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There's No Smoking Gun: Cities Should Not Sue the Firearm Industry

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COMMENT

THERE'S NO SMOKING GUN: CITIES SHOULD NOT SUE THE FIREARM INDUSTRY

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I. INTRODUCTION

For many years, guns have maintained a special status in the United States. In America, the United States Constitution's Second Amendment

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highlights the significance placed upon one's privilege to bear arms.[1] From the days of the town sheriff to Dirty Harry, guns have dominated our system of protection and justice. However, for many people, guns are associated with crime, injury, and innocent deaths. On one hand, guns are protectors of one's home, family, and liberty, yet on the other hand, guns advance America's severe crime problems. This friction has led to a controversy, which in turn has prompted immense social discussion as to whether courts should assign product liability to the manufacturers, distributors, and retailers in the firearm industry.[2]

In a *Time Magazine* poll launched June 29, 1998, over ninety percent of the persons polled stated that they believed that allowing people to carry concealed weapons reduced crime.[3] Additionally, less than two percent of the persons polled believed that cities should sue gun manufacturers to recoup money spent dealing with gun-related crime.[4] Over the course of the past several years there have been more than fifteen instances of school violence involving the use of guns.[5] Such unspeakable and visible gun violence has given gun opponents much needed momentum and ammunition against the firearm industry. Recently, opponents of the firearm industry, unsatisfied with their efforts in the legislatures to control guns, began to attack in a new manner, bringing this debate to the forefront of our collective social conscience.[6] Cities, not simply individuals, challenged the firearm industry through litigation.[7]

Cities alleged that manufacturers, distributors, and retailers were liable for monetary damages due to the burden that costs related to the use and abuse of firearms place on municipalities.[8] They argued that the

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[1] U.S. CONST. amend. II. The second amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear [a]rms, shall not be infringed." *Id.*

[2] 6 SPEISER ET AL., THE AMERICAN LAW OF TORTS § 18:311, at 986 (1989).

[3] *Gun Poll Results* (visited Jan. 9, 2000) <http://www.pathfinder.com/time/polls/gunpoll.html>.

[4] *Id.*

[5] *Violence in U.S. Schools* (visited Apr. 20, 1999) <http://abcnews.go.com/sections/us/DailyNews/schoolshootings990420.html>.

[6] Several entities have sued. *See, e.g.*, City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998); Morial v. Smith & Wesson Corp., No. 98-18578, (La. Civ. Dist. Ct., Orleans Parish) (Oct. 30, 1998); Penelas v. Arms Technology Inc., No. 99-01941, (Fla. Cir. Ct., 11th Jud. Cir., Miami-Dade County) (Jan. 27, 1999); Ganim v. Smith & Wesson Corp., No. CV99-036-1279 (Conn. Super. Ct., Fairfield Jud. Dist.) (Jan. 27, 1999).

[7] Although municipalities, counties, and individual cities have sued the firearm industry, for ease of discussion, hereinafter this Comment will collectively refer to these entities as cities.

[8] *See* City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998); Morial v. Smith & Wesson Corp., No. 98-18578, (La. Civ. Dist. Ct., Orleans Parish) (Oct. 30, 1998); Penelas v. Arms Technology Inc., No. 99-01941, (Fla. Cir. Ct., 11th Jud. Cir., Miami-Dade

firearm industry should pay damages for the ever-increasing costs of police, paramedic, and emergency room professionals and facilities expended for those involved in gun violence.[9] This argument appears to be reminiscent of the "Big Tobacco" litigation; however, the firearm industry is substantially different from the tobacco industry.[10] Unlike guns, which offer beneficial aspects of protection and recreation, cigarettes have no redeeming value. Dissimilar from gun manufacturers, distributors, and retailers, who concede the inherent dangers associated with guns, cigarette makers purposely concealed the dangers of cigarette use.[11] Additionally, even some people who do not choose to own or associate with the gun culture may support the right of others to purchase and use guns.

This Comment questions the soundness of applying traditional tort theories such as products liability, negligent marketing, and nuisance, to gun litigation. Part II provides a synopsis of recent cases filed against gun manufacturers, distributors, and retailers.[12] Part III analyzes the plaintiffs' theories for alleging industry liability and argues that such actions should fail because, while applicable to individual plaintiffs, the theories do not readily transfer for use by entities such as cities.[13] Further, such actions impermissibly invite judicial legislating in violation of the separation of powers doctrine.[14] Part IV of this Comment concludes that the theories of tort liability are not directly applicable to the firearm industry and calls for restraint on the part of plaintiffs considering such litigation, asserting that the legislature is in the better position to impose firearm industry liability.[15]

County) (Jan. 27, 1999); Ganim v. Smith & Wesson Corp., No. CV99-036-1279, (Conn. Super. Ct., Fairfield Jud. Dist.) (Jan. 27, 1999).

[9] *See, e.g.*, City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998).

[10] *See* Cipollone v. Liggett Group Inc., 505 U.S. 504 (1992); Bon Van Voris, *Gun Cases Use Tobacco Know-How*, NAT'L L.J., Dec. 7, 1998, at A1. The Liggett Group Inc. reached a settlement in which it agreed to pay an estimated thirty million dollars annually to the states, or about 750 million dollars in total. *Id.*

[11] Cipollone v. Liggett Group, 683 F.Supp. 1487, 1490 (D.N.J. 1988) (finding that the cigarette makers entered into a "sophisticated conspiracy").

[12] *See infra* notes 16-63 and accompanying text.

[13] *See infra* notes 64-147 and accompanying text.

[14] *See infra* notes 64-147 and accompanying text.

[15] *See infra* Part IV.

II. BACKGROUND

A. Attacking the Status of Guns

Over twenty years ago, Congress passed the Consumer Protection Act[16] to address its concern that defective products would find their way into commerce, yet the legislature exempted guns from the Act.[17] The Federal Government maintains limited regulatory power over guns, as is evidenced by the National Firearm Act and Gun Control Act of 1968.[18] Individual states and local governments maintain the power to implement gun-related legislation.

Various cities recently challenged the social acceptance of guns based on figures representing an aggregate of lost lives and monetary expenditures for police, paramedic, and hospital procedures ostensibly attributable to the use of firearms.[19] For example, in the past four years, criminals illegally used over 37,500 guns in Chicago, Illinois.[20] Chicago's Mayor, Richard Daley, contended that "[h]undreds of millions of dollars are spent annually dealing with the consequences of gun violence."[21]

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[16] *See* 15 U.S.C. § 2052 (1982). The Consumer Product Safety Commission ("CPSC") has authority to regulate all consumer products not specifically excluded by the Act which affect interstate commerce. CPSC Advisory Opinion No. 225 (Oct. 21, 1975).

[17] *See* 15 U.S.C. § 2052(a)(1)(E) (stating that under 15 U.S.C. § 2052(a)(1)(E), guns and ammunition are not consumer products). Firearms and ammunition are exempted from the authority of the CPSC. Wendell H. Gauthier, *Suit Against Gun Makers Like Tobacco Suit*, NEW ORLEANS TIMES-PICAYUNE, Dec. 8, 1998, at B4.

[18] *See, e.g.*, National Firearm Act, 26 U.S.C. § 5801 (1982); Gun Control Act, 18 U.S.C. § 921 (1982). The National Firearm Act sets out requirements that must be met before a transfer of firearms is sanctioned, while the Gun Control Act regulates the manufacture and distribution of firearms. *See* National Firearm Act, 26 U.S.C. § 5801 (1982); Gun Control Act, 18 U.S.C. § 921 (1982).

[19] *See, e.g.*, City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998); Morial v. Smith & Wesson Corp., No. 98-18578, (La. Civ. Dist. Ct., Orleans Parish)(Oct. 30, 1998).

[20] *See* City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998).

[21] Mayor Daley stated:

> On the basis of this investigation, we filed a lawsuit this morning in Cook County Circuit Court aimed at gun dealers and manufacturers – to hold them accountable for the costs to society stemming directly from their irresponsible business practices. We hold polluters accountable for poisoning the environment. We hold liquor stores accountable for selling to minors. It's time to hold the gun industry accountable for the direct costs imposed on us.

Remarks of Mayor Richard M. Daley-Gun Lawsuit Press Conference, (visited Jan. 21, 2000) <http://www.ci.chi.il.us/Mayor/Speeches/GunLawSuit.html>.

Mayor Daley is not alone. Mayors from several cities, including New Orleans and Atlanta, echoed Mayor Daley's words.[22] Cities are no longer simply counting bodies when focusing on the damage associated with guns. On the contrary, cities are now viewing the issue from the pocketbook perspective and seeking remedies in this vein. New Orleans charged that it costs "14,000 [dollars] to treat a child wounded by gunfire" and that the "average cost of a gun-related crime can be as high as 268,000 dollars."[23] Each of the litigants contended that members of the firearm industry should pay the costs incurred by the municipalities in the aftermath of gun use.[24]

B. Outlining the Individual Suits Filed by the Cities

Chronologically, New Orleans' Mayor Marc Morial was the first to initiate a lawsuit against several defendants including gun manufacturers, distributors, and retailers seeking millions of dollars lost by the city due to gun violence.[25] Chicago followed by filing its own $433 million lawsuit against the industry.[26] Next, Miami-Dade County[27] and Bridgeport, Connecticut,[28] likewise joined the litigation frenzy. Additionally, Atlanta Mayor Bill Campbell sued several gun manufacturers in February 1999.[29] To date, twenty-eight cities have sued the firearm industry pursuing dollars lost to gun violence.[30]

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[22] New Orleans contended that the gun industry knew about "the unreasonable dangers of their guns" and failed to provide safety devices and warnings. *Gun Makers Sued Over Costs of Violent Crime* (visited Jan. 27, 2000) <http://www.insync.net/~tagvhou/sued.htm>. Mayor Marc Morial said that "gun makers have long known about how to make weapons that can be fired only by owners, or 'smart-gun technology.'" *Id.*

[23] *Reforming the Gun Industry: The New Orleans Lawsuit* (visited Jan. 21, 2000) <http://www.handguncontrol.org/legalaction/noqa.htm>.

[24] *Id.*

[25] *See* Morial v. Smith & Wesson Corp., No. 98-18578 (La. Civ. Dist. Ct., Orleans Parish) (Oct. 30, 1998).

[26] *See* City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998).

[27] *See* Penelas v. Arms Technology Inc., No. 99-01941 (Fla. Cir. Ct., 11th Jud. Cir., Miami-Dade County) (Jan. 27, 1999).

[28] *See* Ganim v. Smith & Wesson Corp., No. CV99-036-1279 (Conn. Super. Ct., Fairfield Jud. Dist.) (Jan. 27, 1999).

[29] *See, e.g.*, Atlanta v. Smith & Wesson Corp., No. 99VSO149217J (Ga. State Ct., Fulton Cnty.) (Feb. 4, 1999).

[30] Paul M. Barrett & Vanessa O'Connell, *Atlanta Wins Ruling Allowing Its Suit Against Gun Manufacturers to Proceed*, WALL STREET JOURNAL, Oct. 28, 1999, at B22.

Although the cities based their claims on similar theories of liability, not every complaint stipulated the same litigation strategy.[31] Three general theories of liability are represented in the lawsuits: 1) products liability; 2) negligent marketing; and 3) nuisance.[32] Thus, although the cities have similar goals, each has chosen its own blueprint for alleging liability against manufacturers, distributors, and retailers.

1. Products Liability

In filing its lawsuit, New Orleans used products liability theories based upon the Louisiana Products Liability Act.[33] Employing the Castano group,[34] known for their accomplishments in recent tobacco litigation, the New Orleans complaint alleged products liability claims of unreasonable design[35] and failure to warn.[36] New Orleans alleged that manufacturers

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[31] *See* City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998); Morial v. Smith & Wesson Corp., No. 98-18578, (La. Civ. Dist. Ct., Orleans Parish) (Oct. 30, 1998); Penelas v. Arms Technology Inc., No. 99-01941, (Fla. Cir. Ct., 11th Jud. Cir., Miami-Dade County) (Jan. 27, 1999); Ganim v. Smith & Wesson Corp., No. CV99-036-1279 (Conn. Super. Ct., Fairfield Jud. Dist.) (Jan. 27, 1999).

[32] *See* cases cited *supra* note 31.

[33] *See* Morial v. Smith & Wesson Corp., No. 98-18578 (La. Civ. Dist. Ct., Orleans Parish) (Oct. 30, 1998); *see also* Louisiana Products Liability Act, LA. REV. STAT. ANN. §§ 9:2800.51-59 (West 1999).

[34] The Castano group consists of roughly sixty law firms willing to pledge money to finance the litigation. Bon Van Voris, *supra* note 10, at A1. Mayor Marc Morial justified the decision to hire the Castano lawyers with, "[y]ou want lawyers who can take on giants. This is not litigation for the faint of heart" *Id.* at A15.

[35] *See* Morial v. Smith & Wesson Corp., No. 98-18578 (La. Civ. Dist. Ct., Orleans Parish) (Oct. 30, 1998); *see also* LA. REV. STAT. ANN. § 2800.56. This statute states:

> Unreasonably dangerous in design
>
> A product is unreasonably dangerous in design if, at the time the product left its manufacturer's control:
>
> (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and
>
> (2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product. An adequate warning about a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.

Id.

[36] *See* Morial v. Smith & Wesson Corp., No. 98-18578 (La. Civ. Dist. Ct., Orleans Parish) (Oct. 30, 1998); *see also* LA. REV. STAT. ANN. § 2800.57. This statute states:

> Unreasonably dangerous because of inadequate warning

should employ new technology to prevent anyone but the owner of a gun from using the firearm.[37]

Similarly, Miami-Dade County, which includes thirty municipalities, alleged that over twenty-five gun manufacturers and distributors, and three trade associations were liable for negligent design, strict liability design defect, and inadequate warnings for firearms.[38] However, Miami-Dade's suit did not attempt to recover money from retailers, only manufacturers, and distributors.[39] The Florida Department of Health estimated that the aggregate costs associated with gun-related deaths of citizens under twenty-five years of age are over $129 million.[40] Although the city pursued both compensatory and punitive damages for police, paramedic, and hospital expenses stemming from gun-related incidents, the suit did not

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A. A product is unreasonably dangerous because an adequate warning about the product has not been provided if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.

B. A manufacturer is not required to provide an adequate warning about his product when:
(1) The product is not dangerous to an extent beyond that which would be contemplated by the ordinary user or handler of the product, with the ordinary knowledge common to the community as to the product's characteristics; or
(2) The user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.

C. A manufacturer of a product who, after the product has left his control, acquires knowledge of a characteristic of the product that may cause damage and the danger of such characteristic, or who would have acquired such knowledge had he acted as a reasonably prudent manufacturer, is liable for damage caused by his subsequent failure to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.

Id.

[37] *See* Morial v. Smith & Wesson Corp., No. 98-18578 (La. Civ. Dist. Ct., Orleans Parish) (Oct. 30, 1998).

[38] *See* Penelas v. Arms Technology Inc., No. 99-01941 (Fla. Cir. Ct., 11th Jud. Cir., Miami-Dade County) (Jan. 27, 1999); *see also* Product Safety & Liability Reporter, *Bridgeport, Miami-Dade Sue Gun Industry, Seek Damages for Health Care, Police Costs*, Vol. 27, No. 5, 91 (Jan. 29, 1999) (discussing the Miami-Dade complaint).

[39] *See* Penelas v. Arms Technology Inc., No. 99-01941 (Fla. Cir. Ct., 11th Jud. Cir., Miami-Dade County) (Jan. 27, 1999).

[40] *See* Product Safety & Liability Reporter, *Bridgeport, Miami-Dade Sue Gun Industry, Seek Damages for Health Care, Police Costs*, Vol. 27, No.5, 91, (Jan. 29, 1999) (discussing the Miami-Dade complaint).

specify the dollar amount sought.[41] Calling for gun reform, Mayor Alex Penelas of Miami argued that "[i]t is absurd that guns are not required to be childproofed . . . or [have a] safety lock built into their design."[42]

Headed by Atlanta's Mayor Bill Campbell, Atlanta's complaint was similar to the New Orleans complaint because it was also based on products liability.[43] Under Georgia products liability law,[44] Atlanta argued that firearms were unreasonably dangerous because they lacked safety features.[45] Mayor Campbell stated that "he would consider dropping the action if gun manufacturers voluntarily agree to make their products safer."[46]

In October 1999, a Georgia state court judge dismissed the defendant gun manufacturers' arguments and established for the first time that a city could move forward concerning its lawsuit against the firearm industry.[47] However, in December 1999, a state court judge in Florida disallowed Miami-Dade County's lawsuit against the firearm industry.[48]

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[41] Gail Appleson, *Two More U.S. Cities Sue Gun Makers, More Likely* (visited Jan. 28, 1999) <http://dailynews.yahoo.com/headlines>.

[42] *Id.* However, devices such as trigger locks are available for purchase separately. Additionally, as recent as March 2000, Smith & Wesson Corp. agreed to put trigger locks in the guns it manufactures in connection with the Company's settlement with the United States Government. Smith & Wesson, *Clarification of Settlement Document Agreement* (visited May 9, 2000) <http://www.smith-wesson.com/misc/agreement.html>.

[43] Atlanta v. Smith & Wesson Corp., No. 99VSO149217J (Ga. State Ct., Fulton County) (Feb. 4, 1999).

[44] *See* GA. CODE ANN. § 51-1-11(b)(1) (1982 & Supp. 1999). The Georgia Product Liability Law provides:

> The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.

Id.

[45] Product Safety & Liability Reporter, *Georgia Law Barring Gun Suits Signed by Governor After Atlanta Files Action*, Vol. 27, No. 7, 150, 151 (Feb. 12, 1999) (discussing the Atlanta complaint); *see also* GA. CODE ANN. § 51-1-11.

[46] Product Safety & Liability Reporter, *Georgia Law Barring Gun Suits Signed by Governor After Atlanta Files Action*, Vol. 27, No. 7, 150, 151 (Feb. 12, 1999) (discussing the Atlanta complaint).

[47] Barrett & O'Connell, *supra* note 30, at B22. However, an appeal of Judge Brogdon's decision is likely. *Id.*

[48] Todd Lighty, *Two Lawsuits Against Gunmakers Tossed Out; In Cases Similar to Chicago's, Judges Find No Grounds to Sue*, CHICAGO TRIBUNE, Dec. 14, 1999, at News 1.

2. Negligent Marketing

Brought by individual plaintiffs, the initial case arguing a negligent marketing theory of liability occurred in Brooklyn, New York.[49] In this case of first impression, relatives of persons killed by guns sued many gun manufacturers jointly, alleging that the defendants' negligent marketing practices created a large pool of illegal guns readily accessible to violent New York criminals.[50] The substantive theory suggested that the "defendants negligently marketed their guns in various parts of the country and that, foreseeably, these guns made their way into the hands of New York's and other states' criminals, who used them to kill and wound."[51]

Explaining their negligent marketing theory, plaintiffs analogized guns to a virus, contending that the defendants created an excessively large nationwide market in, and reservoir of, guns, leading to the individual shootings that were the subject of the *Hamilton v. Accu-Tek* case.[52] This theory attempted to incorporate various features of mass torts, including difficulty in tracing a particular plaintiff's injury to a particular defendant's actions, and problems in determining the number of potential defendants and their relative degrees of culpability.[53]

3. Nuisance

In its $433 million lawsuit, the City of Chicago alleged liability based on nuisance,[54] and shortly thereafter, Bridgeport, Connecticut echoed a similar theory in its complaint.[55] Chicago asserted that a person creates a

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[49] *See* Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1330 (E.D.N.Y. 1996). This suit was brought in 1995 by two plaintiffs against forty-nine firearm manufacturers. *Id.* at 1314-15. The first plaintiff was Freddie Hamilton, whose son was shot and killed in 1993 and the weapon used to kill him was not found. *Id.* at 1314. The second plaintiff was Katina Johnstone, whose husband was shot and killed with a stolen Smith & Wesson handgun. *Id.*

[50] Hamilton v. Accu-Tek, 32 F. Supp.2d 47 (E.D.N.Y. 1998).

[51] *Id.* at 50.

[52] *Hamilton*, 935 F. Supp. at 1313. Although dismissing the plaintiffs' products liability and fraud claims, the court permitted the plaintiffs to continue using a negligent marketing theory. *See id.* at 1315.

[53] See id. at 1313-15, 1321-24; *see also* Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1595-97 (1995) (discussing nature and characteristics of mass torts).

[54] City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998).

[55] *See* Product Safety & Liability Reporter, *Bridgeport, Miami-Dade Sue Gun Industry, Seek Damages for Health Care, Police Costs*, Vol. 27, No. 5, 91 (Jan. 29, 1999) (discussing the Bridgeport

nuisance by violating an ordinance designed to protect the public from a threat to its health, welfare, or safety[56] and by behavior resulting in unreasonable actions including negligence.[57] Chicago has strict gun laws prohibiting the ownership of any gun other than a rifle or shotgun.[58] The city argued that the defendants' conduct of selling guns that inevitably find their way into the Chicago area created a nuisance.[59] Alleging that the defendants willingly design, manufacture, and market firearms to persons they know will bring them into the City of Chicago, Chicago maintains that the defendants created an unreasonable risk to the public's heath, welfare, and safety.[60]

Additionally, Chicago argued that the defendants' conduct created a disturbance and reasonable apprehension of danger to persons and property.[61] The city stated that the defendants distribute weapons to ensure that the weapons are readily available to persons who live in areas where gun possession and ownership are illegal.[62] In December 1999, a Connecticut State court judge dismissed the Bridgeport, Connecticut suit against gun manufacturers stating that the city did not have standing to file the lawsuit.[63]

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complaint). Additionally, the city hopes to get the firearms industry to produce the safest product possible, change the industry advertising tactics, and induce the industry to implement change to aid in preventing criminals access to guns. *Id.*

[56] City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998); *see also* Chicago National League Ball Club, Inc. v Thompson, 483 N.E.2d 1245 (Ill. 1985) (upholding a statute declaring night baseball at Wrigley Field a nuisance).

[57] City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998); *see also* Gilmore v Stanmar, Inc., 633 N.E.2d 985, 993 (Ill. App. 1994) (holding that to properly plead a nuisance, the plaintiffs must show that they had rights, the defendant transgressed those rights, and that the plaintiffs suffered damages because of the transgressions); *see* RESTATEMENT (SECOND) OF TORTS, § 821B.

[58] *See* Chicago Municipal Code § 8-20-010; Chicago Municipal Code § 4-144-010.

[59] City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998).

[60] *Id.*

[61] *Id.*

[62] *Id.*; Ganim v. Smith & Wesson Corp., 1999 Conn. Super. Lexis 3330 *4 (Dec. 10, 1999).

[63] Paul M. Barrett, *Gun Industry Wins Round in Battle, As Judge Dismisses Bridgeport Lawsuit*, WALL STREET JOURNAL, Dec.13, 1999, at B28.

III. ANALYSIS

This section examines the plaintiffs' theories for alleging industry liability and argues that such actions should not succeed.[64] Further, use of these theories in this manner erroneously invite judicial legislating.[65] When the plaintiff in gun litigation is a governmental entity such as a city, county, or municipality,[66] the court should not allow the plaintiff to stretch or mold traditional tort theories to fit its litigious goals. Theories such as products liability, negligent marketing, and nuisance should not be permitted when cities sue to collect damages relative to mass gun-related injuries. Guns are unique products that necessitate restraint from stretching tort law to create such industry liability.

A. Tort Actions Cities Brought Against the Gun Industry Should Fail

1. Products Liability Theory

A starting point to discuss the recent trend of cities suing the gun industry, is with theories of products liability. Most people are familiar with the recent tobacco litigation and the fact that there has been similar large scale litigation over the effects of asbestos, Agent Orange, and silicone gel breast implants.[67] When plaintiffs sued manufacturers, distributors, and retailers of firearms, they used theories similar to those employed in traditional products liability cases.[68] These theories include:

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[64] *See infra* notes 148-60 and accompanying text.

[65] *See infra* notes 148-60 and accompanying text.

[66] For ease of discussion, hereinafter these entities will be referred to collectively as cities.

[67] Hamilton v. Accu-Tek, 32 F. Supp.2d 47, 50 (E.D.N.Y. 1998); *see also* Deborah R. Hensler, *The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1595-97 (1995) (describing characteristics of mass torts); *cf.* Note, *Absolute Liability for Ammunition Manufacturers*, 108 HARV. L. REV. 1679, 1681-82 (1995).

[68] *See* City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998); Morial v. Smith & Wesson Corp., No. 98-18578, (La. Civ. Dist. Ct., Orleans Parish) (Oct. 30, 1998); Penelas v. Arms Technology Inc., No. 99-01941, (Fla. Cir. Ct., 11th Jud. Cir., Miami-Dade County) (Jan. 27, 1999); Ganim v. Smith & Wesson Corp., No. CV99-036-1279 (Conn. Super. Ct., Fairfield Jud. Dist.) (Jan. 27, 1999).

a) design defects; b) manufacturing defects; c) failure to warn; and d) abnormally dangerous activities.[69]

Guns, like automobiles, are unavoidable in our society, and just as the justice system cannot hold the automobile industry liable when a drunk driver gets in a car and harms another person, the system should not hold the firearm industry liable when an individual uses a firearm to commit a crime.[70]

a. Design Defect

When suing the firearms industry in products liability, some plaintiffs[71] have chosen to use a theory of design defect.[72] The Restatement (Second) of Torts states that a product is "dangerous to an extent . . . contemplated by [the] ordinary [purchaser] . . . [with] ordinary knowledge common to the community as to its characteristics."[73] In other words, this test outlines the boundaries of liability by what the ordinary consumer assumes is the level of dangerousness inherent in the product. However, implicit in this theory is the tension between what the consumer determines is necessary to properly design the product and what the manufacturer determines is reasonable when contemplating a risk-utility analysis. A risk-utility analysis entails determining whether the costs of the intended change are outweighed by the benefits the change affords.

A classic example of this dilemma is the use of non-breakable glass in windows of all cars. For example, consumers may be desirous of such a product, however, the additional cost in manufacturing and loss in

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[69] *See* cases cited *supra* note 68.

[70] *See* Quiroz v. Leslie Edelman of N.Y., Inc., 638 N.Y.S.2d 154 (N.Y. Sup. Ct. 1996) (finding, as matter of law, that no proximate cause exists between sale of firearm and its use in a crime).

[71] These cities include, Atlanta, New Orleans, Miami-Dade County, and Bridgeport, Conn. *See Jury Deciding U.S. Gun Case Reviews Key Document* (visited Feb. 5, 1999) <http://dailines.yahoo.com/headlines/ts/story.html?s=v/nm/19990210/ts/guns_15.html>.

[72] *See* Robinson v. Reed-Prentice Div., 403 N.E.2d 440 (N.Y. 1980) (finding that when a plaintiff was injured by a machine whose design had been modified after the machine left the manufacturer that the manufacturer was not liable in tort); Micallef v. Miehle Co., 348 N.E.2d 571 (N.Y. 1976) (finding that the manufacturer of a printing press was liable for not providing guard rails on the press commensurate with industry standards and usage). The manufacturer is liable if a reasonable alternative design, at reasonable cost, would have reduced the foreseeable risks posed by the product, and the omission of the alternative design rendered the product unreasonably safe. RESTATEMENT (THIRD) OF TORTS: Products Liability § 2 cmt. c (Tentative Draft No. 1, 1995).

[73] See RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965); *see also* Wheeler v. John Deere Co., 935 F.2d 1090, 1103 (10th Cir. 1991) (determining a products liability analysis when a plaintiff lost his arm while servicing a combine); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 331, 337 (6th Cir. 1988) (exploring products liability theories in the context of cigarette usage).

efficiency may greatly outweigh the utility gained from the manufacturer's perspective.[74]

Although a manufacturer is under a "non-delegable duty to design and produce a product that is not defective,"[75] a manufacturer is under no duty to create a design that prevents all misuse of the product.[76] Therefore, under a risk-utility analysis, in which the parties balance the inherent risks associated with a given activity against the utility gained by engaging in the activity, it is not mandatory that a manufacturer incorporate safety features into its product so as to guarantee that no harm will come to every user (or bystander) no matter how careless or even reckless the user.[77] Consequently, "a product is defectively designed only when it presents an unreasonable risk of harm in light of other design considerations; liability is imposed where that defect is a substantial factor in bringing about plaintiff's injuries when the product is being used in a reasonably foreseeable manner."[78]

Applying the design defect theory to the cities' challenges of the firearms industry, plaintiffs are fruitlessly trying to combat a product that manufacturers specifically design to harm or kill, that is, the gun does what it was designed to do. Analogously, products such as knives have been exempted from strict design liability because, "'[a]lthough a knife qualifies as an obviously dangerous instrumentality . . . a manufacturer need not guard against the danger that it presents.'"[79] The very benefit of having a sharp knife contributes to making it a dangerous instrument. People use guns for protection, sport, and collecting, yet they know that guns can cause harm. Accordingly, guns and knives represent products that reasonable persons can readily associate with an inherent risk of injury.[80]

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[74] Baxter v. Ford Motor Co., 12 P.2d 409 (Wa. 1932); *see also* Sperry-New Holland v. Prestage, 617 So. 2d 248, 254-55 (Miss. 1994) (discussing risk-utility analysis).

[75] DeRosa v. Remington Arms Co., Inc., 509 F. Supp. 762, 769 (E.D.N.Y. 1981) (citing Robinson v. Reed-Prentice Div. of Mach. Co., 403 N.E.2d 440, 442 (N.Y. 1980).

[76] Truchan v. Nissan Motor Corp., 720 A.2d 981 (N.J. Super. 1998); Rodriguez v. Glock, Inc., 28 F. Supp.2d 1064, 1068 (N.D. Ill. 1998).

[77] *DeRosa*, 509 F. Supp. at 769 (finding a shotgun not unreasonably dangerous for its foreseeable use).

[78] *Id.* at 766; *see also* RESTATEMENT (THIRD) OF TORTS: Products Liability § 2 (Tentative Draft No. 1, 1995).

[79] *Robinson*, 403 N.E.2d at 442 (referring to knives as illustrative of functionally dangerous articles); *see also* Final Report of the Legal Study, Interagency Task Force on Product Liability, U.S. Department of Commerce Rep. No. ITFPL-77/OL, pp. II-8- 9 (1977).

[80] Note, *Handguns and Product Liability*, 97 HARV. L. REV. 1912, 1918 (1984) (noting that "handguns necessarily fire bullets with deadly force"). Additionally, the U.S. Department of Commerce determined that such dangerous products need not be labeled defective merely because

Whether or not products liability law would require an anti-theft safety mechanism as part of the design of guns is disputed because plaintiffs assert that the technology is already available, while defendants contend that it is not ready.[81] Under the Products Liability section of the Restatement (Third) of Torts, the test is not simply the social desirability of product, on the contrary, the test is the availability of a reasonable alternative design.[82]

In *Hamilton v. Accu-Tek*, relatives of persons killed by guns sued several gun manufacturers alleging that the defendants' negligent marketing practices created a large pool of illegal guns readily accessible to violent New York criminals.[83] However, the plaintiffs did not show that such safety mechanisms were readily available, nor did they assert that even if a mechanism existed it would satisfy the New York risk-utility test.[84]

Several courts have found that firearms and ammunition are not defectively designed.[85] For example, when John Downs, Jr. was employed at a convenience store and an unknown armed robber entered the store and shot Downs three times, the Louisiana court held as follows:

> In a typical products liability case there exists some defect in the product or some unintended side effects or results. In the instant case the weapon functioned properly as it was designed to operate. There was nothing 'wrong' with it in a functional sense. There must be 'something wrong' with a product before the risk/utility analysis may be applied in determining whether the product is unreasonably dangerous or defective. The primary or basic function of a gun is to fire a bullet capable of killing. A gun that has the capacity to shoot and kill, which is its primary function, cannot be said to

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they pose a "commonly known danger." *Id.*; *see also* MURPHY & SANTANGATA, ANALYZING PRODUCT LIABILITY 4 (1979).

> [I]t must be acknowledged that [m]any products, however well-built or well-designed may cause injury or death. Guns may kill; knives may maim; liquor may cause alcoholism; but the mere fact of injury does not entitle the (person injured) to recover . . . there must be something wrong with the product, and if nothing is wrong there will be no liability.

Id.

[81] Gauthier, *supra* note 17, at B4.

[82] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (Tentative Draft No. 1, 1995).

[83] 935 F. Supp. 1307 (E.D.N.Y. 1996).

[84] *Id.*

[85] *See, e.g.*, McCarthy v. Olin Corp., 119 F.3d 148, 155 (2d Cir. 1997) (finding that Black Talon bullets perform as designed and, thus, are not defective); Downs v. R.T.S. Sec. Inc., 670 So.2d 434, 439 (La. Ct. App. 1996) (finding ammunition dangerous, but not unreasonably dangerous); Kelley v. R.G. Indus., Inc. 497 A.2d 1143 (Md. 1985) (holding that a firearm's normal use cannot be considered abnormally dangerous).

> be unreasonably dangerous per se because it has that capacity. A product cannot be said to be unreasonably dangerous per se where the danger complained of is the purpose and function of the product.[86]

The court continued discussing the reality that guns by their very nature, must be dangerous to be functional.[87] Therefore the court found that while guns have the potential to inflict injury, it does not follow that this characteristic necessarily gave rise to liability.[88]

Similarly, where several people were shot on a Long Island commuter train in New York, the plaintiffs argued that the gun and ammunition manufacturers were liable for, among other things, the making of a defective product.[89] The court held that "[a]s a matter of law, a product's defect is related to its condition, not its intrinsic function."[90] The court reasoned that the defendants could not be held liable because their products were not in a defective condition nor were they unreasonably dangerous with respect to their intended use.[91]

Because plaintiffs cannot successfully argue that manufacturers defectively design guns, the proper place for cities to enforce design restrictions on the firearm industry is through the legislature. To achieve their goal, cities should direct their efforts to supporting and passing legislation such as the Firearms Safety and Consumer Protection Act introduced by Democrats in 1999.[92]

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[86] *Downs*, 670 So. 2d at 437 (citing Addison v. Williams, 546 So. 2d 220 (La. Ct. App. 1989)).

[87] *Id.*

[88] *Id.*

[89] *See McCarthy*, 119 F.3d at 154-156.

[90] *Id.* at 155 (citing Robinson v. Reed-Prentice Div., 403 N.E.2d 440, 443 (N.Y. 1980)).

[91] *Id.*

[92] Representative Patrick Kennedy of Rhode Island and Senator Robert Torricelli of New Jersey introduced this bill which would give the U.S. Bureau of Alcohol, Tobacco, and Firearms the ability to regulate the manufacture, distribution, and sale of firearms and ammunition. H.R. 920, 106th Cong. (1999).

b. Manufacturing Defects

Under the manufacturing defect theory,[93] the plaintiff establishes liability where the individual product is defective in some manner due to a deficiency in its manufacturing.[94] A manufacturing defect results when a mistake in manufacturing renders a product, which is ordinarily safe, dangerous so that the product causes harm.[95] Cities will have difficulty proving manufacturing defects concerning firearms because they are advocating a theory of mass liability. Unlike a specific incident, in which the plaintiff has recovered the weapon used in the crime, the weapons used in the vast amounts of the cases asserted by cities are not predominately available for examination. This poses a significant problem for the cities because, by advocating a manufacturing defect theory of recovery, the cities bear the burden of proving that the guns were somehow manufactured incorrectly. Without the ability to test the actual weapons used in each crime, there is no method for assessing claims that the defendants defectively manufactured the firearms at issue.

Therefore, without systematically establishing links between the defective manufacturing of the weapon in question and gun-related violent crimes, cities cannot prove that the firearms industry defectively manufactured the weapons used in the vast amount of violent crimes. Thus, manufacturing defect theory would be correctly applicable only for individuals suing certain manufacturers when the weapon was located and identified to the particular industry representatives who manufactured it. Furthermore, it would be necessary to establish that the weapon was defective.

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[93] Manufacturing defects are mistakes in manufacturing which render the product dangerous and cause harm, *see, e.g.*, Victorson v. Bock Laundry Mach. Co., 335 N.E.2d 275 (N.Y. 1975) (discussing the idea that strict products liability sounds in tort); OJA v. Howmedica, Inc., 111 F.3d 782, 792-93 (10th Cir. 1997) (discussing manufacturing defect in context of an artificial hip).

[94] *See, e.g.*, Greenman v. Yuba Power Prod. Co., 377 P.2d 897 (Cal. 1963); Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (discussing manufacturing defect in the context of an exploding glass bottle).

[95] *Victorson*, 335 N.E.2d at 278-79.

c. Failure to Warn

Another theory based in products liability is failure to warn.[96] Section 402A of the Restatement (Second) of Torts requires the plaintiff to prove that the lack of a warning made the product unreasonably dangerous and was a proximate cause of the injury.[97] Failure to warn cases usually assert one of two theories, either that the product is dangerous and does not have established clear warnings,[98] or that the product is safe unless used in a manner not warned against.[99] However, guns do not fit in either category. For example, under Illinois law, a product is "unreasonably dangerous" when it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[100] Illinois law therefore does not require warnings on alcoholic beverages, as the dangers posed by alcohol are common knowledge.[101]

Similarly, it is curious to apply a failure to warn theory of tort liability to the firearms industry because the product is admittedly dangerous and bears its own inherent warning.[102] However, if proponents

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[96] Failure to warn is defined as the absence of, or inadequacy of, warnings accompanying a product which causes harm. *See* Moulton v. Rival Co., 116 F.3d 22, 28 (1st Cir. 1997); Hill v. R.J. Reynolds Tobacco Co., 44 F. Supp.2d 837 (W.D. Ky. 1999); Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525 (Iowa 1999); Coward v. Owens-Corning Fiberglas Corp., 729 A.2d 614 (Pa. Super. Ct. 1999). *See generally* Annotation, Benjamin J. Jones, *Presumption or Inference in Products Liability Action Based on Failure to Warn, That User of Product Would Have Heeded an Adequate Warning Had One Been Given*, 38 A.L.R.5th 683, 701-11 (1996) (discussing comment j to § 402(a) of the Restatement (Second) of Torts and comparable rules under state cases).

[97] RESTATEMENT (SECOND) OF TORTS § 402A (1986); *see also* Estate of Carey v. Hy-Temp Mfg., Inc., 929 F.2d 1229, 1233 (7th Cir. 1991) (denying motion for summary judgment because (1) component part was not defective in and of itself, and (2) evidence that maker of component influenced design of furnace vent damper was sufficient to preclude summary judgment in component maker's favor).

[98] *See, e.g.*, Borel v. Fibreboard Paper Prod. Co., 493 F.2d 1076, 1089 (5th Cir. 1973) (reasoning that a warning is necessary when the consumer would want to be informed of the risks so as to decide whether to purchase the product).

[99] For example, swimming pool slides are safe unless misused through careless actions such as standing while sliding down. Also hairdryers, normally safe, can be dangerous if used by or in water.

[100] Palmer v. Avco Distrib. Corp., 412 N.E.2d 959, 962 (Ill. App. 1980) (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965)).

[101] Garrison v. Heublein, Inc., 673 F.2d 189 (7th Cir. 1982); *see also* Hunt v. Blasius, 384 N.E.2d 368 (Ill. 1978) (holding that the danger posed by a solid sign post was obvious to any motorist).

[102] *See, e.g.*, McCarthy v. Olin Corp., 119 F.3d 148 (2d Cir. 1997) (stating that hollow-point bullets used by the assailant in a shooting spree on a passenger train were not defectively designed because the "very purpose of such bullets was to kill or cause severe wounding," and plaintiffs conceded that bullets performed exactly as intended by manufacturer); Resteiner v. Sturm Ruger & Co., 223 Mich. App. 374 (Mich. Ct. App. 1997); Treadway v. Smith & Wesson Corp., 950 F. Supp.

of this idea deem such warnings necessary, then they could easily look to their state legislatures to implement the requirement.

Plaintiffs argue that tragic accidents could be prevented if the industry maintained adequate warnings.[103] Yet, one cannot effectively argue that people need to be warned against the dangers of playing with guns.[104] Guns command a great deal of respect from both those who fear and favor the weapons. A warning that a bullet remains in the chamber when the magazine is removed seems unnecessary in our society because people know that guns are dangerous. Thus, arguments that the industry fails to warn society that guns are dangerous should fail.

d. Abnormally Dangerous Activities

The general rule in torts is that one who "carries on an abnormally dangerous activity" is strictly liable for the harm inflicted by the activity.[105] Applying the abnormally dangerous activities theory, courts examine several factors including: 1) a high degree of risk of harm to others; 2) the likelihood that the harm will be great; 3) the inability to eliminate the risk through the exercise of reasonable care; 4) the extent to which the activity is uncommon; 5) the inappropriateness of the activity to the place where it is carried out; and 6) the extent of the activity's value to the community.[106] Typical examples of abnormally dangerous activities are the manufacture,

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1326 (E.D. Mich. 1996) (finding that Michigan's "obvious and open danger" rule precluded handgun manufacturer's liability on design defect and failure to warn claims when a child was killed by his fourteen-year old friend who allegedly fiddled with the gun's hammer, pointed it at the child, and applied a little pressure to the trigger which caused it to discharge); Forni v. Ferguson, 648 N.Y.S.2d 73 (N.Y. App. Div. 1996) (holding that allegations were insufficient to prove a defect in a semi-automatic handgun, ammunition, and magazine used in an assault on passengers on commuter train, because product's defect is related to its condition, not its intrinsic function, and no showing of specific defect had been made).

[103] *See, e.g.*, Morial v. Smith & Wesson Corp., No. 98-18578, (La. Civ. Dist. Ct., Orleans Parish) (Oct. 30, 1998); Penelas v. Arms Tech., Inc., No. 99-01941, (Fla. Cir. Ct., 11th Jud. Cir., Miami-Dade County) (Jan. 27, 1999).

[104] Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1202 (7th Cir. 1984) (holding that a non-defective product that presents a danger that the average consumer would recognize does not give rise to strict liability); *Garrison*, 673 F.2d at 189 (stating that Illinois law does not require warnings on alcoholic beverages as dangers posed by alcohol are common knowledge).

[105] *See* Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1323 (E.D.N.Y. 1996); *see also* RESTATEMENT (SECOND) OF TORTS § 519(1) (1965).

[106] RESTATEMENT (SECOND) OF TORTS § 520 (1965).

storage, or use of explosives, the operation of oil or gas wells, or the operation of high voltage power lines.[107]

This theory is generally limited to hazardous uses of land because courts are reluctant to expand the doctrine's application to other scenarios. Because the manufacture, distribution, and retail of firearms has no direct connection to the land, a traditional element necessary for establishing abnormally dangerous activity, the cities' use of this theory should fail. The courts have not readily adopted the idea of ultra-hazardous activity in the firearm industry context because it is similar to shoving a square peg into a round opening.

When a woman's ex-husband shot her with a .38 caliber firearm manufactured by Smith & Wesson,[108] the plaintiff invoked the doctrine of ultra-hazardous activity articulated in the Restatement (Second) of Torts, sections 519 and 520.[109] The court correctly determined that the factors outlined in the Restatement (Second) of Torts did not support application of liability to gun manufacturers under the ultra-hazardous activity theory.[110] The court concluded that the plaintiff was harmed not by the

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[107] *Id.* § 520 cmts. g, h, i, j.

[108] *See* Copier v. Smith & Wesson Corp., 138 F.3d 833, 834 (10th Cir. 1998).

[109] *Id.*; Utah law imposes strict liability on one who carries on an abnormally dangerous activity for harm resulting from the activity. Walker Drug Co., Inc. v. La Sal Oil Co., 902 P.2d 1229, 1233 (Utah 1995) (discussing an incident where gasoline leaked from containers and contaminated property); RESTATEMENT (SECOND) OF TORTS § 519 (1976). The factors to be considered in determining whether an activity is abnormally dangerous are:

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

RESTATEMENT (SECOND) OF TORTS § 520 (1976).

[110] *Copier*, 138 F.3d at 834; *See also*, Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); Leslie v. United States, 986 F. Supp. 900, 910 (D.N.J. 1997) (interpreting New Jersey Products Liability Act N.J.S.A. § 2A:58c-2); Delahanty v. Hinckley, 564 A.2d 758 (D. C. App. 1989). *But see*, Joi Gardner Pearson, *Make It, Market It, and You May Have to Pay for It: An Evaluation of Gun Manufacturer Liability for the Criminal Use of Uniquely Dangerous Firearms in Light of* In re 101 California Street, 1997 B.Y.U. L. REV. 131 (1997). In cases involving assault-style firearms or other firearms particularly attractive to criminals, where criminal use is especially foreseeable by the manufacturer, the manufacturer should be held strictly liable for criminal misuse. *Id.*; Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257 (1987). Although not addressing liability of gun manufacturers in particular, the article advocates the policy of cost spreading; the potentially overwhelming cost of injury may be needless to the person injured, since the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business, a policy which has moved from a status of questionable legitimacy to wide acceptance as a justification for strict products liability. *Id.*

manufacturing of the gun, but by the use of the gun to shoot her.[111] This distinction was significant as the ultra-hazardous argument essentially collapsed all uses of guns into one malevolent purpose, to injure or kill people.[112] This theory ignores a number of legitimate uses, including self-defense, home protection, and use by law enforcement officers.[113]

As articulated by this Utah court, if the ultra-hazardous theory is carried to its logical extension, it would suggest that the manufacturing of any product that is significantly misused and has great potential for injuring or killing persons should be considered as an ultra-hazardous activity.[114] The Utah court explained further that "[a]lcohol production, for example, might be so considered because in any given year, there is a statistical certainty that thousands of people will be killed in alcohol-related accidents. Yet, the Utah Supreme Court has refused to apply strict liability principles to alcohol providers."[115] Additionally, New York courts have found this theory inapplicable.[116]

Therefore, defendants, when confronted with such an argument, correctly argue that the ultra-hazardous activity doctrine applies only to the use of a product, not to its manufacture or sale.[117] Courts should not stretch this doctrine to include guns because not only is this doctrine inapplicable to cities as plaintiffs, it does not properly translate to the firearm industry at all. Additionally, the courts would have to determine where to draw the line, or all products could be subject to the ultra-hazardous activity doctrine. Thus, these claims should fail.

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[111] *Copier*, 138 F.3d at 836.

[112] *Id.* at 834.

[113] *Id.*

[114] *Id.*

[115] *Id.* (citing Horton v. Royal Order of the Sun, 821 P.2d 1167, 1169 (Utah 1991).

[116] *See, e.g.*, Hamilton v. Accu-Tek 935 F. Supp. 1307, 1324 (E.D.N.Y. 1996); Forni v. Ferguson, No. 132994/94, slip op. at 9-10 (Sup. Ct. N.Y. Cnty Aug. 2, 1995).

[117] *See, e.g.*, Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1203-04 (7th Cir. 1984) (stating that ultra-hazardous activity doctrine applies only to the use of a product, not to its manufacture or sale); *see also* Note, *Legal Limits of a Handgun Manufacturer's Liability for the Criminal Acts of Third Persons*, 49 Mo. L. Rev. 830 (1984) (criticizing the imposition of liability under the ultra-hazardous activity doctrine).

2. Negligent Marketing Theory

To state a cause of action for negligence, the plaintiffs must show: 1) that defendant owed them a "duty, or obligation, recognized by law,"[118] 2) a breach of the duty, 3) a "reasonably close causal connection between [defendant's] conduct and the resulting injury," and 4) loss or damage resulting from the breach.[119] Under the negligent marketing theory, plaintiffs argue that there is a causal connection between the negligence of manufacturers, distributors, and retailers, through their marketing procedures, which has created an underground market for firearms.[120]

This negligent marketing theory gained attention because individual plaintiffs in Brooklyn, New York in *Hamilton v. Accu-Tek*, successfully used negligent marketing practices to assign liability to the firearm industry.[121] In the *Hamilton* case, the plaintiffs alleged that the defendant firearm manufacturers failed to police the sale of guns adequately, permitting criminals to acquire them.[122] Defendants countered that they were not responsible for the actions of third parties and asserted that the entire industry cannot be liable for each individual gun injury.[123] The case was allowed to proceed to the jury based in part on the efforts of Judge Jack B. Weinstein, a well-respected senior judge known for expanding the bounds of toxic-tort law.[124] However, in line with the arguments articulated in this Comment, Judge Weinstein correctly granted summary judgement on the plaintiffs' products liability theories.[125]

Plaintiffs' argued that the defendant's negligent marketing practices allow manufacturers, distributors, and retailers to flood markets with less restrictive gun laws, knowing full well that the overflow of firearms in

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[118] *See generally* Knight v. United States, 498 F. Supp. 316 (E.D. Mich. 1980); Anderson v. Greenbay & Western R.R., 299 N.W.2d 615 (Wis. Ct. App. 1980); Strother v. Hutchinson, 423 N.E.2d 467 (Ohio 1981).

[119] Richards v. City of Lawton, 629 P.2d 1260 (Okla. 1981); Cannon v. Sears Roebuck & Co., 374 N.E.2d 582 (Mass. 1978); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984).

[120] *See, e.g.*, McCarthy v. Olin Corp., 119 F.3d 148, 151 (2d Cir. 1997).

[121] 935 F. Supp. at 1307.

[122] *Id.*; *see also* Bon Van Voris, *Gunmakers Go on Trial in Brooklyn*, NAT'L L.J., Jan. 11, 1999, at A10.

[123] *Hamilton*, 935 F. Supp. at 1307; see also Van Voris, *supra* note 122, at A10.

[124] *Hamilton*, 935 F. Supp. at 1307; see also Van Voris, *supra* note 122, at A10.

[125] *Hamilton*, 935 F. Supp. at 1307.

these markets makes guns readily available where there are stricter gun laws.[126] The concern is that:

> [t]here may, however, come a point that the market is so flooded with handguns sold without adequate concern over the channels of distribution and possession, that they become a generic hazard to the community as a whole because of the high probability that these weapons will fall into the hands of criminals or minors prohibited from possession under state and federal law.[127]

With this argument, the New York plaintiffs attempted to factor collective liability into proof of negligent marketing practices. Collective liability provides a lower bar for a plaintiff to prove defendant's liability where proof of the negligence element of causation is impossible because the plaintiff does not have to prove a specific defendant caused the harm concerning their incident in question.[128] Under the collective liability theory, it is enough for the plaintiff to establish that *but for* the industry actors the incident would not have happened at all.[129] Because the plaintiff cannot say who the primary defendant is, the courts allow the plaintiff to hold the entire industry liable.

In *Ashley v. Abbott Laboratories,* the judge introduced the "pond theory" referring to the jurisdictional analysis.[130] Under the "pond theory," the national market for a product may be analogized to a "common economic pond that knows no state boundaries," and introduction of the product into any part of the market or pond would have foreseeable ripple effects throughout the country.[131] In the present context, to establish a successful collective liability argument, the plaintiff must convince the court that the cause of action is the creation of the abundant pool of available firearms and not merely the negligent sale of a particular firearm

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[126] *Id.* at 1324.

[127] *Id.* at 1330.

[128] *Id.* at 1325-31.

[129] On questions of collective liability in tort, the highest court of both New York and California have been national innovators and have adopted substantially similar approaches. *See, e.g.*, Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989) (adopting a national market-share theory of liability against manufacturers of Diethylstibesterol ("DES")); Sindell v. Abbott Lab., 607 P.2d 924, 931 (Cal. 1980) (adopting market-share liability when victims could not identify the specific DES manufacturer of the drugs taken by family members).

[130] 789 F. Supp. 552, 576 (E.D.N.Y. 1992).

[131] *Hamilton*, 935 F. Supp. at 1307; *see also* Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 COLUM. L. REV. 2183 (1997). *But see* Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912, 1920-24 (1984) (opposing "defect in distribution" theory as basis for strict liability for handgun manufacturers).

to a particular individual.[132] Such theories have been successful when the product is mass-produced and sold.[133]

For example, in Diethylstibesterol ("DES") synthetic estrogen[134] litigation, the Judge Jack B. Weinstein distinguished the DES cases from the standard products liability case where an individual plaintiff, who has been injured by a particular item, brings suit against defendants known to have manufactured or sold that particular item.[135] Thus, because DES was a generic product marketed nationally and produced by numerous manufacturers, any given plaintiff could not reasonably be expected to know who manufactured or distributed the DES they ingested.

Firearms cannot and do not fit within the confines of the "pond theory" because they are not a "generic" product. To the contrary, the government regulates firearms to the extent that law enforcement can trace a gun used to commit a crime from the scene of the crime to its original manufacture, regardless of its several different owners along the way. Guns possess many personal characteristics including serial numbers and markings denoting the manufacturer's name. For example, a Beretta gun is as readily distinguishable as a Ford car.

Additionally, consumers did not prefer who manufactured the DES they took, yet consumers of firearms, like consumers of automobiles, often have established brand loyalties. For example, the marketing efforts of one firearm company would, in all likelihood, do little to boost the sales of another. Indeed, there is fierce competition between the manufacturers and distributors of firearms, focused in part on promoting the particular features of their product over their competitors' products.

The major flaw with the negligent marketing theory is that absent a relationship, the manufacturers, distributors, and retailers do not owe a duty to third parties, in this case the cities.[136] Even if the cities could establish the causal connection between the marketing practices and the firearm industry, the manufacturers do not owe a duty to the cities. When a

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[132] *Hamilton*, 935 F. Supp. at 1328.

[133] *See* Christopher J. McGuire, Note, *Market-Share Liability After* Hymowitz *and* Conley*: Exploring the Limits of Judicial Power*, 24 U. MICH. J.L. REFORM 759, 761-62 (1991) (arguing market-share theory may not be limited to DES but instead encompasses a particular set of defendant identification problems).

[134] DES was a drug manufactured to replicate the female hormone estrogen. *Sindell*, 607 P.2d at 593. The drug was prescribed to prevent miscarriages. *Id.* DES was advertised as being safe and effective. *Id.* at 595. However, as a result of injecting the drug, deformed babies were born to the pregnant women. *Id.*

[135] Hamilton v. Accu-Tek, 62 F. Supp.2d 802, 835 (E.D.N.Y. 1999).

[136] First Commercial Trust Co., Inc. v. Lorcin Eng'g, 900 S.W.2d 202 (Ark. 1995).

consumer purchases a gun, the manufacturer owes a duty to that consumer to ensure that the product be free from defects.[137] However, if that consumer uses the gun to commit violence or sells the weapon to someone who commits violence, the manufacturer should not owe a legal duty to the third party. Recognizing this flaw, a recent Michigan court agreed that a motion to dismiss should be granted because the plaintiffs could not state a claim for negligent marketing absent a relationship between manufacturer and victim.[138]

Because two of the four elements of negligence, owing a duty and establishing a causal connection, are absent in litigation where cities are the plaintiffs, use of the negligent marketing theory to impute liability on the firearm industry should fail.

3. Nuisance Theory

Nuisance constitutes a third basic tort theory proffered by plaintiffs in firearm litigation.[139] Under traditional nuisance law, a defendant will be held liable for unreasonable interference with a right held by the general public.[140] However, for this theory to be successful, the city must prove that the defendants' conduct effects "the City's efforts to protect the public health, safety and welfare through stringent gun control ordinances which make it illegal to possess most types of guns in the City."[141] The City of Chicago alleged that the defendants intentionally and recklessly design, market, distribute and sell firearms to persons whom defendants should know will bring those firearms into Chicago and Cook County, Illinois.[142] In Chicago's complaint, the city asserted that the defendants caused thousands of firearms to be possessed and used in Chicago illegally, which

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[137] *See supra* notes 63-115 and accompanying text.

[138] Resteiner v. Sturm, Ruger & Co., Inc., 566 N.W.2d 53, 54 (Mich. Ct. App. 1997) (reasoning that plaintiffs could not state a claim for negligent marketing absent relationship between manufacturer and victim). In *Linton v. Smith & Wesson*, the court affirmed the dismissal of the plaintiff's complaint because, under Illinois law, no common law duty existed upon the manufacturer of a non-defective handgun to control the distribution of the product to the general public. 469 N.E.2d 339 (Ill. 1984).

[139] *See, e.g.*, City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998).

[140] *See* Town of Newcastle v. Grubbs, 86 N.E. 757 (Ind. 1908) (finding a nuisance where there was interference with public right of passage on a highway); *see also* Seigle v. Bromky, 124 P. 191 (Colo. Ct. App. 1912) (finding a nuisance where there was an interference with public health); RESTATEMENT (SECOND) OF TORTS § 821B (1977).

[141] City of Chicago v. Beretta U.S.A. Corp., (Ill. Cir. Ct., Ch. Div., Cook County) (Nov. 12, 1998).

[142] *Id.*

resulted in a higher level of crime, death, and injuries to Chicago citizens, and a higher level of fear, discomfort, and inconvenience to the residents of Chicago.[143] Chicago alleged that the conduct of manufacturers, distributors, and retailers thereby caused "a significant and unreasonable interference with the public health, safety, welfare, peace, comfort and convenience, and ability to be free from disturbance and reasonable apprehension of danger to person and property."[144]

It is this unreasonable interference with the public health, safety, and welfare that is the crux of Chicago's case.[145] Yet, this suggests that just because Chicago has strict gun laws, surrounding cities and states must also abide by Chicago's ordinances. Allowing the aforementioned theory to prevail essentially would permit any town to dictate laws to its surrounding neighbors. For example, imagine if City X prohibits the sale of alcohol within its boundaries. In City Y where there is no such ordinance, a retailer sells alcohol to a citizen of City X. If the retailer is found liable under City X's laws, City X is thus able to extend its laws to City Y regardless of City Y's more liberal choice of laws.[146] In this unfortunate scenario, predictability of laws is lost because the retailer would be left wondering the extent of its liability. Because predictability is desired in the law, this result is unacceptable.

Additionally, the nuisance argument is not readily transferable to all cities. Chicago represents a city with very strict gun laws. Only shotguns and rifles are legal in Chicago.[147] Therefore, not only is the nuisance argument incorrectly applied to the firearm industry, it is not an option for cities without such restrictive laws. Thus, cities use of nuisance theory against the firearm industry should fail.

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[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] This hypothetical interjects a constitutional question of sovereign immunity and issues concerning personal jurisdiction that are beyond the scope of this Comment.

[147] *See* Chicago Municipal Code § 8-20-010; Chicago Municipal Code § 4-144-010.

B. The Better Choice: Refrain from Judicial Lawmaking

Under the separation of powers doctrine, the role of the courts is not to make law, but to interpret it.[148] Although the courts do have the power to say what the law is,[149] arguably their responsibility should be limited to speaking on issues in which the legislature has not acted upon. Yet, a legislature may deal with an issue through inaction. Inaction by choice of the legislature is still an action if the issue was brought forth and the government decided to leave the law in its current state. For example, calls to regulate the gun industry have been before the legislatures and several general assemblies have acted accordingly, whether their actions entailed promulgating new laws or keeping the status quo.[150] Therefore, it does not follow that because legislatures may choose to remain silent on gun industry issues that the judicial branch should step in. On the contrary, "inaction upon the part of the legislature, however long continued, cannot confer legislative functions upon the judiciary."[151]

This idea does not advocate a static common law. It simply states that what cannot be correctly achieved through the legislature should not be ill-gotten through an end run in the judicial system. Similar to the child who is unsuccessful asking dad for candy so he then goes to mom, where proponents of liability have been unsuccessful in the legislature, like mom, the courts should not grant their request.[152]

Furthermore, in response to the recent wave of gun litigation, at least one state legislature has responded with a statute regulating litigation

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[148] Moore v. U.S. House of Reps., 733 F.2d 946, 958 (D.C. App. 1984) (stating that the court's "province . . . is, solely, to decide on the rights of individuals"); Ex parte Levitt, 302 U.S. 633, 634 (1937) (finding that interests common to all members of the public is the business of the political branches). *See generally* A.C. Pritchard & Todd J. Zywicki, *Finding the Constitiution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 409 N.C. L. REV. (Jan. 1999); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, N.Y.U. L. Rev. (Nov. 1996).

[149] Marbury v. Madison, 5 U.S. 137, 176 (1803) (providing that under the U.S. Constitution Art. 3, section 2, the Supreme Court has original jurisdiction in all cases in which the state is a party and it is the responsibility of the judicial branch to say what the law is); *see also* Garcia v. San Antonio Metro. Transit. Auth., 469 U.S. 528, 567 (1985) (stating that it is the settled province of the judiciary "to say what the law is").

[150] California has already precluded the use of the defect in design argument in firearm or ammunition litigation. CAL. CIV. CODE § 1714.4(a) (West 1998 & Supp. 1999).

[151] Bandoni v. Rhode Island, 715 A.2d 580, 596 (R.I. 1998).

[152] *See, e.g.*, Patterson v. Gesellschaft, 608 F. Supp. 1206 (N.D. Tex. 1985); Mavilia v. Stoeger Indus., 574 F. Supp. 107 (D. Mass. 1983); Rhodes v. R.G. Indus., Inc., 325 S.E.2d 465 (Ga. Ct. App. 1984).

involving firearms.[153] Georgia Governor Roy Barnes recently signed a bill in response to Atlanta's lawsuit against fifteen gun manufacturers.[154] Although the Georgia statute does not restrict an individual's legal right to sue, the new statute explicitly states that "the regulation of firearms is properly an issue of general, state-wide concern."[155] Additionally the statute declares that "the lawful design, marketing, manufacture, or sale of firearms or ammunition to the public is not unreasonably dangerous activity and does not constitute a nuisance per se."[156] Finally, the Georgia statute reserves the right to sue in any other legal matter other than contract or warranty solely to the State.[157]

The statute quickly passed both the Georgia House and Senate by votes of 146-25 and 44-11 respectfully.[158] The swiftness and abundant support endorses one proponent's comment that the statute "reaffirms [that] the American people and their elected representatives recognize the fact that firearms are unique among consumer products."[159] Although Atlanta plans to proceed with its lawsuit,[160] Georgia has paved the way for other states to follow.

Other states should follow Georgia's lead and prevent cities from suing the firearm industry. Unlike the judiciary, the legislature is the proper place for these battles to be fought. Georgia's success in quickly passing its statute should be a wake-up call to cities and encourage other states to enact similar statutes because the cities' suits should not only fail, but be prevented altogether.

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[153] H.B. 189, 145th Leg. (Ga. 1999) (amending Code Section 16-11-184 of the Official Code of Georgia Annotated).

[154] June Patterson, *Georgia Passes Law Blocking Anti-Gun Lawsuits* (visited Feb. 10, 1999) <http://dailines.yahoo.com/headlines/ts/story.html?s=v/nm/19990210/ts/guns_15.html>.

[155] GA. CODE ANN. § 16-11-184(a)(1)(1999).

[156] *Id.* § 16-11-184(a)(2).

[157] *Id.* § 16-11-184(b)(2).

[158] *See* Product Safety & Liability Reporter, *Georgia Law Barring Gun Suits Signed by Governor After Atlanta Files Action*, Vol. 27, No. 7, 150, 151 (Feb. 12, 1999) (discussing the Atlanta complaint).

[159] *Id.*

[160] *Id.* Mayor Bill Campbell plans to challenge the constitutionality of the new law. Mayor Campbell commented that "it's [not] legal for the Georgia General Assembly to prohibit cities from filing lawsuits to protect the public's interest. . . .[W]e are confident that a court will rule that the bill is unconstitutional." *Id.*

IV. CONCLUSION

It is not foreseeable that the firearm industry will repeat the results achieved in the tobacco cases. On the contrary, the firearms industry should prevail over these unwarranted lawsuits, and cities should be wary of investing taxpayers' resources to bring such suits. Regulating the firearm industry is better left to the legislature where the money invested on both sides of the issue is primarily that of individual groups and not that of every taxpayer.

The theories used in this litigation resemble square pegs being shoved into round holes – maybe this can be done with a lot of force, but is it correct? This is a battle best fought on a field where each citizen gets to vote on the issue, not simply the twelve men and women comprising a jury. Georgia has the right idea making these municipal lawsuits illegal; more states should follow its lead.