitive Damages*, 6 J. CONTEMP. HEALTH L. & POL'Y 343, 344 (1990).

liability for the manufacturers of a product intended to be deadly? The only plausible answer is skewed social policy. It would be a serious tactical error for proponents of handgun seller liability to lose sight of the fact that it is primarily public policy, rather than rules of law, that drives the tort liability engine. Many factors influence this policy: the romantic history of guns in America; a culture that, through the media, glorifies violence; an unyielding and inaccurate interpretation of the Second Amendment;[80] a vast exaggeration of the utility of handguns to society;[81] and a belief by judges that, if action is to be taken, legislators should be the ones to act.[82] Whatever legal theory is pursued, success in the tort arena for handgun victims will depend on judges being willing to reassess the use of handguns in our society.

II. Negligent Marketing Claims Against Handgun Manufacturers

With strict liability for handgun manufacturers dead, or at least in a deep sleep, it is time to return to a more basic liability approach: elementary negligence. Negligence has been somewhat of a forgotten theory in the tort battle against gun sellers. The application of basic negligence principles to tort suits against handgun manufacturers is potentially sound under several different negligent marketing theories. This does not mean success for plaintiffs will come easily, for they will confront the same policy

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80 Obscured in the rhetoric of the gun debate are two important facts concerning the Second Amendment. First, no gun control regulation has ever been struck down on the ground that it violated the Second Amendment. Second, the United States Supreme Court has never "incorporated" the Second Amendment into the due process clause of the Fourteenth Amendment. Therefore, the amendment has no applicability to state action. Presser v. Illinois, 116 U.S. 252, 265 (1886) (holding that the Second Amendment declaration that the right to bear arms shall not be infringed " . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National Government . . . "). *See also* Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) ("we hold that the second amendment does not apply to the states . . . "). For critical analysis of the reasoning flaws on both sides of the gun control debate, *see* McClurg, *The Rhetoric of Gun Control*, *supra* note 17.

81 *See* McClurg, *Handguns as Products Unreasonably Dangerous Per Se*, *supra* note 1, at 613-16 (challenging the utility of handguns).

82 *See, e.g.*, Mavilia v. Stoeger Indus., 574 F. Supp. 107, 111 (D. Mass. 1983) (stating legislators do not find the marketing of handguns as socially unacceptable or unreasonably dangerous); Rhodes v. R.G. Indus., 325 S.E. 2d 465, 467 (Ga. 1984) (asserting regulatory scheme for the use and distribution of handguns comes from the General Assembly).

judgments which have stood in the way of strict liability. The vagaries of "duty" analysis under negligence law grant judges considerable leeway to implement those same policy judgments. Accordingly, before addressing specific negligence theories, some words about duty are necessary.

A. *The "Duty" Quagmire*

"Duty," in all its wonderful abstractness, is the joker in the negligence deck. Duty is an essential element of any negligence claim. Stating a definition of the term is beguilingly simple: " '[D]uty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff."[83] However, trying to ascertain when this obligation exists can lead to early madness. As Dean Prosser opined:

> The statement that there is or is not a duty begs the essential question — whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. It is therefore not surprising to find that the problem of duty is as broad as the whole law of negligence, and that no universal test for it has ever been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis in itself.[84]

Recognition of the chimerical substance of duty is critical to appreciating the obstacles to tort liability against gun sellers under any negligence theory. "There is a duty if the court says there is a duty . . . ."[85] Conversely, there is not a duty if the court says there is not. Faced with a novel negligence claim that he or she does not favor, a judge need only incant the magic words "no duty" and the case is over.[86] Thus, to have any chance of successfully battling the handgun industry in the negligence arena, plaintiffs need to go to court well-prepared to fight and win the duty contest.

Torts students learn early in law school that "foreseeability" (of either the harmful consequences[87] or of the plaintiff[88]) is the most prominent standard for determining the existence of a legal duty.

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83 W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 53, at 356 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

84 *Id.* § 53, 357-58 (footnote omitted).

85 William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953) [hereinafter Prosser, *Palsgraf Revisited*].

86 The issue of whether a duty exists is a question of law for the court. PROSSER & KEETON ON TORTS, *supra* note 83, § 37, at 237.

87 Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'r Co., [1961] A.C. 388

The manufacture and marketing of handguns easily pass the foreseeability test. Given the staggering statistical evidence regarding the harm inflicted by handguns,[89] one would be hard pressed to argue that the harmful consequences of handguns are not foreseeable. Moreover, since handguns are marketed by the millions to the population at large, any member of the public is a foreseeable plaintiff. The fact that a criminal act intervenes as the direct cause of injury does not break the chain of legal responsibility. Foreseeable criminal acts within the scope of the original risk do not supersede the original actor's liability.[90]

Unfortunately, the duty question is not answered so easily. Satisfying the foreseeability formula is a crucial prerequisite to finding a legal duty. However, many other factors play a role, including: the moral culpability of the defendant; the magnitude of the risk; the utility of the defendant's conduct; the policy of deterrence; the morality, fairness and justice of imposing a duty; the availability of insurance; the economic efficiency of imposing a duty; the closeness of the causal connection between the defendant's conduct and harm to the plaintiff; and administrative practicalities.[91] To build a convincing case

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(P.C.) (Austl.), known more commonly as *The Wagon Mound*, is perhaps the most famous case espousing this principle.

88 In *Palsgraf v. Long Island Railroad*, probably the most famous torts case in American history, Judge Cardozo said that the existence of a legal duty depends upon a relation between the defendant and the plaintiff, and that this relation arises from foreseeability of harm to the plaintiff. Palsgraf v. Long Island R.R., 162 N.E. 99, 101 (N.Y. 1928).

89 *See supra* note 17 (giving gun violence statistics).

90 The RESTATEMENT (SECOND) OF TORTS so provides:

> An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

RESTATEMENT (SECOND) OF TORTS, *supra* note 11, § 302B. *See also* Silva v. Showcase Cinemas Concessions of Dedham, Inc., 736 F.2d 810 (1st Cir.), *cert. denied*, 469 U.S. 883 (1984) (defendant's failure to adequately patrol premises was proximate cause of plaintiff's stabbing); Easley v. Apollo Detective Agency Inc., 387 N.E.2d 1241 (1979) (security agency liable for hiring guard with a violent history); Christensen v. Epley, 585 P.2d 416 (1978) (youth center supervisor liable for police officer's death when the officer was shot by juveniles who escaped from the center). *See generally* Paula C. Murray, *Premises Liability: Owner Liability for Criminal Acts of Third Parties*, 22 REAL EST. L.J. 341 (1994) (discussing premises liability of landlords and property management companies for criminal acts of third parties); Andrew K. Miller, *Understanding Premises Liability for Third Party Crimes*, 80 ILL. B.J. 311 (1992) (discussing business premises liability for the criminal acts of third parties).

91 *See, e.g.*, Soldano v. O'Daniels, 190 Cal Rptr. 310, 315 (Cal. Ct. App. 1983) (hold-

that a legal duty should be imposed, plaintiffs' attorneys need to be prepared to address relevant factors beyond foreseeability. However, to do so effectively, the attorneys need the opportunity to marshall relevant litigative *facts*. "The extent of duty can seldom, if ever, be determined until all the facts of a transaction in its environmental setting are known."[92] Consider a hypothetical lawsuit against a gun manufacturer which asserts a negligent marketing theory.[93] Plaintiff, the victim of a criminal attack undertaken with a small, cheap handgun sues the manufacturer. The plaintiff's negligence claim alleges the manufacturer employed a marketing strategy that emphasized volume sales at urban pawn shops that are known to be a primary source of weapons acquisition for street criminals. The defendant manufacturer moves for summary judgment asserting it owed no legal duty to the plaintiff. Without more, the trial court may well be inclined to grant the motion. However, it would be premature to dispose of the case without allowing the plaintiff the opportunity to develop, through discovery, facts concerning the defendant's marketing strategy that might have a bearing on the duty determination.

Suppose, to use an example that may not be purely hypothetical,[94] discovery discloses evidence that the manufacturer had conducted market research showing that criminals are much more likely to purchase cheap handguns than expensive, high-end handguns. Based on this information, the company decides to implement a marketing strategy designed to target criminal consumers. Confronted with such evidence of moral culpability, would the trial court's "no duty" ruling remain the same?

In the first stages of handgun litigation, the primary strategic focus of plaintiffs' lawyers should be to convince the trial court that dismissal is inappropriate until the plaintiff has had an opportunity to

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ing duty determination requires consideration of foreseeability of harm to plaintiff, the closeness of the causal connection between defendant's conduct and plaintiff's injury, the moral blame attached to defendant's conduct, the policy of preventing future harm, the burden to defendant and community of imposing a duty, and availability and cost of insurance); Prosser, *Palsgraf Revisited*, *supra* note 85, at 15 ("In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall.").

92 Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1418 (1961).

93 *See infra* notes 144-69 and accompanying text for discussion of this type of negligent marketing claim.

94 *Id.*

conduct factual investigation through discovery. My research has indicated that public information regarding the gun manufacturing industry is scarce. It may be that a large cache of relevant and perhaps damning information regarding matters such as marketing strategy exists in the files of gun manufacturers. Before courts rule on potentially dispositive pretrial motions raising the duty issue, plaintiffs should be allowed access to relevant information pertaining to the many factors that influence the duty determination. The issue of duty in this complex area cannot properly be decided in a factual vacuum.

B. *Theories of Negligent Marketing*

The most prominent negligence theory for applying negligence principles against handgun manufacturers is a negligent-marketing theory. Negligence involves the creation of unreasonable risks of harm.[95] Given the statistical evidence regarding the terrible harm inflicted by handguns,[96] the marketing of handguns presents substantial risks. Are these "unreasonable" risks within the meaning of negligence law? Negligent marketing claims assert an affirmative answer to this question. However, the development of negligent marketing theory is in its embryonic stages. Important cases that will test the viability of negligent marketing claims are pending.[97]

At least three variations of negligent marketing claims can be articulated. Valid arguments exist that a handgun manufacturer creates an unreasonable risk and, therefore, acts negligently when the manufacturer: (1) markets a weapon that presents an unusually high risk of harm and negligible utility for legitimate purposes;[98] (2) implements a marketing strategy that deliberately, recklessly, or negligently targets criminal consumers;[99] or (3) fails to take reasonable steps in the marketing process to minimize the risk that its products will be purchased by persons likely to misuse them.[100]

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95 *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 11, § 282 (defining negligence as conduct falling below the standard of conduct established by law for the protection of others against unreasonable risks of harm).

96 *See supra* note 17 (listing gun violence statistics).

97 *See infra* notes 109-30, 144-54, 155-84 and accompanying text.

98 *See infra* notes 101-30 and accompanying text.

99 *See infra* notes 144-69 and accompanying text.

100 *See infra* notes 170-85 and accompanying text.

1. Negligently Manufacturing and Selling Unusually Dangerous Weapons

One basis for a negligent marketing claim would be that a manufacturer acts negligently if it markets a weapon which it knows, or should know, creates an unusually high risk of being used for criminal activity and which has negligible utility for legitimate purposes. Such a claim would be particularly well-suited to litigation against manufacturers of assault weapons and Saturday Night Special-type handguns. Unfortunately, the analytical similarity of such a claim to the doomed risk-utility products liability theory discussed above may present problems for plaintiffs. One of the primary criticisms of risk-utility analysis grounded in strict liability has been that, as applied in most jurisdictions, it is identical to the risk-utility analysis used to assess the reasonableness of risks under negligence law.[101]

The conceptual difference between the two claims is that the negligence claim focuses on the *conduct* of the manufacturer, whereas strict liability is concerned only with the *condition* of the product. Thus, under the negligence theory the inquiry would not be whether the weapon was defective, but whether the manufacturer created an unreasonable risk of harm by manufacturing and marketing the weapon. Conversely, a strict liability claim focuses on any defect in the product without centering on the manufacturer's conduct.

For most purposes, this conceptual difference may be largely a semantic one. Most courts hold manufacturers strictly liable under products liability law only as to risks that were known or knowable

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101 *See supra* note 15. *See also* RESTATEMENT (SECOND) OF TORTS, *supra* note 11, §§ 291-93 (incorporating risk-utility balancing as the method for determining the reasonableness of risks under negligence law). Risk-utility analysis is really nothing more than an elaboration of Judge Learned Hand's famous formula for negligence. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) ("[i]f the probability be called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [is less] than PL"). *See also* JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 496 (2d ed. 1992) [hereinafter HENDERSON & TWERSKI, PRODUCTS LIABILITY]

> [I]t should not be surprising that in searching for a test for design defect, courts would look to the risk-utility test developed by Learned Hand . . . . If that test is capable of determining whether a bargee was reasonable in leaving his vessel rather than incurring the costs occasioned by his remaining on board, it should be able to decide whether a product is reasonably designed without a safety feature.

at the time of manufacture.[102] Accordingly, although courts may assert they are focusing only on the condition of the product, it is inescapable that they are evaluating the conduct of the manufacturer. Pure strict liability would impose liability if the risks of a product design outweighed its utility, without regard to whether those risks were known or should have been known by the manufacturer. Since most courts have eschewed this approach, there is little real difference between risk-utility analysis grounded in strict liability and risk-utility analysis grounded in negligence.[103]

There is, however, an important tactical advantage for handgun plaintiffs that derives from the conceptual difference between a negligence-based risk-utility analysis and a strict liability-based risk-utility analysis. As has been discussed, strict liability doctrine has all but locked the courthouse doors to plaintiffs trying to sue handgun manufacturers. Judicial decisions,[104] state statutes,[105] and, if adopted in its present form, the new Restatement (Third) of Torts,[106] all preclude a products liability plaintiff from prevailing unless he or she shows there was "something wrong" with the product. Current strict liability law holds there is nothing wrong with a product which is manufactured as intended, performs as intended and expected, and for which no safer, alternative design exists.[107] Indeed, handguns are said to be functioning marvelously when used to injure or kill human beings.[108]

A risk-utility analysis cast in terms of negligent marketing would allow plaintiffs and willing courts to avoid this doctrinal obstacle. To impose liability for negligence, it would not be necessary for the plaintiff to prove there was "something wrong" with the product. The plaintiff would need to show only that there was "something wrong" with the manufacturer's conduct. To find for the plaintiff under a negligent marketing theory, the court essentially would be saying: "Your product may be fine, but there was '*something wrong*' with your selling it (or with the manner in which you sold it)."

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102 HENDERSON & TWERSKI, PRODUCTS LIABILITY, *supra* note 101, at 612.

103 *See id.* at 605-06 (explaining this dilemma).

104 *See supra* notes 33-34 and accompanying text.

105 *See supra* notes 3, 22, 32 and accompanying text.

106 *See supra* notes 35-44 and accompanying text.

107 *See supra* notes 33-34 and accompanying text.

108 *See, e.g.*, Oliver, *supra* note 6, at 29 ("[g]un suppliers provide precisely what is requested and expected — an instrument that can intimidate, injure and kill.").

This distinction may not impress judges who firmly oppose tort liability for gun manufacturers. However, the distinction would give judges who favor tort liability a hook on which to hang their legal hats. One has to believe that the growing case against handguns, supplemented daily in newspapers and on television, has persuaded some judges that the policy considerations which led courts to reject strict liability should be reassessed. It is probably too late to revive strict liability, but negligence doctrine gives judges another legal avenue to pursue.

A series of cases arising out of the San Francisco law firm shooting tragedy may serve as a test for this type of risk-utility negligent marketing theory. On July 1, 1993, Gian Luiagi Ferri walked into the high-rise offices of the San Francisco law firm of Pettit & Martin and shot four people he did not know.[109] Ferri then roamed through three floors of the building, shooting lawyers, secretaries and a client of the firm.[110] The carnage ended when, trapped by police in a stairwell, Ferri shot himself in the head.[111] The final toll of his madness: eight people dead and six wounded.[112]

The San Francisco tragedy was notable not only for its magnitude and the senselessness of the harm, but also because of the odious weapons Ferri employed to inflict it. Ferri used two Tec-DC9 semiautomatic assault pistols in his rampage[113] — the "Saturday Night Special" of assault weapons. The Tec-DC9 is the successor to an earlier model assault pistol, the Tec-9, which was produced by the same manufacturer. The Tec-9 was an inexpensive 9 mm assault pistol made by Navegar, Inc., doing business as Intratec firearms ("Intratec"), a company based in Miami, Florida. The weapon, which looks like a small machine gun, first gained notoriety from prominent use in the popular 1980's television series, *Miami Vice*.[114] The pistol boasted ominous features such as a

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109 Jenifer Warren & Richard C. Paddock, *Grudge Over Soured Deal May Have Led to Rampage*, L.A. TIMES, July 3, 1993, at A1.

110 *Id.*

111 *Id.*

112 *Id.*

113 Ken Hoover, *Families Sue Gun Firms in Massacre: Makers of Weapons, Gear Used in S.F. Highrise Rampage*, SAN FRAN. CHRON., May 19, 1994, at A1.

114 Mark Pazniokas, *Gun Maker in Court Makes No Apologies*, HARTFORD COURANT, Jan. 28, 1994, at B1.

thirty-two round magazine and a ventilated barrel.[115] Sales brochures for the Tec-9 praised its special Tec-Kote finish, which " 'provides a natural lubricity to increase bullet velocities' and 'excellent resistance to fingerprints.' "[116] A member of the New York Police Department's Joint Firearms Task Force described the Tec-9 as "the weapon of preference for drug dealers" in New York City.[117]

Allegedly to circumvent bans of the Tec-9 in California and Washington, D.C., Intratec made a slight modification of the weapon and renamed it the Tec-DC9.[118] Ferri purchased his two Tec-DC9s at a Las Vegas pawn shop.[119] Both weapons were equipped with magazines capable of holding (and firing without reloading) fifty cartridges and "Hell-Fire" trigger mechanisms that enable users to pull the trigger at a greatly accelerated rate.[120]

One year after the San Francisco killings, the families of four

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115 Larry Rohter, *Gun Packs Glamour, Force and Reputation as Menace,* N.Y. TIMES, Mar. 10, 1992, at A1.

116 *Id.* at A14.

117 *Id.* (quoting Lieut. Kenneth McCann). While only a small percentage of weapons used for criminal purposes are traced, federal weapons tracings suggest that the Tec-9 is used in crime more than any other assault-type weapon. *Id.* When questioned about the Tec-9's bad reputation with law enforcement authorities, a company executive responded: "I'm kind of flattered . . . . It just has that advertising tingle to it . . . . It may sound cold and cruel, but I'm sales oriented." *Id.*

118 Hoover, *supra* note 113, at A13 (stating the Tec-9 was banned in California, "but Intratec sought to get around the law by making a minor modification and selling the gun as the TEC-DC9"); Pazniokas, *supra* note 114, at B1 (describing in-court questioning of Intratec owner concerning cosmetic revisions to and renaming of the Tec-9 shortly after Washington, D.C. passed a law banning the Tec-9; the witness denied any purpose to circumvent the law). Congress recently banned the manufacture and sale of both the Tec-9 and the Tec-DC9. 18 U.S.C.A. §§ 921(a)(30), 922(v)(1) (1994).

119 Hoover, *supra* note 113, at A1.

120 Hoover, *supra* note 113, at A1. The Hell-Fire trigger device consists of a spring behind the trigger that puts pressure on the trigger. Associated Press, *Maker Says Trigger Won't Make Gun Automatic,* ROCKY MTN. NEWS, May 20, 1994, at 29A. The inventor of the device denies that it has any "tactical purpose" or that it makes a rapid-fire weapon out of a single-shot weapon, stating that it "was invented and marketed as a novelty to give a person the feel of a machine gun." *Id.* (quoting Vince Troncoso). An advertisement for the device appearing in a magazine for gun enthusiasts makes the following claims:

> UNLEASH "HELL-FIRE" Do you own any Semi-Automatic and want to Rock 'N Roll! Well, the all-new "*HELL-FIRE" Trigger System* is here! You won't find anything closer to a "Select Fire" Conversion *and it's LEGAL*! . . . When engaged, you may fire bursts, [sic] to emptying complete magazines at a FULL AUTOMATIC RATE ACCURATELY and LEGALLY! Hurry and *get yours now before it's too late!* Advertisement, GUN WORLD, Sept. 1994, at 44.

of Ferri's victims sued Intratec, and the manufacturers of the high-capacity magazines and the Hell-Fire trigger system.[121] The lawsuits against Intratec allege that the company was negligent because it: (1) knew or should have known that the Tec-DC9 "has no legitimate sporting or self-defense purpose and is particularly well adapted to a military-style assault on large numbers of people";[122] (2) knew or should have known that the Tec-DC9 is "disproportionately associated with criminal activity";[123] and (3) acted negligently by manufacturing and marketing the Tec-DC9 to the general public.[124]

In essence, these allegations are rooted in a basic risk-utility argument that the risk of the Tec-DC9 outweighs its social utility.[125] The argument is that Intratec knowingly created an unreasonable risk of harm by marketing a weapon that posed an unusually high risk of being used for criminal activity and that has negligible utility for legitimate purposes. The problem plaintiffs face is that their argument would require a court to make the type of value judg-

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121 Hoover, *supra* note 113, at A1.

122 First Amended Complaint at 8, ¶ 31, Stephen Sposato, v. Navegar, Inc., Case No. 960937 (San Francisco County Super. Ct. filed June 22, 1994) [hereinafter "Intratec Complaint"]. This is one of several complaints filed against Intratec. The complaints contain identical allegations of negligence. Telephone Conversation with Mark D. Polston, staff attorney for the Center to Prevent Handgun Violence, co-counsel for plaintiffs (Jan. 4, 1995).

123 Intratec Complaint, *supra* note 122, at 8, ¶ 32.

124 *Id.* at 8, ¶ 33. The complaint also asserts claims against Intratec for strict liability under the abnormally dangerous activities doctrine and for violations of the California Unfair Business Practices Act. *Id.* at 10, 12-13. For discussion of the obstacles confronting gun victims seeking to impose liability under an abnormally dangerous activities theory, *see supra* notes 45-62 and accompanying text.

125 This characterization of the plaintiffs' argument seems inescapable. *See* Notice of Demurrer and Demurrer of Defendant Navegar, Inc. To Complaint at 5, Stephen Sposato, v. Navegar, Inc., Case No. 960937 (San Francisco County Super. Ct. filing date unknown, service date Oct. 3, 1994) ("The thrust of these claims is that the benefits of the TEC-DC9 are substantially outweighed by its potential to cause serious injury, damage or death when discharged, especially by criminals."). Plaintiffs take issue with this characterization. Opposition of Plaintiffs' Stephen Sposato, To Demurrer of Defendant Navegar, Inc. at 8, Stephen Sposato, v. Navegar, Inc., Case No. 960937 (San Francisco County Super. Ct. filed Nov. 7, 1994) ("Plaintiffs here make no assertion that defendant should be strictly liable simply because the risks posed by the DC9 outweigh its benefits."). Plaintiffs no doubt are attempting to avoid the pitfalls of a California statute that prohibits products liability actions against firearms makers under a risk-utility, defective design theory. *See* CAL. CIV. CODE § 1714.4 (West 1985). *See also infra* notes 128-29 and accompanying text for discussion of this statute.

ment that courts have been unwilling to make under strict liability: that the risks of firearms outweigh their utility to society.

However, an important difference favoring the plaintiffs is that their risk-utility argument is tightly focused on the Tec-DC9. They are not seeking, as past handgun plaintiffs have done, to apply a risk-utility analysis to handguns generically, but only to one sinister, military-style assault pistol that has no legitimate usefulness to society.[126] On the plaintiffs' side is the fact that in 1989 the California legislature banned the sale of assault weapons, including the Tec-9 (the Tec-DC9's virtually identical predecessor).[127] Thus, in effect, a legislative policy decision has already been made that the risks of the Tec-DC9 outweigh its utility. Working against plaintiffs is a California statute that prohibits products liability actions against firearm sellers for design defects based on the allegation that the benefits of the products outweigh the risks.[128] Technically, this latter statute should not apply to the *Intratec* litigation because the plaintiffs' lawsuits are not products liability actions based on defective design, but rather negligence actions alleging unreasonable conduct by the defendants. Nevertheless, the policy underlying the statute will no doubt carry weight. Ultimately, resolution of the lawsuits may depend on which of the conflicting policies behind these two legislative acts is given precedence.[129] Predictions have been made that a San Francisco court will be receptive to the claims.[130] One can only hope that the predictions are correct.

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126 The plaintiffs' argument would apply with nearly equal force to other assault weapons, as well as Saturday Night Special-type handguns.

127 ROBERTI-ROOS ASSAULT WEAPONS CONTROL ACT OF 1989, CAL. PENAL CODE §§ 12275-76 (West 1992). The legislature found that the weapons listed in § 12276 of that chapter "pose[ ] a threat to the health, safety, and security of all citizens." *Id.* at 12275.5. The legislature further declared that "each firearm [listed] has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." *Id.*

128 CAL. CIV. CODE § 1714.4 (West 1985). *See supra* note 3 for the relevant text of the statute.

129 Intratec has filed demurrers to the complaints and plaintiffs have responded with memoranda opposing the demurrers. Arguments on the demurrers have not yet been heard by the court. Telephone Conversation with Mark D. Polston, staff attorney for the Center To Prevent Handgun Violence, co-counsel for the plaintiffs (Jan. 4, 1995).

130 *See* Steven W. Colford, *Suit Targets Tec-9 Gun Ad Claims*, ADVERTISING AGE, July 11, 1994, at 14 (Washington advertising lawyer stating that California presents a friendly environment for such suits); Maura Dolan, *Relatives of Victims Sue Gun Makers*,

2. Negligence In the Manner of Marketing

A second category of negligent marketing claims focuses not so much on the particular type of weapon marketed, but on the manner in which the manufacturer marketed the product. At least two sub-classes of "negligence in manner of marketing" theories can be delineated. The first is that gun manufacturers owe a duty not to market their deadly products in ways likely to substantially increase the risk of harm. This duty would be breached if it could be proven that a manufacturer implemented a marketing plan that deliberately, recklessly, or negligently targeted criminal consumers. Secondly, and somewhat conversely, gun manufacturers should be held to an affirmative duty to take reasonable precautions to decrease the risk of their products being sold to those likely to misuse them.

"Negligence in manner of marketing" claims may prove to be the most workable theories for imposing legal responsibility on handgun[131] manufacturers. Even if one accepts that handguns have sufficient utility that the mere selling of them should not subject sellers to liability, it makes eminent good sense to require that gun makers not act unreasonably to enhance the risk of their deadly products. In addition, the gun manufacturers should take affirmative reasonable precautions to minimize the risk. Negligence law requires that persons act with reasonable care to avoid foreseeable risks of harm to others. This may include protecting against foreseeable risks of criminal attack.[132] Several courts have approved liability for firearms *retailers* who fail to exercise reasonable care in purchase transactions that create foreseeable risks of criminal attack.[133] No legitimate reason exists for exempting hand-

L.A. TIMES, May 19, 1994, at A3 (California lawyer familiar with gun liability issues predicting San Francisco court will be receptive to the lawsuits).

131 There is no particular reason why this type of claim should be limited to handguns. However, because criminals use handguns far more often than other types of firearms, it is appropriate to limit the discussion to handguns.

132 *See supra* note 90 and accompanying text.

133 *See, e.g.*, Cullum & Boren-McCain Mall, Inc. v. Peacock, 592 S.W.2d 442 (Ark. 1980) (selling gun to customer who requested a weapon that would make a "big hole" in a person); Hoosier v. Lander, 17 Cal. Rptr. 2d 518 (Cal. Ct. App. 1993) (sale of handgun to minor's grandmother in a "strawman" sale); West v. Mache of Cochran, Inc., 370 S.E.2d 169 (Ga. Ct. App. 1988) (sale of semiautomatic rifle to former mental patient); Rubin v. Johnson, 550 N.E.2d 324 (Ind. Ct. App. 1990) (selling Intratec Tec-9 to person who clerk knew or should have known was of unsound mind); Bernethy v. Walt Failor's, Inc., 653 P.2d 280 (Wash. 1982) (furnishing rifle to intoxicated person).

gun manufacturers from the obligation to exercise reasonable care in the marketing of their products.

The leading case supporting liability for marketing a dangerous product in an unreasonable manner is Moning v. Alphono.[134] In *Moning*, a twelve-year-old boy was shot in the eye with a slingshot by his eleven-year-old playmate. The twelve-year-old victim sued the manufacturer, distributor, and retailer of the slingshot.[135] The trial court directed a verdict in favor of the defendants and the court of appeals affirmed.[136] The Michigan Supreme Court reversed, holding that the defendants owed a duty of reasonable care to the plaintiff.[137] "It is now established," the court stated, "that the manufacturer and wholesaler of a product, by marketing it, owe a legal duty to those affected by its use."[138] The court held that whether that duty was breached — that is, whether the defendants created an *unreasonable* risk by marketing the slingshots directly to children — was a jury question.[139]

Of particular importance to the gun liability debate was the court's rejection of the defendants' argument that imposing a duty on the seller of a dangerous product to exercise reasonable care in marketing would amount to a legislative-type value judgment. The defendants in *Moning* asserted that the court was " 'being asked to perform a legislative task' " because to rule for the plaintiff " 'would in effect be making a value judgment and saying . . . [that slingshots] should not be *manufactured or marketed.*' "[140] The court dismissed this argument because it "assumed that allowing juries to decide the reasonableness of the risk of harm created by *marketing* slingshots directly to children would so burden the manufacture and marketing of slingshots that all manufacturing and marketing would cease, *rather than merely affect the manner and cost of marketing slingshots* . . . . "[141]

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134 254 N.W.2d 759 (Mich. 1977).

135 *Id.* at 762.

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.* at 763.

140 *Id.*

141 *Id.* (emphasis at end of quotation added). *See also id.* at 767 ("Moning does not . . . contend that manufacturing and marketing slingshots is negligence *per se.* His contention, rather, is that marketing them *directly to children* creates an unreasonable risk of harm.").

This critical distinction is what may make a negligence in manner of marketing claim the most promising theory for handgun victims suing manufacturers. The unanimous rejection of product liability for handgun sellers under a risk-utility balancing analysis[142] has shown that courts are unwilling to make the value judgment that handguns should not be made or sold. However, liability under this type of negligent marketing theory would not require courts to make any such value judgment. The gist of the claim would be that the defendant was negligent not simply for selling the handgun, but for acting unreasonably in the manner in which the defendant marketed the product. Such a claim demands no more than what is expected from all of us, namely, the exercise of reasonable care for the protection of others from foreseeable risks.[143] As discussed below, negligence in manner of marketing claims could take at least two different forms.

a. *Negligently Promoting the Sale of Handguns To Criminal Consumers*

In the *Intratec* litigation,[144] the plaintiffs alleged that Intratec knew or should have known that its semiautomatic assault pistols would be used by criminals. To support this allegation the plaintiffs relied both on the military-style design of the Tec-DC9 and advertising by Intratec. Design features making the weapon appealing to criminals included a large capacity magazine,[145] a

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142 *See supra* notes 12-44 and accompanying text.

143 At least one court has misapprehended the limited meaning of *Moning* in a handgun case. In Caveny v. Raven Arms Co., 665 F. Supp. 530 (S.D. Ohio 1987), the plaintiff, victim of a handgun attack, relied on *Moning* in claiming the manufacturer was negligent in the distribution of its handguns. The court distinguished *Moning* on the basis that different rules are applicable to children:

> Since children are readily identifiable, methods of distribution can be designed to prevent the sale of inherently dangerous items to children. [citation omitted] In contrast, it is more difficult to conceive of a method of distribution by which handgun manufacturers could avoid the sale of its product to *all* potential misusers.

Id. at 533 (emphasis added). The issue in a negligent marketing claim is not whether a method can be devised to prevent *all* misusers from purchasing handguns. Undoubtedly, that would be impossible. The issue is only whether the manufacturer could have and should have taken *reasonable* steps that would have reduced the risk. If the manufacturer acted reasonably, no liability would result even if the precautions failed to prevent the harm.

144 *See supra* notes 109-30 and accompanying text.

145 Intratec Complaint, *supra* note 122, at 4, ¶ 12. "This magazine enables the

threaded barrel designed to accept a silencer and/or flash suppressor,[146] a barrel shroud that protects the shooter's hands from heat during rapid firing,[147] and a sling swivel that allows a shoulder strap to be attached, enhancing the ability to "spray-fire the weapon from the hip."[148] The complaint also describes advertisements praising the Tec-DC9 and Tec-9 for being " 'a radically new type of semiautomatic pistol, designed to deliver a high volume of firepower,' "[149] " 'as tough as your toughest customer.' "[150] and for having a special finish that " 'provides excellent resistance to finger prints [sic].' "[151]

Plaintiffs' counsel assert that these design features and advertisements were part of a "marketing strategy that was directed toward criminals."[152] If a willful marketing strategy of this type could be proved, it would appear to state a viable, independent claim of negligence. Surely, the tort system would not condone deliberate or reckless efforts to sell weapons capable of inflicting mass destruction to those most likely to use them for that purpose.

A claim based on proof of a willful marketing strategy would be analogous to a negligent entrustment theory. It is negligent for an actor to supply "directly or through a third person" an instrumentality to one whom the supplier "knows or has reason to know" will be likely to use the instrumentality in a manner presenting an unreasonable risk of physical harm to others.[153] Imposing liability

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shooter to fire 32 rounds without reloading. Once these 32 rounds are expended, the shooter can quickly reload the weapon by removing the spent magazine and inserting a fresh one." *Id.*

146 *Id.*

147 *Id.* at 4, ¶ 13.

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.* Another Intratec advertisement boasted of the capability of the weapon to make " 'a clean sweep in one pass.' " Joanne Wojcik, *Taking Aim on Gun Manufacturers Assault Weapon; Victims Return Fire With Creative New Liability Theories*, BUS. INS., June 20, 1994, at 1.

152 Colford, *supra* note 130, at 14 (quoting one of the plaintiffs' lawyers). It does not appear from the complaint that plaintiffs are relying on this alleged marketing strategy as an independent negligence theory, but only to show that Intratec knew or should have known of the risk posed by their product. *Id.*

153 RESTATEMENT (SECOND) OF TORTS, *supra* note 11, § 390. The full text of the section reads as follows:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner

on gun manufacturers would be an extension of traditional negligent entrustment theory because the cases would lack proof that the manufacturer knew or had reason to know that any *particular* purchaser would be a misuser. This extension, however, would be appropriate assuming there is proof of a willful plan to market guns to a class of criminals. Proof that a handgun manufacturer deliberately, recklessly or negligently targeted criminals as consumers would support a conclusion that the manufacturer knew or had reason to know that its products would be entrusted to those likely to use them in a manner presenting a risk of unreasonable harm to others.

Establishing a case of willful marketing may be difficult, particularly if trial courts continue to dispose of handgun cases at the pleading stage before plaintiffs have had an opportunity to engage in discovery. The design features of unusually dangerous weapons and advertisements of the type relied on in the *Intratec* litigation would be highly relevant to proving a tortious marketing strategy, but may not be sufficient by themselves to establish the existence of such a plan.[154]

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involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Id.

154 A separate claim might be predicated on the argument that the advertisements constituted negligence in themselves by inciting criminal activity. However, it is doubtful the ads were specific enough to support liability under this theory. In *Braun v. Soldier of Fortune Magazine, Inc.*, the Eleventh Circuit Court of Appeals upheld a substantial jury verdict against the defendant magazine for running a personal services advertisement by a "professional mercenary" offering his services as a "GUN FOR HIRE" and stating that "[a]ll jobs" would be considered. Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1112 (11th Cir. 1992). Bruce Gastwirth hired the mercenary, Michael Savage, to kill his business partner, Richard Braun. *Id.* Savage and some accomplices murdered Braun and wounded his son in a shooting attack. *Id.* The Eleventh Circuit held that Soldier of Fortune owed a duty to Braun to refrain from publishing advertisements that subjected the public "to a clearly identifiable risk of harm from violent criminal activity." *Id.* at 1114. The magazine breached that duty because the advertisement "openly solicited criminal activity." *Id.* at 1115.

The defendant in *Fortune* relied heavily on Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990), a case with similar facts which had rejected liability. The Eleventh Circuit distinguished *Eimann* on the basis that the advertisement at issue in that case was ambiguous and the trial court had granted the jury too much leeway to impose liability by instructing it that Soldier of Fortune could be found liable "if a reasonable publisher would conclude 'that the advertisement *could reasonably be interpreted*' as an offer to commit crimes." *Id.* at 1116 (quoting *Eimann*, 880 F.2d at 833 (emphasis added)). The jury instructions in

A case pending in Little Rock, Arkansas, offers insight into other types of evidence that might establish a tortious marketing strategy by a handgun manufacturer. On September 28, 1993, Michael Leon Catlett, a mentally disturbed young man suffering from manic depression, purchased a Lorcin .38 caliber pistol from Garry's Pawn Shop.[155] Three days later Catlett used the gun to fatally shoot Stephanie Jungkind, his former girlfriend, while she sat in her car at a crowded intersection.[156] Catlett had been in and out of mental institutions several times during the seventeen-month period preceding the shooting.[157] A jury found Catlett guilty of capital murder, rejecting his insanity defense. The judge sentenced Catlett to life in prison with no chance of parole.[158]

Jungkind's estate sued, among others, Lorcin Engineering, Inc., the manufacturer of the handgun.[159] The complaint alleged, *inter alia*, that Lorcin was negligent in aggressively promoting and selling cheap handguns which it knew or should have known would be used in criminal attacks.[160] In response to a motion to dismiss,

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Braun were much more limiting. The trial court emphasized in its instructions that Soldier of Fortune could be found liable only if the ad created a "clearly identifiable unreasonable risk" of a criminal act. *Id.* This instruction, said the court, "properly conveyed to the jury that it could not impose liability on Soldier of Fortune if Savage's ad posed only an unclear or insubstantial risk of harm to the public . . . ." *Id.*

Intratec's ads are repugnant and may very well have increased the risk that Intratec's weapons would be purchased by criminals. However, they probably were not specific enough in encouraging criminal activity to form an independent basis for liability. Thus, their relevance would be limited to proving a tortious marketing plan to target criminal consumers.

155 Complaint at 10, ¶ XIX, First Commercial Trust Co., Adm'r of the Estate of Stephanie Michelle Jungkind v. Lorcin Eng'g Inc., Case No. 94-3006 (Pulaski County Cir. Ct. filed Mar. 25, 1994) [hereinafter *Jungkind Complaint*].

156 *Id.* at 11, ¶ XXI.

157 *Id.* at 7, ¶ XIV. A petition for involuntary commitment filed by Catlett's brother in May 1992 alleged that Catlett was " 'violent — suicidal — having delusions that he is the campaign mgr for the Perot for President National Campaign — He thinks he is the 'chosen one.' " Exhibit 3 to Plaintiff's Motion For Reconsideration of Defendant Lorcin's Motion To Dismiss (filed Aug. 29, 1994).

158 Linda Satter, *Jury Takes Hour: Catlett Gets Life*, ARK. DEM.-GAZETTE, Sept. 16, 1994, at 1A.

159 *Jungkind Complaint*, *supra* note 155, at 2, ¶ II.

160 *Id.* at 4, ¶ X1. The plaintiff also asserted that Lorcin was negligent in failing to develop and furnish to its downstream sellers a "safe-sales policy," including warnings of the unusually high risk that Lorcin .38 caliber handguns will be misused and behavioral profiles of purchasers most likely to misuse handguns for criminal purposes. *Id.* at 4, ¶ X2, X3. *See infra* notes 170-85 and accompanying text for discussion of this aspect of the lawsuit.

the plaintiff submitted numerous affidavits to establish that the Lorcin Model L380 (the weapon used to kill Stephanie Jungkind) was a cheap,[161] low-quality weapon which presented an unusually high risk of being used in crime.[162] Particularly interesting was the affidavit of Professor David Stewart, a Professor of Marketing at the University of Southern California.[163] Stewart was asked to conduct a preliminary study to determine if the Lorcin L380 handgun was "being marketed to any identifiable group of consumers, and if that were being done pursuant to a recognizable product marketing plan."[164] His review of relevant materials led him to conclude

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161 Indeed, print advertisements tout Lorcin products as *The World's Most Affordable Handguns*. Advertisement, GUN WORLD, Sept. 1994, at 87.

162 *See* Affidavit of Michael Nyberg, Crime Prevention Coordinator for the State of Arkansas, Exhibit 4 to Plaintiff's Supplemental Memorandum In Opposition To Defendant Lorcin's Motion To Dismiss (filed July 11, 1994) (asserting that "the Lorcin .38 caliber handgun is an inferior weapon which would not be recommended by any responsible police or security consultant for use in law enforcement, self-defense, marksmanship shooting, hunting or any other legitimate purpose"; that "Lorcin handguns have in recent years become one of the weapons most frequently confiscated from persons arrested for violent crime"; and that "[i]t is common knowledge among police officers that the Lorcin .380 is a preferred weapon for burglars, robbers, drug dealers and other potentially violent persons"); Affidavit of Max Cloniger, owner of Heights Gun Shop in Little Rock, Exhibit 6 to Plaintiff's Supplemental Memorandum In Opposition To Defendant Lorcin's Motion To Dismiss (filed July 11, 1994) (asserting that "[t]he Lorcin Model L380 is a handgun with a high probability of being used by violent, criminal or unstable purchasers to wound or kill other people"; that "the Lorcin L380 is absolutely one of the lowest quality and least reliable firearms currently in U.S. production"; and that "[v]ery few knowledgeable people in the firearm industry would recommend this handgun for any legitimate purpose").

163 Affidavit of David W. Stewart, Robert E. Brooker Professor of Marketing in the College of Business Adminstration, University of Southern California, Los Angeles, Exhibit 1 to Plaintiff's Motion For Reconsideration of Defendant Lorcin's Motion to Dismiss (filed Aug. 29, 1994) [hereinafter *Stewart Affidavit*]. Professor Stewart is the author of five books on marketing and sixty articles published in professional journals. *Id.* at 1-2. He has served as a marketing consultant to Coca Cola, Honeywell, NCR, Ford Motor Company, Hewlett Packard and the Federal Trade Commission. *Id.* at 2.

164 *Id.* at 2. Stewart defined a "product marketing plan" as:

> an analysis of who is expected to buy a product and how to sell it to them. Age and gender of customers, their standards of living, cultural and ethnic identity, purchasing patterns and other demographic information is included. Psychographic profiles are developed of 'bullseye' individuals within the target group — persons who will not only buy the product, but use it conspicuously, thereby stimulating others to do likewise. The product marketing plan enables a merchandiser to determine what it wishes to sell, to whom and how and where the selling is to be done. Sales are

that the Lorcin L380 handgun:

> is being marketed to the very low end of the handgun market, with retail emphasis on high volume sales in pawn shops, cash-and-carry outlets, and the like in high-crime metropolitan areas. The emphasis on low price rather than quality and craftsmanship implies an avoidance, if not disdain, of traditional police, sporting and enthusiast markets.[165]

Stewart opined that this marketing strategy was not random, but rather was part of a "disciplined product marketing plan whose strategy emphasizes saturation sales in certain high-crime metropolitan areas."[166]

The *Jungkind* affidavits demonstrate the kind of evidence resourceful counsel can develop to prove a willful marketing plan, but also reveal the limitations inherent in trying to establish the existence of such a plan at the initial pleading stage of litigation. The best evidence of whether a gun manufacturer engaged in a tortious marketing plan is in the manufacturer's files. Product manufacturers invest substantial amounts of time and money in researching and developing their products. This includes gun manufacturers.[167] Evidence pertaining to product conception and design, manufacturing processes, market research, marketing strategies, sales data, consumer demographics, consumer quality complaints, and other material relevant to proving a tortious marketing plan can be obtained only by permitting the plaintiff to pursue discovery. However, the trial judge

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monitored by volume, geography, and often by individual retailer. Customer use of the product is critical to a successful product marketing plan.

Id.

165 *Id.* at 4.

166 *Id.* Stewart noted that the "strategy has been extraordinarily successful in that the Lorcin .380 has achieved first-place market share status in the 30 months since its introduction, displacing all other firearms in the low-end handgun market . . . ." *Id.* at 4-5.

167 Support for this proposition can be found in an interesting article in a magazine for handgun enthusiasts that details the development and marketing of the SW40F .40 caliber semiautomatic handgun manufactured by Smith & Wesson. Massad Ayoob, *Sigma*, AM. HANDGUNNER, Sept./Oct. 1994, at 94. The article explains how Smith & Wesson invested up to $5 million in research and development to produce a handgun that would rival those produced by a major competitor. *Id.* For example, Smith & Wesson enlisted a team of twelve engineers, assisted by a "human factors" expert, just to design an ergonomically appealing handgrip for the pistol. *Id.* at 99. Smith & Wesson's marketing department developed a list of almost one hundred proposed names for the new weapon, including the Phalanx, Combat Guardian, Vigilante, Viper, Devourer, Lazarus, Dictator, Referee, and my favorite because it sounds like a comic book character, the Relentless Redeemer. *Id.* at 101.

in *Jungkind* denied the plaintiff the opportunity to pursue supporting evidence when the judge granted Lorcin's motion to dismiss.[168] The court ruled that Lorcin owed no duty to plaintiff's decedent to refrain from promoting the sale of its handguns.[169] The case is on appeal.

b. *Negligently Failing To Take Reasonable Precautions To Minimize the Risk of Handguns Being Sold To Those Likely To Misuse Them*

Ultimately, *Jungkind's* greater significance may lie in its advancement of a different form of negligence in the manner of marketing theory: a claim that handgun manufacturers owe a duty to the public to take reasonable precautions to minimize the risk of their products being sold to persons likely to misuse them. This simple yet ingenious theory could be the key to opening the door to tort liability for gun manufacturers because it rests on the bedrock, virtually unassailable assumption that persons who create dangerous risks of foreseeable harm should act to reduce the risk if that can be done reasonably and feasibly.

The *Jungkind* complaint asserted that Lorcin could have and should have taken reasonable measures to reduce the risk that the handgun used to kill Stephanie Jungkind would be sold to the deranged Catlett. Specifically, the plaintiff alleged that Lorcin could have substantially reduced the risk by developing and furnishing to downstream sellers a "safe-sales policy" notifying them of the high potential for misuse of the Lorcin .38 caliber handgun and providing them with behavioral "profiles" of likely misusers.[170]

This claim also found support in Professor Stewart's affida-

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168 Plaintiff has raised this point on appeal: "[T]he plaintiff . . . was never given the opportunity to obtain specific details regarding defendant's in house documents pertaining to marketing and sales strategy due to the dismissal of this case prior to the completion of discovery." Brief for Appellant at 47, First Commercial Trust Co. v. Lorcin Eng'g, Inc. (Dec. 15, 1994) (No. 94-1094).

169 Rule 54(B) Order of Dismissal With Prejudice at 2, ¶ 4 (Sept. 14, 1994). The trial court also ruled that Lorcin did not owe a duty to develop and furnish to its distributors and retailers a safe-sales policy. *Id.*

170 *Jungkind Complaint*, *supra* note 155, at 4, ¶ X2, X3. Plaintiff's complaint suggested that a safe-sales policy might include descriptions of persons likely to misuse the product and instructions on how to spot such persons when they attempt to purchase a handgun. *Id.* Such warnings and instructions might also work "to stimulate, encourage, facilitate, embolden, and buttress point-of-purchase decisions by store personnel of its retailers . . . to refuse sales of [defendant's] Lorcin Model L380 .38 Caliber Revolver to such persons." *Id.* at ¶ X3.

vit.[171] Stewart concluded that Lorcin's marketing strategy, combined with data showing "that the Lorcin .380 is one of the firearms most frequently confiscated by law enforcement agencies or involved in numerous criminal activities,"[172] placed a duty on Lorcin to exercise reasonable care in alerting retailers of the substantial potential for misuse of the product.[173] Such safety advisories, he stated, are regularly distributed by other industries that sell dangerous products posing a high probability of misuse by certain groups of purchasers."[174] Additionally, Stewart said that Lorcin should have transmitted to retailers descriptions of behavioral profiles of potential misusers.[175] Stewart stated that such steps would have been logistically and economically feasible and would have substantially reduced the risk that Garry's Pawn Shop would have sold the handgun to Catlett.[176]

The plaintiff bolstered Stewart's opinions with the affidavit of an expert product safety researcher named Patrick McGuire.[177] McGuire prepared a sample safety advisory containing information that Lorcin should have transmitted to retailers, which, if followed, would have lowered the risk of its handguns being sold to persons likely to misuse them.[178] The safety advisory encourages retail sales

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171 Stewart Affidavit, *supra* note 163.

172 *Id.* at 5.

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.* The complaint alleged Catlett "appeared weird, suspicious, nervous and distressed" when he purchased the handgun. *Jungkind Complaint*, *supra* note 158, at 10, ¶ XIX. Plaintiff supported this allegation with numerous affidavits of persons who observed these characteristics in Catlett. *See* Exhibits 12-18 to Plaintiff's Motion for Reconsideration of Defendant Lorcin's Motion to Dismiss (filed Aug. 29, 1994). The characteristics made Catlett fit the behavioral profile of a likely misuser. *See infra* note 178.

177 Supplemental Affidavit of E. Patrick McGuire, Exhibit 2 to Plaintiff's Motion For Reconsideration of Defendant Lorcin's Motion to Dismiss (filed Aug. 29, 1994).

178 *Id.* The complete text of McGuire's proposed safety alert reads as follows:

Important Notice to All Firearms Retailers

D A N G E R

FAILURE TO SCREEN GUN BUYERS RESULTS IN CRIMINAL USE OF WEAPONS

The Lorcin .380 is an economic and effective handgun. Unfortunately, according to ATF data, it is also one of the most popular guns with criminals. We are certain that you share our concern that the Lorcin .380 be sold only for legitimate self defense or recreational use. Your firm, as a gun retailer, plays an all important role in making certain that weapons such as the Lorcin .380 are kept out of the hands of criminals. You are in

a key position to help prevent criminal misuse of this weapon. Here are some things you can do.

1. Make certain, through a training program, that all sales personnel are completely familiar with federal and local regulations and procedures regarding gun purchaser applications and registrations.

2. Instruct your sales personnel to be especially alert to, and wary of, gun buyers who display certain behavioral characteristics such as:

(a) Buyers who appear in unkempt clothing and have a slovenly appearance.

(b) Buyers who appear nervous, agitated, distracted or hurried in their purchase.

(c) Buyers who appear evasive, hesitant in responding to questions, stand off from the sales counter and who resist eye contact with the sales person.

(d) Purchasers who appear vague and uncertain in response to routine questions about why they are purchasing the weapon, how they intend to use the gun, where it will be stored, suggestions for safe use, and similar topics.

(e) Buyers who are belligerent or aggressive in response to routine questions about where they live, how they came to select your store, and similar questions.

(f) Those buyers who purchase large quantities of ammunition with their first gun purchase.

(g) Buyers who present an altered or expired drivers license or other out of date or invalid documents.

Challenging Suspect Gun Buyers

Retail sales personnel should be trained and encouraged to politely but candidly question suspect gun buyers, such as those exhibiting the above characteristics, about the truthfulness of the applicants' answers to questions on the ATF application form. Experience shows that many persons who misstate personal information, such as prior felony convictions, psychiatric history and treatment, etc., will — if challenged and confronted — often admit that their applications contain false information. For example, a sales clerk, reviewing an application that may contain false data, may properly ask:

"You realize that federal agents do check the accuracy of information on these applications. If they find any of it to be incorrect, you can be fined and imprisoned. Is there anything, anything at all, that you would like to change on this application? Or, would you like to hold this application for a while, and think about it, before filing it and purchasing this gun?"

Challenged in the above way many — while certainly not all — unqualified gun buyers will either admit to a false statement that disqualifies them as a gun buyer or will give up their attempt to make a gun purchase.

Lorcin Engineering can assist you in training retail sales personnel to screen out potential gun misusers. There is no perfect system to prevent guns from falling into the hands of criminals and other dangerous persons. But as a gun dealer you can be of significant assistance to law enforcement agencies, and to your community, by staying alert to these telltale signs.

personnel to question buyers exhibiting the suspect characteristics about the truthfulness of the buyers' responses on the federal firearms transaction form 4473.[179] The form asks questions intended to determine whether the buyer is legally prohibited from purchasing a firearm. Important to the *Jungkind* case, the form asks whether the buyer has ever been committed to a mental institution.

McGuire's affidavit states that experience has shown many persons who complete the form untruthfully will, if confronted and challenged, admit they lied. Indeed, this was the case in *Jungkind.* One day before buying the gun he used to shoot Jungkind, Catlett attempted to purchase the identical model at another pawnshop.[180] However, when questioned by the clerk whether he answered the questions on Form 4473 truthfully, Catlett admitted he had lied about never being committed to a mental institution.[181] The clerk refused to sell the gun to Catlett.[182]

Unfortunately, this portion of Jungkind's claim was also rejected by the trial court.[183] The court's only "reasoning" was a one-sentence conclusion that Lorcin "did not owe a duty" to plaintiff's decedent.[184] The case is on appeal, where hopefully the court will decide that Stephanie Jungkind's survivors deserve their day in court. Jungkind's estate should be given an opportunity to prove it was feasible and reasonable for Lorcin to develop a safe-sales policy that would have substantially reduced the risk of its products being sold to misusers. At least one major retailer already has instituted a safe-sales program to train its employees concerning the sale of

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For more information about how Lorcin can assist you, please call 1-800-000-000.

Id.

179 *Id.*

180 *Jungkind Complaint, supra* note 155, at 10, ¶ XIX.

181 *Id.*

182 *Id.* Compliance with the Brady bill, which imposes a five-day waiting period on handgun purchases to permit law enforcement agencies to conduct background checks on potential buyers, may work to protect retailers and manufacturers from liability under a negligence in manner of marketing theory by discouraging potential misusers, particularly convicted felons, from purchasing handguns from legitimate retail outlets. *See* BRADY HANDGUN VIOLENCE PROTECTION ACT, 18 U.S.C.A. § 922(s)(1) (West 1994). On the other hand, violations of the Brady bill would create a new theory of recovery: negligence per se for statutory violations.

183 Rule 54(B) Order of Dismissal With Prejudice at 2, ¶ 4 (Sept. 14, 1994).

184 *Id.*

firearms,[185] showing that such a program is indeed feasible.

If the appellate court affirms the dismissal of the *Jungkind* complaint, it should at least give a full explanation for its decision. If judges are going to make value judgments that handgun manufacturers are immune from legal responsibility for the terrible harm inflicted by their products, without allowing juries to evaluate whether reasonable steps could have been taken to minimize the harm, the plaintiff and the public are entitled to know the bases for those judgments.

IV. Conclusion

Strict liability no longer holds promise as a theory for suing handgun manufacturers. It is time for lawyers representing handgun victims to retreat to common law negligence principles, perhaps the last battleground available in the litigation war against gun manufacturers. This article has delineated three independent negligent marketing claims that might be pressed against handgun manufacturers: negligence in marketing unusually dangerous weapons such as assault weapons and Saturday Night Special-type handguns;[186] negligence in promoting the sale of handguns to criminal consumers;[187] and negligence in failing to take reasonable precautions to minimize the risk of handguns being sold to those likely to misuse them.[188]

The good news for tort plaintiffs is that negligence is a familiar battleground that will not require courts to configure sweeping new doctrines. The bad news is that negligence plaintiffs may continue to confront the same policy-based reluctance to imposing liability that led courts to reject strict liability.

In considering negligence claims at the initial stages of litigation, courts should avoid the knee-jerk reactions that killed strict liability. Though judges are understandably reluctant to tread into an area so laden with conflicting policy considerations, they must be made to realize that negligence doctrine may be society's last

185 *See* Kalina v. KMart Corp., No. CV-90-269920, 1993 WL 307630 (Conn. Super. Ct. Aug. 5, 1993) (discussing videotape KMart Corporation uses to train employees concerning the sale of firearms to " 'individuals who should not own a gun because of the danger to themselves and others' ").

186 *See supra* notes 101-30 and accompanying text.

187 *See supra* notes 144-69 and accompanying text.

188 *See supra* notes 170-85.

chance to instill legal responsibility on the manufacturers of the only legal product designed and intended to kill human beings. If courts eliminate negligence the way they did strict liability, there will be nothing left to fall back on.

For the present, there is an acceptable middle-course for courts to choose. Judges who are sympathetic to the claims of handgun victims but who are also wary of opening a liability floodgate against gun manufacturers, can avoid squelching negligence without opening the floodgates of liability simply by refusing to invoke the "no duty" talisman at the beginning of litigation and allowing discovery to go forward. If during the litigation a court became convinced that no legal duty was owed to the plaintiff, it would retain the power to dispose of the case at that point through summary judgment or by directed verdict. In the meantime, permitting discovery to proceed would permit plaintiffs to gather vital information bearing on the duty issue. As Dean Leon Green observed, it is impossible to properly determine the extent of a legal duty until all relevant facts are known in their environmental setting.[189]

Disposing of negligence suits against gun manufacturers at the initial pleading stage through the *ipse dixit* that manufacturers owe no duty to gun victims is equivalent to saying to gun manufacturers: it is irrelevant how you conducted your deadly business. It is irrelevant whether you acted recklessly or by design to increase the risk of death and grievous bodily injury posed by your products. It is irrelevant whether reasonable, feasible means existed by which you could have substantially reduced this risk. No other product manufacturer gets the luxury of complete immunity from legal responsibility. Surely our societal mindset toward guns is not so narrow that we are unwilling or afraid even to *examine* the conduct of gun manufacturers.

Tomorrow is another day in America's tort system. Somewhere a ladder manufacturer will be held liable because it failed to warn users not to set up ladders on wet surfaces.[190] Perhaps a jury will order a fast-food chain to pay millions of dollars to a customer

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189 *See supra* note 92 and accompanying text.

190 *See* Lewis v. Watling Ladder Co., No. 104, 1986 WL 13960 (Tenn. Ct. App. Dec. 12, 1986) (reversing summary judgment against plaintiff in case where ladder slipped on wet concrete; held genuine issue of fact existed with respect to adequacy of warning and defectiveness of design).

who spilled hot coffee in her lap.[191] A large judgment may be levied against the maker of quality lawn tools because the starter rope on its lawnmower was too hard to pull, allegedly causing a heart attack.[192] And, with any luck, somewhere, a court with good sense and courage will say enough is enough and refuse to dismiss a lawsuit on behalf of a handgun victim.

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191 *See* Dan Shaw, *Coffee, Tea or Ouch*, N.Y. TIMES, Oct. 12, 1994, at C1 (discussing $2.9 million jury verdict against McDonald's in favor of woman who spilled hot coffee on her lap while driving; the verdict was reduced to $640,000 on appeal).

192 *See* Stuart Taylor, Jr., *Product Liability: The New Morass*, N.Y. TIMES, Mar. 10, 1985, at 3-1 (describing $1.75 million jury award against Sears, Roebuck & Company in favor of man who claimed lawnmower starter rope was too hard to pull, causing him to suffer a heart attack).