

## NOTES

### IS *HAMILTON V. ACCU-TEK* A GOOD PREDICTOR OF WHAT THE FUTURE HOLDS FOR GUN MANUFACTURERS?

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#### INTRODUCTION

"We are all very upset. We are starting to fight. We cannot reach a decision. We are emotionally drained and some of us feel physically ill!! Please, please give us more direction!!"<sup>1</sup>

These were the first pleas from the jury to district court Judge Jack Weinstein in February 1999, after four days of deliberations in a novel products liability case. The judge responded: "Everybody has invested, including yourselves, too much time in this case to allow you to throw up your hands prematurely."<sup>2</sup> Although exhausted and reluctant, the jurors resumed deliberations and reached a consensus two days later. The surprising verdict made legal history while sparking fierce debate in the world of products liability.

On February 11, 1999, fifteen gun manufacturers were found liable for three gunshot fatalities and one injury on the theory of negligent distribution in the case of *Hamilton v. Accu-tek*.<sup>3</sup> This verdict marks the first time the gun industry has been held collectively liable<sup>4</sup> for the criminal uses of its products. Supporters of the lawsuit hailed the decision as a breakthrough in a country where guns often symbolize freedom, independence, and justice.<sup>5</sup> Although the significance of the judgment was dampened by the fact that just three of the companies were

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1. Vanessa O'Connell & Paul M. Barrett, *Open Season: How a Jury Placed the Firearms Industry on the Legal Defensive*, WALL ST. J., Feb. 16, 1999, at A1 (quoting a note from the jury to the judge).

2. *Id.*

3. No. 95 Civ. 0049 (E.D.N.Y. 1999).

4. This theory of liability allows plaintiffs to hold all potentially responsible defendants liable in the interests of justice since plaintiffs would have no other way of obtaining relief. See *Summers v. Tice*, 199 P.2d 1, 4 (Cal. 1948).

5. See David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 3 (1998).

assessed damages for only one of the seven victims,<sup>6</sup> this did not prevent supporters from predicting a string of successes in the courtroom. However, the highly controversial nature of the verdict and corresponding theories of liability will prevent subsequent plaintiffs from achieving similar results, as many other jurisdictions are still unpersuaded by the plaintiffs' legal arguments and uncomfortable with the public policy issues tied to resolving society's concerns about gun violence in court.

The *Hamilton* decision was also welcomed by cities around the country, totaling almost thirty,<sup>7</sup> who have sued gun manufacturers on negligence and public nuisance theories for the reimbursement of millions of dollars in police and medical expenses resulting from gun-related crimes.<sup>8</sup> In an attempt to repeat the success of some of the claims against the tobacco industry, many cities have modeled their suits after those of the state attorneys general involved in the tobacco litigation. However, there was no organization analogous to the National Rifle Association (NRA) with a stake in the tobacco litigation, and it has proved to be a resourceful organization for gun manufacturers now facing a fight. In response to the cities' claims, the NRA retaliated on behalf of the industry by introducing and passing legislation in several states that prohibits municipalities from filing suits against gun manufacturers and dealers.<sup>9</sup> Although most of the city suits previously filed were unaffected by this legislation, the cities that were preempted are already fighting the new laws in court.<sup>10</sup> As the litigation continues, the cities hope that their suits will at least result in a settlement, but the prospects for large financial concessions are unlikely when considering the intervening power of the NRA and the stark differences between the tobacco and gun industries. However, the cities might be able to strike a deal at the bargaining table by using their legal leverage to gain restrictions on industry practices, which could include heightened safety measures and tighter controls on distribution channels. Nevertheless, the new Bush administration, clearly supportive of the NRA, could use its power to minimize the cities' chances of gaining a favorable agreement from the gun industry.

This Note addresses the meaning of the *Hamilton* verdict while illustrating

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6. See *Hamilton v. Accu-tek*, 62 F. Supp. 2d 802, 808 (E.D.N.Y. 1999).

7. A partial list of the cities who have already filed includes: New Orleans, Chicago, Atlanta, Miami-Dade County, Fla., Bridgeport, Cleveland, Detroit, Wayne County, Mich., Cincinnati, Hamilton County, Oh., St. Louis, Los Angeles, San Francisco, Newark, and Boston. See Timothy A. Bumann, *Gun Control Through Retailer Litigation*, BRIEF, Fall 1999, at 21, 27.

8. See Paul M. Barrett, *Chicago Sues Gun Makers in Battle's Second Shot*, WALL ST. J., Nov. 13, 1998, at A3.

9. See Lisa Gelhaus, *Brooklyn Jury Adds Momentum to Antigun Litigation*, TRIAL, Apr. 1999, at 96, 98. Georgia just enacted an NRA-backed bill, O.C.G.A. § 16-11-184, that may preempt the suit previously filed by the city of Atlanta, while already prohibiting other Georgia cities from filing similar suits. See *id.* at 98. The NRA has also planned legislation for numerous other states. See *id.*

10. See David Firestone, *Gun Lobby Begins Concerted Attacks on Cities' Lawsuits*, N.Y. TIMES, Feb. 9, 1999, at A1.

why courtroom battles against gun manufacturers will find little success. Part I introduces the initiative to pursue legal sanctions against gun manufacturers. Next, Part II addresses the unsuccessful theories previously used against gun makers and the more recent theories of negligent marketing and distribution. Part III then discusses the most influential case prior to *Hamilton*, and Part IV explains the details of the *Hamilton* case. Finally, Part V surveys the strengths and weaknesses of the suits filed by the cities, and Part VI concludes with an analysis of the future of the gun litigation.

### I. THE INITIATIVE TO PURSUE LEGAL SANCTIONS AGAINST GUN MANUFACTURERS

The motive for pursuing legal relief from the gun industry has escalated with the notoriety of recent shootings and the success of imposing liability on other powerful industries like Big Tobacco. However, a little background on the presence of guns in the United States provides additional insight into the conflict and the motivation for the litigation.

Citizens in the United States own approximately 192 million guns<sup>11</sup> and in 1997, firearms killed more than 32,400 people.<sup>12</sup> The United States also holds the unenviable title of leading the world in the number of people who die or are injured by handguns every year, which is approximately fifty times the amount in every other industrialized country.<sup>13</sup> Furthermore, gun deaths disproportionately affect young people, illustrated by the fact that gun deaths peak between the ages of 15 and 24.<sup>14</sup> In some states, such as New York, California, and Texas, gunshot fatalities have surpassed car accidents as the leading cause of unnatural death.<sup>15</sup> Aside from the toll of human lives, the cost of providing medical care for gun-related injuries in 1995 was estimated at \$4 billion,<sup>16</sup> which does not take into consideration police and emergency services, disability benefits, security costs at schools and public buildings, and prison costs.<sup>17</sup> As a result of these circumstances, many crime victims and their families have renewed their interest in searching for an alternative source of compensation for their injuries by using the tort system. In addition, almost thirty cities have also joined the battle, filing lawsuits against the gun

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11. See Susan DeFrancesco, *Children and Guns*, 19 PACE L. REV. 275, 276 (1999).

12. See Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 ST. LOUIS U. PUB. L. REV. 247, 250 (1999).

13. See Kairys, *supra* note 5, at 2.

14. See DeFrancesco, *supra* note 11, at 276.

15. See Timothy D. Lytton, *Negligent Marketing: Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681, 681 (1998).

16. See DeFrancesco, *supra* note 11, at 277.

17. See Siebel, *supra* note 12, at 251. Chicago has estimated that its costs of gun violence exceed \$850 million every few years. See Amended Complaint for Plaintiff at 76-77, *Chicago v. Beretta U.S.A. Corp.*, No. 98-CH-015596 (Cook County Cir. Ct. 1998).

manufacturers in order to recoup the public costs of gun violence.<sup>18</sup>

Anti-gun groups and potential plaintiffs have also set their sights on the judicial system because guns are one of the consumer products most resistant to federal regulation. Congress has excluded guns and ammunition from the jurisdiction of the Consumer Products Safety Commission, while also prohibiting certain public health research on guns by the Centers for Disease Control.<sup>19</sup> Furthermore, under the Consumer Product Safety Act, Congress enacted a rule that prevents the Commission from taking any action that might restrict the availability of firearms to the consumer.<sup>20</sup> In fact, the only federal organization with any regulatory power over the industry is the Bureau of Alcohol, Tobacco, and Firearms, an agency whose power is limited to issuing federal firearms licenses, collecting excise taxes, and tracing stolen guns.<sup>21</sup> In contrast, public debates surrounding the dangers of tobacco, drugs, and asbestos have scrutinized the activities of manufacturers and distributors, while the gun debate has rarely focused on the responsibilities of these parties.<sup>22</sup>

The immunity to regulation that the gun industry has received could be a result of the status that guns have enjoyed in our history, culture, and the Constitution. Since our country was founded through armed revolution, guns have often symbolized freedom, independence, and justice.<sup>23</sup> The media has also contributed to this symbolism by capitalizing on the theme that well-armed people stand for heroism and truth and will triumph in the end.<sup>24</sup> Today, gun owners and pro-gun groups ferociously defend what they view as a fundamental right in the Second Amendment "of the people to keep and bear arms. . . ."<sup>25</sup>

In 1999, gun sales exploded across the country, which may have increased the awareness of gun violence and further fueled the resolve of plaintiffs and cities. One entrepreneur in California predicts a fifty percent increase in sales over 1998, while a retailer in Minnesota has experienced a 112% rise in sales

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18. See Bumann, *supra* note 7, at 27; see also Frank J. Vandall, *O.K. Corral II: Policy Issues in Municipal Suits Against Gun Manufacturers*, 44 VILL. L. REV. 547, 553 (1999) (explaining that in economic terms the cities are asking the industry to internalize the costs of gun violence, which already occurs in the steel industry where manufacturers must pay the cost of air and water pollution).

19. See Kairys, *supra* note 5, at 3.

20. See Ted Copetas, *Handguns Without Child Safety Devices—Defective in Design*, 16 J.L. & COM. 171, 174 (1996).

21. See Fox Butterfield, *Bill Would Subject Guns to Federal Safety Controls*, N.Y. TIMES, Mar. 3, 1999, at A10.

22. See Kairys, *supra* note 5, at 3.

23. See *id.*

24. See *id.* The status and support of guns varies from region to region across the country, but the "Wild West" may be more resistant to suits against the gun industry as one lawyer from the area comments, "[i]n the West, a gun rack and an open can of beer in the truck are both considered sacred, and we're not going to try and change these cowboys." Douglas McCollam, *Long Shot*, AM. LAW., June 1999, at 86.

25. U.S. CONST. amend. II.

from the first five months of the year, compared with 1998.<sup>26</sup> There are several reasons for such a rise in sales. First, some gun makers sought out new markets by focusing on women and youth after they experienced stagnant sales in the early 1990s. In 1992, the magazine of the National Shooting Sports Foundation carried a column by industry celebrity Grits Gresham, in which he said: "There's a way to help insure that new faces and pocketbooks will continue to patronize your business: Use the schools . . . . [I]t's time to make your pitch for young minds, as well as for the adult ones."<sup>27</sup> Another reason for the increase in sales is the fear of new regulations and stiffer gun control laws, which has encouraged a stampede of first-time buyers.<sup>28</sup> Nevertheless, as plaintiffs continue their battle against guns, the number of legal theories that have consistently failed plaintiffs in the past presents quite an obstacle.

## II. UNSUCCESSFUL THEORIES OF LIABILITY

While plaintiffs have employed numerous product liability theories to pursue relief against gun manufacturers, the claims have consistently fallen short due to the presence of a criminal act by an intervening shooter. The majority of the theories used have been variations of strict liability or negligence concepts.<sup>29</sup>

Strict liability<sup>30</sup> once held high hopes for gun plaintiffs, but has now been almost entirely discarded.<sup>31</sup> In fact, one professor has stated,

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

. . . 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.<sup>32</sup>

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26. See Paul M. Barrett, *Boom Times: Industry Under Siege, Threats of Regulation*, WALL ST. J., June 8, 1999, at A1.

27. Kairys, *supra* note 5, at 11.

28. See Barrett, *supra* note 26, at A1.

29. See Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability Is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777 (1995).

30. Strict liability is defined as liability regardless of fault; therefore an actor whose conduct proximately causes harm to another is liable even if the action was reasonable or if extraordinary care was used. See JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 185 (4th ed. 1994).

*Herbstman v. Eastman Kodak Co.*, 342 A.2d 181, 184 (1975), further explains the concept of strict liability by stating the tort is founded on the idea that when a manufacturer presents his products to society for sale, he represents they are suitable for their intended use. Therefore, to use this doctrine the plaintiff must prove that the product was defective when it was placed in the stream of commerce. See *id.*

31. See McClurg, *supra* note 29, at 777.

32. *Id.* at 777-78.

Plaintiffs suing gun manufacturers typically tried one of two strict liability theories.<sup>33</sup> The first prospect, a risk-utility balancing approach, alleged that guns are unreasonably dangerous because their risk outweighs their social utility.<sup>34</sup> The second argument proposed that the production or sale of handguns constituted an abnormally dangerous activity under the Restatement (Second) of Torts.<sup>35</sup> However, both arguments were consistently unsuccessful for both legal and public policy reasons.

First, risk-utility analysis is normally used in litigation involving the existence of a defect in the design of a product.<sup>36</sup> This balancing approach is helpful in judging a product that was manufactured as intended because the usual means for determining defectiveness, like the use of a standard, are unavailable.<sup>37</sup> The risk component of the defective design analysis addresses the probability and the severity of the harm possible to the consumer, or others who may be foreseeably harmed,<sup>38</sup> while the utility factor considers the value of the design to the consumer and society at large and whether there is a feasible alternative.<sup>39</sup> The obstacle for plaintiffs using this type of liability against gun manufacturers has been a refusal by the courts to extend the analysis to dangerous products that cannot be made safer.<sup>40</sup> Consequently, plaintiffs have faced the burden that guns

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33. *See id.* at 779.

34. *See id.*

35. *See id.* The Restatement (Second) of Torts states that strict liability is provided for "[o]ne 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." RESTATEMENT (SECOND) OF TORTS § 519-20 (1977).

36. *See McClurg, supra* note 29, at 779.

37. *See id.* at 779-80. Conversely, in cases surrounding manufacturing flaws, there is a standard for evaluating the product, which includes all the other products of the manufacturer that did not malfunction. *See id.* at 780. For example, it is logical to conclude that an exploding soft drink bottle is defective because it can be compared to countless other bottles that did not explode. However, alleged defects that result from conscious design choices, such as handguns, are extremely hard to evaluate since there is no external standard present for comparison. *See id.* Therefore, the only solution is to balance the risk of the product design against its utility. *See id.*

38. *See Carl T. Bogus, Pistols, Politics, and Products Liability*, 59 U. CIN. L. REV. 1103, 1109 (1991).

39. *See McClurg, supra* note 29, at 780. In examining whether an alternative feasible design exists, the 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. *See id.*

40. *See id.* at 781. In general, courts have accepted that guns cannot be made safer without unduly destroying their utility. An example of a court rejecting liability based on a risk-utility analysis is the case of *Patterson v. Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985), where the court held that a robbery victim had no cause of action against gun manufacturers in Texas. *See id.* at 1216. The plaintiff sought recovery under a risk-utility analysis and defective distribution. *See*

are performing as expected when they are used to injure or kill humans.

The second theory, that the manufacture or sale of guns constitutes an abnormally dangerous activity under sections 519-20 of the Restatement (Second) of Torts, has also been unsuccessful.<sup>41</sup> The rationale of the theory supposes that these activities present such unusual risks of danger that the responsible parties, like gun manufacturers, should pay the damages inflicted on society.<sup>42</sup> However, courts have rejected plaintiffs' arguments under this theory and stated that in contrast to the manufacture or sale of a gun, only activities that are dangerous "in and of themselves and that can directly cause harm" are encompassed by the Restatement.<sup>43</sup> Therefore, theories of strict liability have continued to fail because the legal sale of a non-defective product has never been considered an abnormally dangerous activity. Additionally, courts have consistently ruled that a gun does not become defective when an individual uses it to commit a crime.<sup>44</sup>

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*id.* at 1208. The court dismissed the argument quoting:

Virtually any product can be put to an illegal use: an automobile can be used in order to make a getaway from a bank robbery, or a ship in order to smuggle drugs, yet no one would suggest that those products were not performing their intended function of transportation. The argument that a jury should be permitted to subject a product to risk/utility scrutiny merely because it is often used illegally has no logical limit: the manufacturer of any product that is frequently put to illegal use could be called into court to defend his product.

*Id.* at 1213 (quoting Windle Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41, 60-61 (1982) (citation omitted)).

Only one case has ever held a gun manufacturer strictly liable for a non-defective product, but the court's decision was quickly vacated by the state legislature. In *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143, 1144 (Md. 1985), the plaintiff was a store clerk who was shot with a Saturday Night Special during a robbery. The court described such guns as "particularly attractive for criminal use and virtually useless for [] legitimate purposes" and held that strict liability could be imposed on these manufacturers. *Id.* at 1154. The reasoning of the decision included a risk/utility analysis and the court concluded that these guns present an unusually high risk of being involved in criminal activities while having few other uses. *See id.* at 1161-62. Consequently, the Maryland legislature overruled the case by passing legislation that prohibited strict liability for gun manufacturers. *See McClurg, supra* note 29, at 784.

41. *See McClurg, supra* note 29, at 788; *see also* RESTATEMENT (SECOND) OF TORTS § 520 (1977).

42. *See McClurg, supra* note 29, at 788; *see also* RESTATEMENT (SECOND) OF TORTS § 519, cmt. d (1977).

43. *McClurg, supra* note 29, at 790. Other courts have rejected the abnormally dangerous activities doctrine by concentrating on the doctrine's connection to activities related to land which may threaten neighboring owners. *See id.* Some courts have found that the manufacture and marketing of guns does not meet the requirement that the activity not be a matter of common usage. *See id.* at 791.

44. *See* Timothy A. Bumann, *A Products Liability Response to Gun Control Litigation*, 19 SETON HALL LEGIS. J. 715, 724 (1995).

Claims of negligence have also been unsuccessful for plaintiffs suing gun makers. Negligence involves the creation of an unreasonable risk of harm to another—a risk of harm greater than what society is willing to accept in light of the benefits of the activity.<sup>45</sup> The general standard is one of reasonable care under the circumstances,<sup>46</sup> but plaintiffs have encountered problems in defining and asserting a duty of care on the part of the manufacturer that courts will accept.<sup>47</sup> One way to invoke a duty uses the concept of foreseeability, which may include the foreseeability of the plaintiff or of the harmful circumstances.<sup>48</sup> In gun litigation, establishing the foreseeability of an individual plaintiff might be shown through the mass marketing of guns to the general population, while the foreseeability of harmful consequences might be illustrated using the statistical evidence surrounding the human and financial cost of guns.<sup>49</sup> Other factors beyond foreseeability have also been used to assert a duty, including the moral culpability of the defendant, the morality, fairness, and justice of imposing a duty, the causal connection between the conduct and the harm, the magnitude of the risk, the utility of the conduct, and the potential value of deterrence.<sup>50</sup>

However, after finding little success under strict liability and general negligence concepts, plaintiffs have recently started to assert theories of negligent marketing and distribution.<sup>51</sup> Within these theories, the focus is on the collective liability of a large group of manufacturers rather than on the marketing of a single weapon.<sup>52</sup> The entire group could potentially be held responsible for the allegedly lax marketing and distribution methods of the industry. Therefore, not only can the claims be broader under collective liability, but they can also be easier to assert because of the technical difference between a strict liability claim

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45. See HENDERSON ET AL., *supra* note 30, at 185.

46. See *id.* at 201.

47. Professor McClurg has applied this problem to gun litigation and explained:

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. 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.

McClurg, *supra* note 29, at 796.

48. See *id.* at 796-97.

49. See *id.* at 797.

50. See *id.* at 797-98; see also William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953). “In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideals of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall.” *Id.*

51. Negligent marketing claims attempt to show that the marketing of guns, followed by the harm that can be inflicted by the guns, presents substantial risks that should be termed unreasonable in the realm of negligence law. See McClurg, *supra* note 29, at 799. However, these claims are still developing. See *id.*

52. See Anthony Gallia, Comment, “Your Weapons, You Will Not Need Them,” *Comment on the Supreme Court’s Sixty-Year Silence on the Right to Keep and Bear Arms*, 33 AKRON L. REV. 131, 157 (1999).



and a negligence claim.<sup>53</sup> This difference lies in the fact that the negligence claim focuses on the conduct of the manufacturer, while strict liability narrowly focuses on the condition of the product.<sup>54</sup>

Three theories have emerged from negligent marketing and distribution claims. The first theory asserts that the manufacturer acts negligently by marketing a weapon that presents an unusually high risk of harm while providing only minor utility for legitimate purposes. This theory is similar to the risk-utility analysis discussed under strict liability.<sup>55</sup> However, plaintiffs can utilize one advantage by asserting a negligence claim. Specifically, plaintiffs need only show a flaw in the defendant's *conduct*, not in the product itself.<sup>56</sup> Therefore, the duty present in this theory would be breached when a manufacturer implements a marketing plan designed to intentionally target criminal buyers.<sup>57</sup>

The second theory alleges that manufacturers implement marketing strategies that intentionally, recklessly, or negligently target criminal consumers.<sup>58</sup> Similarly, the third theory claims that manufacturers have failed to take reasonable steps during marketing to minimize the risk that their products will be purchased by consumers likely to misuse them.<sup>59</sup>

In response to allegations of negligent marketing and distribution, defendants have countered with issues of causation, asserting that an intervening criminal act<sup>60</sup> relieves them of any liability.<sup>61</sup> The most promising defense occurs when

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53. See McClurg, *supra* note 29, at 800.

54. See *id.* Although the difference may not be tremendous, the distinction might give those judges who support tort cases, "a hook on which to hang their legal hats," especially when the increased media attention given to gun tragedies may also have convinced some judges to reconsider the policy issues that were rejected along with strict liability. *Id.* at 802.

55. See *id.* at 799.

56. See *id.* at 801. For example, to find for a plaintiff the court would rule that the product was acceptable, but there was something wrong with the manner in which the product was sold or marketed. See *id.*

57. See *id.* at 806. Negligence law requires that persons act with reasonable care to avoid foreseeable risks of harm to others, which could also include protecting against risks of criminal attack. See *id.* Some courts have imposed liability on firearms retailers who failed to exercise reasonable care in purchase transactions that created foreseeable risks of criminal attack. See *id.* at 806; see also *Cullum & Boren-McCain Mall, Inc. v. Peacock*, 592 S.W.2d 442, 449 (Ark. 1980) (holding defendant liable for sale of gun to customer who requested a product that would make a "big hole" in a person); *West v. Mache of Cochran, Inc.*, 370 S.E.2d 169, 174 (Ga. Ct. App. 1988) (holding defendant responsible for sale of semi-automatic rifle to former mental patient); *Bernethy v. Walt Failor's, Inc.*, 653 P.2d 280, 285 (Wash. 1982) (holding defendant liable for furnishing a rifle to an intoxicated person).

58. See McClurg, *supra* note 29, at 806.

59. See *id.*

60. An act which follows any conduct of the defendant but occurs before the injury is an intervening act, and the problem that arises is whether the defendant can be held liable for an injury to which he may have made a contribution, but was not entirely responsible. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 301 (5th ed. 1984). The question

the crime is remote in time and place from the purchase of the gun because a reasonably close causal connection, or proximate cause, is required to link the conduct and the resulting injury.<sup>62</sup> However, absent facts placing a defendant on notice of the probability of a crime being committed with the product, there is no foreseeability as a matter of law.<sup>63</sup> Thus, the true obstacle in establishing causation is overcoming an intervening act because criminal conduct will generally interrupt a chain of causation.<sup>64</sup> Therefore, when a plaintiff is injured as the result of the intentional, criminal act of another, it is highly unlikely the plaintiff will be able to demonstrate the necessary proximate causal connection, which would allow the manufacturer's defense to prevail in most jurisdictions.<sup>65</sup>

Within any of these theories, the rationale supporting liability is the concept that victims of gun violence should be allowed to recover from manufacturers because they are most responsible for the loss and should therefore have the duty of repair.<sup>66</sup> Consequently, plaintiffs hope that realistic threats of liability will force the industry to improve the design, sale, and distribution processes of their products to avoid paying legal fees and damages.<sup>67</sup> However, when this rationale was rooted in prior strict liability and negligence suits, it was not a policy that courts were ready to support in gun litigation. Furthermore, allocating this level of public policy setting power to the judiciary is far beyond the responsibility of the courts or the bounds of tort law. This power is better reserved for legislatures where elected officials decide how to resolve the clash between victims of gun violence and the industry. Nevertheless, one judge in New York has accepted a role in the gun battle by allowing two important gun litigation cases to be heard in his courtroom—a location known for its willingness to hear plaintiffs with innovative product liability theories.<sup>68</sup> The first of those cases was *Halberstam*

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arises regarding the extent of the defendant's original obligation, and the answer often involves the policy of imposing legal responsibility. *See id.* This problem is true of intervening criminal acts that the defendant might reasonably anticipate, but the fact that another's misconduct might be foreseen is not sufficient to place the responsibility on the defendant. *See id.* at 305. However, once it is resolved that the defendant had a duty to anticipate the intervening misconduct, liability may be imposed. *See id.*

61. *See* Bumann, *supra* note 44, at 722.

62. *See* KEETON ET AL., *supra* note 60, § 30, at 165.

63. *See* Bumann, *supra* note 44, at 723.

64. *See id.* Furthermore, criminal acts are so unlikely in any specific instance that to impose a burden on gun manufacturers to take precautions against such acts would almost always exceed the apparent risk. *See* KEETON ET AL., *supra* note 60, § 33, at 197.

65. *See* John P. McNicholas & Matthew McNicholas, *Ultrahazardous Products Liability: Providing Victims of Well-Made Firearms Ammunition to Fire Back at Gun Manufacturers*, 30 LOY. L.A. L. REV. 1599, 1622 (1997).

66. *See id.* at 1604-05.

67. *See id.*

68. U.S. District Court Judge Jack Weinstein is in his late seventies and technically semi-retired, but he maintains an active docket in his courtroom in Brooklyn. *See* Paul M. Barrett, *Aiming High: A Lawyer Goes After Gun Manufacturers; Has She Got a Shot?*, WALL ST. J., Sept.

v. *S.W. Daniel, Inc.*<sup>69</sup>

III. *HALBERSTAM V. S.W. DANIEL, INC.*: PASSING THE HURDLE OF SUMMARY JUDGMENT

On February 25, 1994, the Jewish holiday of Purim, Baruch Goldstein murdered twenty-nine Palestinian worshippers at a mosque in Israel.<sup>70</sup> Four days later, in retaliation for the massacre, Palestinian Rashid Baz opened fire using two automatic pistols on a van carrying Hasidic Jewish children across the Brooklyn Bridge.<sup>71</sup> One of the pistols, a Cobray M-11/9, which was assembled through a mail-order kit, fired eighteen shots in just a few seconds, killing one child and injuring another.<sup>72</sup> The parents of some of the children sued the owners of the mail-order company, Wayne and Sylvia Daniel, but Judge Weinstein dismissed all the complaints except the allegation of negligent marketing.<sup>73</sup>

The plaintiffs' negligent marketing count relied on the doctrine of negligent entrustment so the plaintiffs could avoid arguing that the manufacturers should refrain from marketing firearms completely.<sup>74</sup> The plaintiffs asserted that the manufacturers owed a duty to the general public to adopt reasonable restraints on the marketing and distribution of their products.<sup>75</sup> However, the defendants countered that no duty existed to refrain from the lawful distribution of a non-defective product.<sup>76</sup> The plaintiffs then argued that the duty did not require the manufacturers to refrain from selling firearms, it only required that they exercise

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17, 1998, at A1. As a judge, he has been nationally known since the 1980s when he helped to design creative solutions to mass injury lawsuits. *See id.* He supported the theory that in some situations when consumers cannot identify the manufacturers of an allegedly harmful product, which often happens in cases involving prescription drugs, all manufacturers can be held liable according to their share of the market at the time of the injury, as opposed to assessing liability on specific proof of fault. *See id.*

69. No. 95 Civ. 3323 (E.D.N.Y. 1998) (pleadings and court orders on file in clerk's office at the U.S. District Court for the Eastern District of New York).

70. *See Lytton, supra* note 15, at 686.

71. *See id.*

72. *See id.*

73. *See id.* at 687.

74. *See id.* Negligent entrustment is the theory that a person may be subject to liability for harm that results from entrusting a potentially dangerous object to another whom the giver has reason to know is likely to use it in a manner that poses an unreasonable risk of harm to the recipient or to others. *See id.* at 683 n.7. An example of this theory includes subjecting a person to liability for entrusting a loaded gun to a small child who injures herself or another while playing with the gun. *See id.* at 683. Courts in other jurisdictions have applied the negligent entrustment doctrine to merchants selling firearms to children, intoxicated individuals, ex-convicts, and persons acting suspiciously. *See id.* However, no court has applied the doctrine strictly to firearms manufacturers. *See id.* at 689; *see also* RESTATEMENT (SECOND) OF TORTS § 390 (1986).

75. *See Lytton, supra* note 15, at 687.

76. *See id.* at 690.

reasonable care in the promotion and distribution of their products, which could prohibit a manufacturer from advertising the potential criminal uses of its products.<sup>77</sup>

However, the defendants responded that manufacturers have no duty to protect others from the criminal misuse of their products absent a special relationship,<sup>78</sup> which they alleged did not exist in this case.<sup>79</sup> The plaintiffs rebutted by analogizing to other cases where a special relationship was deemed unnecessary. For instance, New York courts previously imposed a duty on BB gun sellers to protect others from the criminal misuse of the weapons, without a special relationship.<sup>80</sup> Therefore, the plaintiffs alleged that a duty arose from the high risk of injury possible from the foreseeable misuse that the retailer created through his selling practices, despite the lack of a special relationship.<sup>81</sup>

The defendants moved for a directed verdict prior to closing arguments, asserting they were under no duty, but Judge Weinstein denied the motion and allowed the case to be resolved by the jury.<sup>82</sup> This refusal marked the first time that such a claim has ever been submitted to a jury.<sup>83</sup> The jury then returned a verdict for the defendants, explaining that their decision was driven by the belief

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77. *See id.* The plaintiffs also suggested that the duty might require the manufacturers to procure the purchaser's background information at the time of the sale because this particular product was purchased through the mail with no such requirements. *See id.*

78. A duty may occur under two situations; first, if there is a special custodial relationship between the manufacturer and the injurer or second, when a special protective relationship between the manufacturer and the victim exists. *See id.* at 691. However, the *Halberstam* defendants also claimed that foreseeability of criminal misuse in New York is relevant only in determining the scope of the duty, not whether it in fact exists at all. *See id.* at 691 n.47 (citing *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996); *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 36 (N.Y. 1985); *Pulka v. Edelman*, 385 N.E.2d 1019, 1022 (N.Y. 1976)).

79. *See Lytton, supra* note 15, at 691.

80. *See, e.g., Earsing v. Nelson*, 212 A.D.2d 66, 69 (N.Y. App. Div. 1995).

81. *See id.* Special relationships include custodial relationships, which are those between parents and children and psychiatrists and patients, as well as protective relationships, which are those between landlords and tenants and teachers and students. *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976); *Bell v. Bd. of Educ.*, 687 N.E.2d 1325 (N.Y. 1997); *Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451 (N.Y. 1980).

The plaintiffs tried to illustrate that a special relationship would be irrelevant in this circumstance because a relationship is necessary only in cases of nonfeasance, where the defendant would have failed to intervene to prevent a third party from harming a victim, but a relationship has never been required in cases of misfeasance, where the defendant's conduct creates or increases the risk of a third party harming a victim. *See Lytton, supra* note 15, at 691; *see also Carrini v. Supermarkets Gen. Corp.*, 550 N.Y.S.2d 710, 712 (N.Y. App. Div. 1990) (holding security firm not liable for injuries caused by thief to bystander for failure to prevent flight of thief absent special relationship between the security firm and bystander).

82. *See Lytton, supra* note 15, at 697.

83. *See id.*

that the defendants' marketing practices did not cause the plaintiffs' injuries.<sup>84</sup>

This case is notable in the history of gun litigation because the plaintiffs overcame three obstacles that were fatal to prior plaintiffs in claims against gun manufacturers. First, courts consistently refused to apply the doctrine of negligent entrustment to firearm manufacturers who marketed their weapons to the general public.<sup>85</sup> Traditionally, liability based on this doctrine arose from selling potentially dangerous products to consumer groups that lacked the capacity to exercise ordinary care.<sup>86</sup> However, plaintiffs had failed to solve the problem of alleging that the entire public lacks the capacity to use ordinary care when purchasing a gun because it is the public that actually sets the standard.<sup>87</sup> In *Halberstam*, the judge excused such a deficiency. Second, courts previously viewed negligent marketing claims essentially as design defect claims in disguise, which forced plaintiffs to allege a defective condition in order to recover.<sup>88</sup> In *Halberstam*, the plaintiffs alleged a duty of care that demanded reasonable restrictions on marketing without claiming a defect, which avoided the appearance of trying to completely prohibit the promotion or sale of weapons.<sup>89</sup> This strategy circumvented the prior failures of negligent marketing claims.

Finally, courts often refused to hold defendants liable for injuries inflicted through the intervening, intentional criminal misconduct of others absent a special relationship.<sup>90</sup> The *Halberstam* plaintiffs argued, instead, that the manufacturers owed a duty to the public to take precautions against the intentional criminal misuse of their products where their own promotion and distribution contributed to the risk of such misuse.<sup>91</sup> Therefore, although the jury

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84. See *id.* at 697-98.

85. See *id.* at 683. The case of *Linton v. Smith & Wesson*, 469 N.E.2d 339, 340 (Ill. App. Ct. 1984), provides an example of such a refusal. The plaintiff was shot by an intoxicated woman and sued the manufacturer, alleging that a duty existed, "to use 'reasonable means to prevent the sale of its handguns to persons who are likely to cause harm to the public.'" *Id.* at 340. The appellate court held that there was no precedent which imposed a "duty upon the manufacturer of a non-defective firearm to control the distribution of that product to the general public" beyond any statutory regulations, which were not violated. *Id.*

86. See Lytton, *supra* note 15, at 683.

87. See *id.* at 684. However, the application of this standard does not take into account the fact that many of the people injured by firearms are not the purchasers, thus those injured will not be protected until the risk to them is considered. See also Siebel, *supra* note 12, at 267-68.

88. See Lytton, *supra* note 15, at 700-01.

89. See *id.* at 703. Like the plaintiffs in *Halberstam*, the plaintiffs in *Hamilton*, *infra*, argued for a duty which would place restrictions on marketing and distribution, but would not prohibit all marketing; therefore, the negligent marketing claim is distinct from a claim of defective design. See *id.* at 702.

90. See *id.* at 703; see also KEETON ET AL., *supra* note 60, § 33, at 201-03.

91. See Lytton, *supra* note 15, at 685. Using this approach, plaintiffs must emphasize that they do not seek to hold the manufacturers liable for the conduct of criminals, but only for lesser harms caused by easy access to weapons tailored to criminal activity. See *id.* at 703.

sided with the defendants, the fact that the judge even allowed the jury to hear this case was a significant achievement for the plaintiffs.

While supporters of gun litigation might interpret *Halberstam* as a step towards imposing a duty on gun manufacturers, several considerations temper the value of the decision. Initially, surpassing a motion for summary judgment was a success, but the judge issued no written opinion which could provide support for future plaintiffs.<sup>92</sup> Additionally, the unfavorable jury verdict highlights the lack of persuasive evidence presented to establish the causal connection between the manufacturers' marketing techniques and the criminal misuse of the weapons.<sup>93</sup> A tight connection is essential because juries could easily conclude that had the criminal not purchased the gun at issue, he would have obtained another weapon with which to commit the crime.<sup>94</sup> Plaintiffs will be more likely to convince a jury of causation when they can prove that a defendant's negligent marketing created a new group of people likely to engage in criminal activity who, but for the defendant's efforts, would be less likely to purchase a weapon.<sup>95</sup> Plaintiffs in the next gun suit heard by Judge Weinstein were striving to present such circumstances to the jury.

#### IV. *HAMILTON V. ACCU-TEK*<sup>96</sup>

Approximately one year after *Halberstam* was decided, Judge Weinstein heard another case involving the liability of gun manufacturers, which also progressed to the jury for a verdict. This time, the jury decided in favor of the plaintiffs and made legal history in the process.<sup>97</sup>

The motivation for *Hamilton* began when two of the plaintiffs, Freddie Hamilton and Katrina Johnstone, lost family members to gun violence—Freddie lost her son in a gang shooting, and Katrina lost her husband to a robber.<sup>98</sup> Both women approached attorneys at local activist groups about pursuing claims against the industry, but both were disappointed when the groups refused to consider taking on the suits as a result of their lack of success in court.<sup>99</sup> The women then located Elise Barnes, an attorney associated with collective liability litigation in the early 1990s, which also occurred in Judge Weinstein's courtroom. Ms. Barnes steered her case to Judge Weinstein under a local practice rule that permits attorneys to request the services of a particular judge that has handled "related cases" in the past.<sup>100</sup>

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92. *See id.*

93. *See id.* at 704.

94. *See id.* at 704-05.

95. *See id.* at 706.

96. No. 95 Civ. 0049 (E.D.N.Y. 1999).

97. *See* Vanessa O'Connell & Paul M. Barrett, *Gun Makers Are Set Back in Jury Verdict*, WALL ST. J., Feb. 12, 1999, at A2.

98. *See* Barrett, *supra* note 68, at A1.

99. *See id.*

100. *See id.*

### A. Legal Strategy of the Case

The plaintiffs' case centered on allegations of negligent marketing and distribution, including the claim that gun companies produce and market more weapons for southern states, where it is easier to purchase a gun, than are actually demanded by legitimate buyers in that region.<sup>101</sup> Consequently, the negligent distribution allegedly allows gun traffickers to move surplus guns to states like New York, where gun control laws are much stricter.<sup>102</sup> Initially, the suit sought class certification and included other theories, like design defect, but the judge denied those claims along with the certification and required the plaintiffs to show that the manufacturers' distribution methods caused each injury.<sup>103</sup>

In 1996, Judge Weinstein allowed the case to move beyond summary judgment in a ruling, which stated:

[T]here may "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."<sup>104</sup>

This decision allowed the plaintiffs to argue that gun companies should be held collectively liable for gun violence without forcing the plaintiffs to prove a link between a particular manufacturer and the gun used in the crime.<sup>105</sup> Furthermore, in his denial of the motion for summary judgment, the judge observed "that the plaintiffs [had] been able to gather extensive material during discovery 'that focuses primarily on coordinated industry activities in opposing government efforts to impose more stringent controls on firearm sales and distribution.'"<sup>106</sup>

### B. The Verdict

In the end, the jury found fifteen of the twenty-five gun manufacturers liable

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101. See O'Connell & Barrett, *supra* note 97, at A2.

102. See *id.*

103. See Gelhaus, *supra* note 9, at 97.

104. Barrett, *supra* note 68, at A1 (quoting Judge Weinstein).

105. See Paul M. Barrett, *Pivotal Trial Pits Gun Victims Against Industry*, WALL ST. J., Jan. 4, 1999, at A13. The court surveyed theories of collective liability and found three factors present in all the cases. First, plaintiffs must show that it would be nearly impossible to determine the actual manufacturer responsible for causing the injury. Second, all handgun manufacturers must be shown to have engaged in tortious behavior. Third, "the plaintiffs [must] show that 'the problems of proof are related to the conduct' of the defendants." Tyrone Hughes, Note, *Hamilton v. Accu-Tek: Potential Collective Liability of the Handgun Industry for Negligent Marketing*, 13 *TOURO L. REV.* 287, 299 (1996) (citation omitted).

106. Hughes, *supra* note 105, at 298 n.62 (citation omitted). These activities included membership in trade organizations, and marketing and distribution. See *id.*

for negligent marketing.<sup>107</sup> However, the jury only imposed total damages of \$520,000 on three of the companies for just one of the seven shootings involved in the case.<sup>108</sup> The jurors affirmatively decided that a number of the manufacturers failed to adequately supervise how their wholesalers distribute guns to retail outlets. Most of the jurors, though, rejected the plaintiffs' argument that federal gun statistics show that manufacturers oversupply southern states causing the excess to move north through illegal traffickers.<sup>109</sup> Ironically, even though a number of jurors considered themselves pro-industry, they supported a unanimous verdict that held gun manufacturers as a group legally responsible for the criminal use of their products.<sup>110</sup>

In the end, the jurors disregarded much of the testimony while devising their own system for assessing liability.<sup>111</sup> First, the jurors agreed that manufacturers should discourage sales at gun shows and by dealers who do not have stores; therefore, they separated each company into one of three groups.<sup>112</sup> The companies whose contracts with wholesalers included restrictions for the years at issue and the manufacturers who did not have any contracts were dismissed from any liability. However, the companies whose contracts lacked restrictions were found immediately negligent.<sup>113</sup>

In determining whether any of the negligent companies had directly caused the shootings, the jurors searched through the companies' product catalogues to see which companies produced the types of guns that were used in these crimes.<sup>114</sup> In addition, the jurors decided that most of the plaintiffs were to blame for their damages and thus, did not deserve a financial reward.<sup>115</sup> However, Steven Fox, one of the victims who survived an accidental gunshot wound to the head, was awarded damages because he was so young. The jurors agreed that \$4 million was appropriate, but only three of the negligent manufacturers produced the type of gun used against Fox.<sup>116</sup> Additionally, those three companies only held about thirteen percent of the sales in the handgun market.<sup>117</sup> Therefore, Fox was awarded \$520,000.<sup>118</sup>

After the verdict, the defense moved to have the verdict set aside, but Judge

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107. See *Hamilton v. Accu-tek*, 62 F. Supp. 2d 802, 808 (E.D.N.Y. 1999); O'Connell & Barrett, *supra* note 97, at A2.

108. See *Hamilton*, 62 F. Supp. 2d at 808. For a list of the companies found negligent, see *id.* at 811.

109. See O'Connell & Barrett, *supra* note 97, at A2.

110. See Paul M. Barrett & Vanessa O'Connell, *Gun Makers, Claiming Jury Misconduct, Seek to Throw Out Negligence Verdict*, WALL ST. J., Feb. 17, 1999, at B11.

111. See O'Connell & Barrett, *supra* note 1, at A1.

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.*

116. See *id.*

117. See *id.*

118. See *id.*



Weinstein denied the motion.<sup>119</sup> He noted that “[w]hile New York courts have ruled that ‘[s]elling a dangerous product is not unlawful, . . . there is a subtle but distinctly different claim in the present case, i.e. that while the sale of a weapon is not in itself tortious, the method of sale and distribution by producers may be.’”<sup>120</sup> To support levying a duty against manufacturers for their distribution and marketing practices, the judge recited statistics, which showed that in twenty-seven cities between 1996 and 1998, fifty-one percent of guns used in crimes by juveniles or people between the ages of eighteen and twenty-four were acquired by intermediaries who purchased them directly from legitimate, licensed dealers.<sup>121</sup> The judge also stated:

It is the duty of manufacturers of a uniquely hazardous product, designed to kill and wound human beings, to take reasonable steps available at the point of their sale to primary distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them. Such a limited duty is consistent with manufacturers’ traditional broad duties . . . .

. . . .  
Manufacturers who market and distribute handguns negligently set the stage for their criminal misuse.<sup>122</sup>

The judge concluded that: “It cannot be said, as a matter of law that reasonable steps could not have been taken by handgun manufacturers to reduce the risk of their products being sold to persons likely to misuse them—a point which is underscored by the jury’s findings on causation . . . .”<sup>123</sup>

### *C. Impact of the Case*

After the verdict was announced, both plaintiffs and defendants claimed victory.<sup>124</sup> Defense attorney James Dorr noted the modest damage award while stating that the decision was clearly a verdict for the defense because the jury rejected the plaintiffs’ main argument concerning the oversupplied southern markets.<sup>125</sup> Furthermore, the companies were released from not one, but six wrongful death cases.<sup>126</sup> Conversely, plaintiffs claimed a major victory with the negligence of fifteen of the companies confirmed, even though only three of

119. See Mark Hamblett, *Verdict Against Gun Makers Upheld*, N.Y. L.J., May 27, 1999, at 2.

120. *Id.* (quoting Judge Weinstein).

121. See *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 825-26 (E.D.N.Y. 1999).

122. *Id.* (quoting Judge Weinstein).

123. Hamblett, *supra* note 119, at 2 (quoting Judge Weinstein).

124. See *O’Connell & Barrett, supra* note 97, at A2. However, the defense has continued to contest some aspects of the case. See *id.*

125. See *id.*

126. See Bob Van Voris, *Lawyers Debate Who Won Gun Suit*, NAT’L L.J., Mar. 1, 1999, at A6.

twenty-five defendants were assessed damages, because gun manufacturers had never before been held liable on theories of negligent marketing or distribution.<sup>127</sup> However, even some jurors were unsure which party was victorious. One juror stated: "Really the plaintiffs lost because they had the burden of proof, and in the end, there wasn't enough there . . . . I didn't grasp that we had found so many negligent until I read it in the papers the next day."<sup>128</sup>

Overall, the *Hamilton* verdict is highly unlikely to provide any legal boost to plaintiffs in gun suits around the country for several reasons. First, the verdict was a mixed decision where many of the companies were found liable, but no damages or other real penalty for their activities was assessed.<sup>129</sup> Second, the wholesalers, who were originally named as defendants, were dismissed for lack of evidence,<sup>130</sup> and out of the twenty-five defendants who remained, only \$520,000 in damages was assessed against three of the companies. The decision was also very fact-specific and difficult to predict. Furthermore, New York is a very favorable jurisdiction in which to try new theories of products liability, especially in front of Judge Weinstein, who is well-known for keeping an open mind about innovative tort claims. For these reasons, other jurisdictions will not likely afford the *Hamilton* verdict much precedential weight when confronted with their own gun litigation.

Beyond the circumstances of *Hamilton*, other hurdles exist as well. For example, issues of causation and the related public policy decisions necessary to hold gun makers liable for criminal acts are still hotly debated. As this verdict illustrates, the jury was unwilling to compensate all of the victims and refused to assess large damage awards, which illuminates the weakness of the plaintiffs' verdict. However, many cities around the country are hoping to gain leverage against gun manufacturers using *Hamilton* as ammunition.

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127. *See id.* There are several reasons why the theory of negligent distribution has never been successful for plaintiffs and may continue to prove difficult in the future. *See Note, Handguns and Products Liability*, 97 HARV. L. REV. 1912, 1921 (1984). First, handgun manufacturers have no practical means to identify which of their thousands of potential customers will misuse the product, and the industry would have a difficult time designing a stricter distribution system without precluding legitimate buyers from acquiring guns. *See id.* Additionally, the courts' informal inquiries into distribution methods would create inconsistent results. In a specific example, the plaintiff would have to show that his attacker would not have come to possess the gun had the manufacturer not used the defective system of distribution in question. *See id.* at 1921-22. If the criminal could have acquired the gun through other means, the plaintiff would have to be denied any recovery. A final concern involves the fact that many guns used in crimes have been stolen from the original purchaser, and if manufacturers tried to tighten the distribution system, the black market for guns could explode, allowing the problem to continue. *See id.* at 1922.

128. O'Connell & Barrett, *supra* note 1, at A1.

129. *See id.*

130. *See* Vanessa O'Connell, *Judge Drops Gun Wholesalers as Defendants in Landmark Case*, WALL ST. J., Jan. 27, 1999, at B15.

## V. CITY SUITS AGAINST THE GUN MANUFACTURERS

Hoping to achieve financial success similar to the state attorneys general who were able to negotiate a settlement with tobacco companies after asserting legal claims against the industry, the mayors of almost thirty cities around the country have filed suits against gun manufacturers.<sup>131</sup> The cities' attorneys believe their suits may have a unique advantage over cases brought by individual plaintiffs because of the shift in the focus of the litigation. Cases filed by individuals have consistently fallen short on issues of causation and duty because the industry can point to a third party who actually committed a criminal act, breaking the chain of causation.<sup>132</sup> However, similar to the states' tobacco claims, causation and duty problems are reduced when a municipality, who alleges it did not share in the responsibility for the harm, sues for the foreseeable damages it has suffered.<sup>133</sup> The focus of these claims is not on the injuries to the victim, but on the harm experienced by cities as a whole from the practices of the industry regarding marketing, distribution, and safety devices.<sup>134</sup> In such cases, the cities' attorneys insist that no new legal theories are needed because they can utilize several traditional tort theories such as public nuisance and negligence.<sup>135</sup>

### A. *The Legal Claims*

New Orleans and Chicago initiated the battle by filing the opening lawsuits against the gun industry to recover police, emergency, and medical services expenses from accidental shootings and homicides.<sup>136</sup> New Orleans filed first on October 30, 1998, and its suit asserts that guns manufactured and sold without locking devices or adequate safety warnings are unreasonably dangerous and defective.<sup>137</sup> The city also alleges that gun makers are capable of "personalizing" weapons, but have neglected to pursue this technology.<sup>138</sup> The suit names gun

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131. See Matt Bai, *The Feds Fire a Round*, NEWSWEEK, Dec. 20, 1999, at 38.

132. See Kairys, *supra* note 5, at 12-13. This is similar to the problems that plaintiffs in tobacco cases were forced to confront—regardless of the problems with cigarettes, the smoker continued to smoke, thus sharing in the responsibility of the injury to his or her health. See *id.*

133. See *id.* at 13. The harm inflicted on the cities through the marketing and distribution practices of the industry is quite diverse, but it can include medical costs, and the expenses of police, emergency personnel, public health, human services, courts, prisons, sheriff, fire, and other services. See *id.*

134. See *id.*

135. See *id.*

136. See Lisa Gelhaus, *Cities Contemplate Filing Anti-Handgun Lawsuits*, TRIAL, Jan. 1999, at 96, 98.

137. See *id.* Behind these allegations are statistics showing that every day approximately one child is killed and as many as thirteen more are injured in unintentional shootings. See Siebel, *supra* note 12, at 253.

138. See Barrett, *supra* note 8, at A3; see also Siebel, *supra* note 12, at 257-58 (stating that changing gun design is analogous to changes that the auto industry made to improve safety features like designing more crash-resistant vehicles, and offering seatbelts and airbags).

manufacturers, gun associations, and area pawnshops as defendants.<sup>139</sup> The mayor of New Orleans explained his motivation for the suit when he stated, “[t]he continuing senseless deaths of children and other citizens make it very difficult for me to sit around a table and negotiate as thousands of handguns are pumped into our streets every year.”<sup>140</sup> The mayor is hopeful that this suit and others like it might be able to place enough pressure on the industry to compel manufacturers to innovate significant safety designs.<sup>141</sup>

Chicago’s suit takes a different approach and targets the loose distribution practices of the industry.<sup>142</sup> It uses a public nuisance statute as the legal anchor for its \$433 million claim because the city has some of the most restrictive gun laws in the country. These laws prohibit handgun sales and private ownership of handguns unless registered before 1982.<sup>143</sup> However, despite such restrictive laws, an undercover operation by Chicago police<sup>144</sup> revealed that the city had a severe gun trafficking problem; thus the suit alleges that gun manufacturers and dealers facilitate trafficking by selling guns with the knowledge that they will be used in crimes.<sup>145</sup> The suit also claims that the defendants create a public nuisance because they knowingly design, market, and distribute firearms to facilitate their entry into Chicago where they are illegal to possess.<sup>146</sup> Furthermore, the suit asserts that manufacturers “knowingly oversupply” gun stores located outside the borders of the city with more weapons than the lawful

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139. See Gelhaus, *supra* note 136, at 88.

140. *Id.* (quoting New Orleans Mayor Marc Morial).

141. See Siebel, *supra* note 12, at 263.

142. See *id.* at 268.

143. See Barrett, *supra* note 8, at A3.

144. Operation Gunsmoke investigated twelve stores around Chicago where the highest number of guns traced to crimes in the city were sold. See Siebel, *supra* note 12, at 279. The undercover officers purchased 171 guns over a span of three months and “openly bragged [to dealers] about needing the guns to ‘settle a score,’” reselling the guns to drug gangs, or using them in other criminal ventures. *Id.* at 280. In each case, the dealers sold the guns to the officers. See *id.*

145. See Barrett, *supra* note 8, at A3.

146. See *id.* However, with the failure of a similar illegal trafficking argument in *Hamilton*, this allegation will be difficult to prove. David Kairys, a law professor at Temple University in Philadelphia, designed the approach that by flooding certain areas with guns inevitably used in crime, the industry disrupts public safety and health. He claims that lawsuits against the industry have failed in the past because the problem is that handguns are not defective, but that they work too well. Therefore, he hopes to shift a jury’s attention toward the harm done to the community as a whole. See *id.*; see also Kairys, *supra* note 5, at 14 (stating that handgun manufacturers’ marketing, distribution, and promotion of their products, designed to instantaneously deliver lethal force, significantly interferes with a public right and creates a public nuisance by “(a) flooding neighborhoods and communities with handguns; (b) making handguns easily available to persons with criminal intentions, felons, and minors; (c) confusing and deceiving law-abiding purchasers about the great risk of possession of a handgun in the home and of concealed carrying of a handgun in public places; and (d) failing to provide potential purchasers with appropriate warnings”).

market could absorb, with the intention that many guns will move into the black market.<sup>147</sup> Chicago Mayor Richard Daley defended his position by stating, “[g]un manufacturers and retailers know exactly what they’re doing [when they] refuse to impose even the most basic controls [on distribution of their products].”<sup>148</sup> Following Chicago’s lead, more cities joined the litigation as San Francisco, Cleveland, Los Angeles, Atlanta, and Bridgeport filed similar suits to offset their cities’ gun-related expenses.<sup>149</sup>

As more cities filed suits, the cases began to model the two main theories of liability previously alleged by New Orleans and Chicago. For example, Atlanta’s lawsuit is very similar to the case filed by New Orleans, alleging that gun makers do not use adequate safety devices to keep unauthorized users, like children, from using the weapons.<sup>150</sup> The suit also claims that guns are “inherently and unreasonably dangerous” because anyone can fire them and they are not issued with sufficient warnings and instructions about danger and storage.<sup>151</sup> Furthermore, Atlanta asserts that guns are promoted to suggest that they are unrealistically safe. After filing the city’s lawsuit, the mayor of Atlanta, Bill Campbell, stated:

It has come time for us to hold gun manufacturers to the same standards that we hold cars, insecticides, medicines and a host of other inherently dangerous products. They can be made safer, they should be made safer, and we think this is the opportunity and the time to do so. . . . We’re not trying to abridge the Second Amendment . . . . What we’re saying, however, is that there’s a problem with the manufacture of this product that has an inherently dangerous nature that could be improved.<sup>152</sup>

The suit seeks an unspecified amount of damages to recover the costs of police protection, emergency services, facilities and other services attributable to the threat of guns, and reduced tax revenue due to lost productivity.<sup>153</sup>

Gun industry officials publicly responded that their products already come with safety devices and instructions, and they cannot absolutely guard against an

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147. Barrett, *supra* note 8, at A3.

148. *Id.*

149. See Paul M. Barrett & Shirley Leung, *Gun Industry Faces Court Challenge from Los Angeles and San Francisco*, WALL ST. J., May 25, 1999, at B3. One professor suggests that the cities are pursuing the legitimate goal of placing the cost of guns on the lowest cost avoider, which supposes that the losses in a products liability suit should be placed on the party who can best analyze the problem and do something about it. See Vandall, *supra* note 18, at 569. Accordingly, manufacturers know what types of guns are produced, who buys them, how they are used, what types of injuries occur, and these companies have the power to increase the costs of guns, redesign the products for better safety, or remove them from the market. See *id.*

150. See Jay Croft & Carlos Campos, *Gun Makers, NRA Vow to Fight City's Lawsuit*, ATLANTA J., Feb. 5, 1999, at A1.

151. *Id.*

152. *Id.*

153. See *id.*

owner's carelessness.<sup>154</sup> An attorney for Beretta U.S.A. Corporation, one of the defendants named in the suit, stated, "[t]here's no gun made that can't be locked. The ultimate decision to lock or not lock a gun lies with the owner, and there are many customers who do not want to lock a gun."<sup>155</sup> Atlanta Senate Minority Leader Eric Johnson also spoke out against the city:

I think they're making a mistake suing legal business for legal products and expecting them to be held accountable for the abuses of citizens. I'd hate to think we're in a situation where we could sue Ford for cars (that are driven improperly) or Nike for shoes that people get their ankles twisted in.<sup>156</sup>

### B. *The First Effects of the Legal Battle*

The wave of city suits filed against gun manufacturers has initiated some restructuring in the industry as one California manufacturer pulled out of the cheap gun market entirely.<sup>157</sup> Additionally, both the pro and anti-gun camps have predicted that a prolonged litigation process could result in the disappearance of some of the smaller gun makers, an increase in prices, and greater stability with the larger players who may be more willing to accept regulations.<sup>158</sup>

In fact, in March 2000, Smith & Wesson stepped out of industry ranks by agreeing to a deal where the company promised to make specific safety advances, such as incorporating high and low-tech locks on its weapons and reorganizing its relationships with dealers by requiring new restrictions on how its guns are sold.<sup>159</sup> In exchange for these concessions, the federal government, along with the states of New York and Connecticut, agreed not to name Smith & Wesson in suits they threatened to file against the industry.<sup>160</sup> In addition, at least fifteen of the cities that sued the industry agreed to drop Smith & Wesson from their suits.<sup>161</sup> However, the deal the federal government thought would encourage other manufacturers to agree to restrictions quickly deteriorated when the NRA began to flex its muscles and a Republican took over the White House. In fact, Smith & Wesson "ran face first into a gun lobby at the height of its power, and

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154. See Jay Croft & Carlos Campos, *Defying Foes at Capitol, Atlanta Sues Gun Makers*, ATLANTA CONST., Feb. 5, 1999, at A1.

155. *Id.*

156. *Id.*

157. See Paul M. Barrett & Alexel Barrionuero, *Guns: Handgun Makers Recoil as Industry Shakes Out*, WALL ST. J., Sept. 20, 1999, at B1.

158. See *id.*; see also Bai, *supra* note 131, at 38 (stating that one Colt plant was forced to lay off over 300 employees while other gun manufacturers across the country admit to feeling the pressure from the mounting legal bills).

159. See Paul M. Barrett & Vanessa O'Connell, *Austrian Firm May Follow Lead of Smith & Wesson to Avoid U.S. Sanctions*, WALL ST. J., Mar. 20, 2000, at A3.

160. See *id.*

161. See *id.*

a gun culture hostile to change.”<sup>162</sup> Immediately after the deal was signed, the NRA sent scathing messages to more than three million of its members, calling Smith & Wesson a British-owned traitor to the Bill of Rights.<sup>163</sup> After a painful consumer boycott and deafening protests from its retailers, Smith & Wesson pulled out of the agreement.<sup>164</sup>

Other gun makers have sworn off a fight and taken a different approach. In September 1999, three California manufacturers who made cheaper guns commonly associated with crime declared bankruptcy as a way to avoid the lawsuits filed by the nearly thirty municipalities.<sup>165</sup>

### C. *The NRA's Response to the Cities' Lawsuits*

The NRA, a powerful lobbyist organization, vowed to fight back against the city suits with the help of several states by endeavoring to get both state and federal legislation passed that would either prevent municipalities from filing suits against the industry or would set damage limits on any verdicts.<sup>166</sup> The organization has already succeeded in getting legislation passed in at least one house of the state legislatures in fourteen states, which precludes local governments from taking legal action against gun manufacturers, and as many as twenty more states could pass similar bills in the future.<sup>167</sup>

The first state to pass such legislation was Georgia, whose bill shields gun manufacturers from product liability suits brought by cities or counties.<sup>168</sup> Both houses of the Georgia legislature passed the measure with strong bipartisan majorities, with the Senate voting forty-four to eleven and the House voting one hundred and forty-six to twenty-five.<sup>169</sup> A similar bill introduced in Florida would make it a crime punishable up to five years in jail with a \$5000 fine for any local government official to file a suit against gun manufacturers.<sup>170</sup> The bill

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162. Matt Bai, *A Gun Deal's Fatal Wound: As a Landmark Pact to Control Gun Sales Falls Apart, Smith & Wesson Takes the Hit*, NEWSWEEK, Feb. 5, 2001, at 30.

163. *See id.*

164. *See id.*

165. *See* Paul M. Barrett, *Some Small California Gun Firms File Under Bankruptcy Code as Cities Sue*, WALL ST. J., Sept. 13, 1999, at B10.

166. *See* Gelhaus, *supra* note 9, at 98.

167. *See* Michael Janofsky, *Concerns About Guns Put New Pressure on State Legislators*, N.Y. TIMES, Jan. 5, 2000, at A12.

168. *See* Gallia, *supra* note 52, at 160.

169. *See* Firestone, *supra* note 10, at A1. The Georgia law states in part, “[t]he authority to bring suit and right to recover against any firearms or ammunition manufacturer, trade association, or dealer by or on behalf of any governmental unit . . . shall be reserved exclusively to the state.” GA. CODE ANN. § 16-11-184(b)(2) (2000). Importantly, the official text of the statute does not include a retroactive provision. *See id.*

170. *See* David Nitkin & Jay Weaver, *State Drops Bills Banning Suits Against Gun Makers*, FORT LAUDERDALE SUN-SENTINEL, Apr. 28, 1999, at 5B. The Florida “bill states that guns and ammunition are ‘lawful and not unreasonably dangerous’ and prohibits a gun from being ‘deemed

also includes a retroactive provision that could quash the suit filed by Miami in January 1999, which seeks to hold manufacturers liable for what the city spends on police and hospital services as a result of gun violence.<sup>171</sup> After devoting significant time and energy to instigating these bills, the NRA vowed to concentrate on states where the governor was likely to sign such a bill to preempt as much legislation as possible.<sup>172</sup>

The legislation was defended by NRA vice president, Wayne LaPierre, who stated,

What the mayors are going to find out is that a direct attack on the freedom to bear arms is the toughest briar patch they can jump into . . . .

They think there is no cost, and this is a way to a quick buck, like tobacco money. But their cost, politically and economically, is going to be high, because we're determined to expose this for the sham that it is.<sup>173</sup>

An attorney for one of the defendants in the Atlanta suit, Beretta U.S.A. Corporation, agreed: "It strikes me as inappropriate for the mayor of a city to try to use, through harassing litigation, what he's unable to accomplish through persuasion at the legislative level . . . ."<sup>174</sup> U.S. Representative Bob Barr, who helped pass the Georgia legislation, explained his actions by stating:

The possibility of imposing liability on an entire industry for harm that is the sole responsibility of others is an abuse of the legal system . . . . The liability actions commenced or contemplated by municipalities and cities are based on theories without foundation in hundreds of years of the common law and American jurisprudence.<sup>175</sup>

defective' because it" may have been used in a crime. Gelhaus, *supra* note 9, at 98 (citation omitted). James J. Baker, chief lobbyist for the NRA, stated, "[w]e are responsible for the Florida legislation . . . . The point is to try to get rid of the suits that have already been filed [and to target] as many as [twenty-five] or [thirty] states where local officials are considering suing." Sharon Walsh, *NRA Moves to Block Gun Suits; Bills in [Ten] States Would Bar Action by Local Officials*, WASH. POST, Feb. 26, 1999, at A1. Dennis Henigan, legal director of the Center to Prevent Handgun Violence, a nonprofit organization helping Miami in its suit, responded, "[w]e think this is an outrageous attempt to prevent Miami-Dade from asserting the legal rights of its citizens . . . . We allow ordinary citizens and cities to assert their rights in court. If a suit is frivolous, the courts have a right to sanction. . . . But we don't threaten people with jail . . . ." *Id.*

171. *See id.*

172. *See id.* This is not the first time that the NRA has attempted to head off the efforts of anti-gun activists—in the 1980s when some jurisdictions passed gun control laws, the NRA approached other regions to pass bills that would prohibit such statutes. *See id.*

173. Croft & Campos, *supra* note 150, at A1 (quoting Wayne LaPierre, NRA vice president).

174. *Id.* (quoting Jeffrey Reh, attorney for Beretta U.S.A. Corp.).

175. Paul Frisman, *Gun Suits Head Down Tobacco Road, Bridgeport Shoots from the Hip to Recover Police and Health Care Costs*, CONN. L. TRIB., Apr. 12, 1999, at 1 (quoting U.S.



Accordingly, Dan Coenen, a law professor at the University of Georgia, predicted that if the gun legislation is upheld with the retroactive provision, the days of Atlanta's lawsuit are numbered.<sup>176</sup> "The city of Atlanta . . . would be viewed by the courts as an arm of the state . . . . Therefore the state Legislature would be able to limit what the city of Atlanta can do in this area."<sup>177</sup>

Many other state legislatures have been active in proposing similar bills, like Pennsylvania, where the Senate approved a bill thirty-nine to eleven, which prohibits cities from suing gun manufacturers.<sup>178</sup> Oklahoma passed a bill in June 1999 that reserves to the state the right to sue arms manufacturers for damages relating to the sale, manufacture or design of firearms and ammunition.<sup>179</sup> However, this bill does not prevent cities and towns from suing for breach of contract or warranty, and it does not prevent individuals from filing suits.<sup>180</sup> Additionally, the State Assembly in Wisconsin passed a bill in a seventy-five to twenty-one vote that prohibits both governments and individuals from suing gun makers and dealers for the costs of gun violence, unless the gun was defective or negligently sold.<sup>181</sup>

U.S. Representative Bob Barr also introduced a bill in Congress that would protect gun manufacturers by prohibiting lawsuits filed by cities across the country.<sup>182</sup> Barr, a Georgia Republican and an NRA board member, stated that federal legislation was needed to preserve free enterprise and halt the get-rich schemes of trial lawyers who attempt to take on big industries.<sup>183</sup> Furthermore, he supported his bill by explaining, "[i]f these lawsuits are allowed to proceed . . . there will be no industry in America that will be safe from these abusive and predatory lawsuits."<sup>184</sup> Conversely, Senator Barbara Boxer, a California Democrat, intends to introduce an opposing bill to preserve the rights of municipalities to sue gun manufacturers.<sup>185</sup> She stated, "[i]f local governments believe the fight against crime is being hampered because of a mass proliferation of guns, I believe it is in the national interest to allow them to take action in

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Representative Bob Barr from Georgia).

176. See Bill Rankin, *Change in State Law Could Derail Atlanta Suit*, ATLANTA J., Feb. 7, 1999, at G5.

177. *Id.* (quoting Dan Coenen, Professor at University of Georgia).

178. See *Senate Amends Bill to Include Ban on Gun Suits*, PA. L. WKLY., Nov. 22, 1999, at 2.

179. See Marie Price, *Late Bill Bans Cities from Suing Gun Manufacturers*, OKLA. CITY J. REC., June 9, 1999, at A1.

180. See *id.*

181. See Anthony Jewell, *Bill to Shield Gun Sellers Gains Assembly Oks, Some Immunity from Lawsuits*, WIS. ST. J., Feb. 9, 2000, at 3B.

182. See Lizette Alvarez, *A Republican Seeks to Ban Suits Against Gun Makers*, N.Y. TIMES, Mar. 10, 1999, at A16.

183. See *id.*

184. *Id.* (quoting Republican U.S. Representative Bob Barr from Georgia).

185. See *id.*

court.”<sup>186</sup> However, as the legislation struggle continues, many supporters of gun litigation are turning their sights away from the courtroom and towards the negotiating table where they hope to achieve a settlement similar to the tobacco deal.

#### *D. Similarities to Tobacco Claims*

Anti-gun groups are hoping the NRA does not destroy their chances to have their cases heard in court, or at least their chances to follow the path of tobacco litigation to a negotiated deal.<sup>187</sup> Professor Lester Brickman explained the approach:

The strategy is to emulate what took place in the tobacco wars . . . . What the plaintiffs’ lawyers relied on was their political ability to bring in enough states to reach a threat level that would cause the tobacco companies to cave in.

If they can get 20 suits going on, they could raise the cost to the gun manufacturers to \$1 million a day.<sup>188</sup>

The similarities in the industry suits have motivated anti-gun groups to continue their litigation battles. For example, the group of attorneys that played an integral role in the tobacco litigation are also intimately involved in the gun litigation, initiating and consulting in several of the suits.<sup>189</sup> However, an important key in the tobacco deal was the damaging information released by the whistleblowers that threatened the industry, and thus far, the gun companies say they will escape similar threats.<sup>190</sup> Another similarity in the suits involves their strategy. Anti-gun activists are calling the structure of these suits “the tobacco model”—government entities file well-financed lawsuits, the discovery process probes deeper into how the companies do business, and it is hoped that one of the suits stays in court.<sup>191</sup>

The allegations in the cities’ suits also bear similarities to the tobacco litigation. For example, New Orleans has alleged that gun companies have failed to make safer guns that can only be fired by an authorized user, which is similar to the states’ claims that tobacco companies blocked the development of a safer cigarette.<sup>192</sup> Further, several cities have claimed that gun companies are targeting markets with lax gun laws, causing weapons to flow to criminals, as tobacco

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186. *Id.* (quoting Democrat Senator Barbara Boxer from California).

187. See Paul M. Barrett, *Jumping the Gun? Attacks on Firearms Echo Earlier Assaults on Tobacco Industry*, WALL ST. J., Mar. 12, 1999, at A1.

188. Laura Mansnerus, *Moving Target: Gun Makers*, N.Y. TIMES, Feb. 14, 1999, at D5.

189. See Barrett, *supra* note 187, at A1.

190. See *id.*

191. See Michael Higgins, *Taking Their Best Shot: Fed up with Gun Violence, Some Cities May Copy an Illinois Father’s Tobacco-Style Suit Against Gun Makers*, A.B.A. J., Aug. 1998, at 79, 81.

192. See Barrett, *supra* note 187, at A1.

companies were accused of targeting minors for cigarette sales. The plaintiffs' attorneys are hoping that these similarities, along with the threat of lawsuits and federal regulation, will force gun companies to agree to a deal, much like the tobacco industry.<sup>193</sup> However, although the comparisons seem strong, there are also many differences working against the cities who seek to pursue litigation.

## VI. THE FUTURE OF GUN LITIGATION

In light of the *Hamilton* verdict and the numerous city suits that have been filed, many anti-gun activists are optimistic about the future of gun litigation. However, their optimism is unfounded because the shaky and wide-ranging product liability theories of *Hamilton* do not provide a persuasive precedent. Furthermore, judges across the country are not ready to support such a battle, as evidenced by the continued failure of lawsuits against the industry.<sup>194</sup> Nor is the public ready to impose such serious sanctions on a legal and useful product with such a long history and sense of meaning in our society. Additionally, the city suits will not conclude with the large monetary success that some tobacco plaintiffs enjoyed because of vast differences in the industries. However, imposing restrictions on manufacturers through negotiations might be a more attainable goal if one or more of the city suits can avoid dismissal. Therefore, plaintiffs' dreams of a future filled with dramatic jury trials and overwhelming verdicts will remain unrealized, but it is unlikely that the industry will be able to remain completely uninfluenced by the efforts to allay society's concerns about gun violence.

### A. *The Value of Hamilton*

First, it will be very difficult for other individuals to repeat the *Hamilton* verdict or find greater success in suits against gun manufacturers.<sup>195</sup> Regardless of how the plaintiffs have tried to recast the verdict, the decision has definitely

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193. *See id.*

194. *See Hughes, supra* note 105, at 287, 305 n.1.

195. *See Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985). The mother of a convenience store clerk killed in a robbery brought a products liability action against the manufacturer of the handgun alleging the risks of injury and death from a non-defective revolver greatly outweighed any utility the gun had, making the product unreasonably dangerous. *See id.* at 1208. The court held the defendant not liable while stating:

This claim is totally without merit and totally unsupported by legal precedent. It is a misuse of tort law, a baseless and tortured extension of products liability principles. And, it is an obvious attempt—unwise and unwarranted, even if understandable—to ban or restrict handguns through courts and juries, despite the repeated refusals of state legislatures and Congress to pass strong, comprehensive gun-control measures.

*Id.* Furthermore, the court addressed the argument that gun manufacturers are better able to absorb the loss than victims. *See id.* at 1213. The court explained that the tort system is based on fairness and the ability of a gun manufacturer to spread the loss is not a sufficient basis for requiring guiltless purchasers to subsidize the actions of those who use the products wrongfully. *See id.*

sent mixed signals. Only fifteen of the twenty-five defendants were found liable, and that group was only composed of the manufacturers who sold their products at gun shows and to dealers who did not have stores.<sup>196</sup> The jurors were otherwise unwilling to impose greater liability. Furthermore, in the jurors' haphazard way of assigning liability, the majority of the fifteen negligent defendants were assessed no damages.<sup>197</sup> This fact sends a message that only the most minimal standards could be agreed upon for the assessment of liability, and no practical consequences were felt by the twelve companies who were not assessed any monetary damages. In addition, the damages amounted to only \$520,000, or \$173,333 per the three companies assessed damages, which is a relatively weak penalty from the jury.<sup>198</sup>

Aside from the verdict, Judge Weinstein is also widely known for his openness to new theories of accountability in products liability cases, and it could be difficult to locate a judge as sympathetic in another jurisdiction.<sup>199</sup> As this jury illustrated, the behavior of juries in general is very difficult to predict, which also adds to the low probability that this verdict could be repeated or surpassed. Therefore, this decision provides no real support for future plaintiffs.<sup>200</sup> For example, in *McCarthy v. Sturm, Ruger & Co.*,<sup>201</sup> the plaintiffs sued the ammunition manufacturer after they were struck by bullets fired in a subway shooting spree.<sup>202</sup> The judge quickly dismissed the case on summary judgment because he believed the manufacturer owed no duty to protect third parties from the criminal misuse of its products.<sup>203</sup> In closing, the court noted the plaintiffs' claims "seek legislative reforms that are not properly addressed to the judiciary. . . . I too would work to ban ammunition like the Black Talon if I was a member of the New York legislature. As judges, though, we both are

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196. See O'Connell & Barrett, *supra* note 97, at A2.

197. See *id.*

198. See *id.*

199. See Barrett, *supra* note 68, at A1.

200. See O'Connell & Barrett, *supra* note 1, at A1.

201. 916 F. Supp. 366 (S.D.N.Y. 1996). Contrary to Judge Weinstein's views, the *McCarthy* judge stated that New York would not recognize a duty running to all those affected by the use of bullets created simply by the act of marketing the bullets. See *id.* at 369-70. On this point, the court held that the advertisements did not emphasize qualities that would make them more attractive to criminals, any more than any other comparable product on the market. Therefore, to hold that the advertisements were negligent would hold the defendant liable for the manufacture of the product with these distinguishing characteristics. See *id.* at 369. Furthermore, the hollow-point bullets, which were designed to expand on impact, were created with the functional design of an inherently dangerous product, thus preventing any claims based on design defects or unreasonable dangerousness. See *id.* at 370. Finally, the individual's conduct was an extraordinary act that broke the chain of causation. See *id.* at 372. The judge stated, "[b]oth of plaintiffs' negligence theories fail because defendant owed no duty to the plaintiffs to protect them from criminal misuse of the Black Talon ammunition." *Id.* at 369.

202. See *id.* at 370.

203. See *id.* at 372.

constrained to leave legislating to that branch of the government."<sup>204</sup>

Most importantly, the issues of causation and fault raised in these suits are especially challenging because of the broader public policy decisions that are shadowed in the alternatives. To impose liability on a manufacturer of a legal product for the criminal misuse of that product months or even years later supposes a kind of responsibility that our society has yet to impose on other industries.<sup>205</sup> Furthermore, although lawsuits are now common, this type of liability could usher in a new era in the legal community, encouraging countless more suits alleging similar responsibility. The dynamics of playing an open-ended liability game in the courtroom are risky and under-appreciated. Ralph Boyd Jr., a Boston lawyer who has consulted with the gun industry, succinctly explained:

The auto industry makes vehicles that exceed by two the lawful speed limit in any jurisdiction . . . . What would stop someone from using this type of legal theory from saying, "Hey, you know those commercials that show cars speeding across the countryside, making tight turns on mountains, zipping around pylons on race courses? Why isn't that negligent marketing? Why isn't the auto industry responsible for all the accidents resulting from excessive speed?"<sup>206</sup>

### B. *The Prospects of the Cities' Suits*

Although one plaintiff in *Hamilton* received a weak verdict that could be labeled a success against the gun industry, the cities that have sued will not realize success in court. Bridgeport, Miami-Dade, and Cincinnati can attest to this as all three suits were dismissed at the end of 1999.<sup>207</sup> On December 10, 1999, the Bridgeport suit was dismissed when superior court Judge Robert McWeeny held that the city lacked standing to sue the gun industry.<sup>208</sup> The judge decided that the injuries of which the city complained were too remote and not

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204. *Id.*

205. See Bumann, *supra* note 44, at 723.

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

*Id.* (quoting KEETON ET AL., *supra* note 60, § 33, at 201).

206. Mansnerus, *supra* note 188, at D5 (quoting Ralph F. Boyd, Jr., a Boston lawyer).

207. See *County's Suit Against Gun-Makers Dismissed*, ORLANDO SENTINEL, Dec. 14, 1999, at D3.

208. See Paul Frisman, *Sticking to Their Guns*, CONN. L. TRIB., Dec. 27, 1999, at 1.

recoverable. "It is recognized at common law . . . that a plaintiff who complains of harm resulting from misfortune visited upon a third person is generally held to stand at too remote a distance to recover."<sup>209</sup> With regard to the cities' analogy to the tobacco industry cases, Judge McWeeny responded: "The tobacco litigation . . . has not succeeded in eradicating the rule of law on proximate cause, remoteness of damages and limits on justiciability."<sup>210</sup> He also explained that unlike the cities in gun cases, the states that sued the tobacco industry were authorized to do so by state law under "the state's unique role relative to protection of its citizens."<sup>211</sup> Finally, the judge viewed the question of damages skeptically, stating that "[c]alculating the impact of gun marketing on teen suicide and diminution of property values in Bridgeport would create insurmountable difficulties in damage calculation . . . . Plaintiffs cannot seriously maintain that reasonable certainty in calculating their damage claims is within the realm of possibility."<sup>212</sup>

In addition to the likelihood of court dismissals, the suits filed by the cities do not have the power to force a substantial financial settlement, unlike the states that faced-off with the tobacco industry. More specifically, the cities' legal fight over guns lacks the elements that were critical in achieving large damage awards in the tobacco litigation.<sup>213</sup> First, guns can be used for self-protection, target shooting, sporting, and law enforcement, while tobacco consumption has no comparable positive uses.<sup>214</sup> Whistleblowers and internal memos from the tobacco industry revealed corporate deceit, which weakened the position of the companies, but no comparable items have surfaced in gun litigation battles.<sup>215</sup> Next, gun manufacturers have never tried to hide the fact that guns are designed for deadly uses, while tobacco companies disputed negative health claims about their products for decades.<sup>216</sup> Furthermore, guns have a positive history in our culture, symbolizing freedom, independence, and honor.<sup>217</sup> The Second

209. *Id.* (quoting Judge Robert McWeeny's opinion).

210. *Id.* (quoting Judge Robert McWeeny's opinion).

211. *Id.* (quoting Judge Robert McWeeny's opinion).

212. *Id.* (quoting Judge Robert McWeeny's opinion).

213. *See* Barrett, *supra* note 187, at A1.

214. *See id.*

215. *See id.*

216. *See id.*

217. *See* Andrew Jay McClurg, *Handguns as Products Unreasonably Dangerous Per Se*, 13 U. ARK. LITTLE ROCK L.J. 599, 613 (1991). He states:

Our romantic attraction to guns has honorable enough roots. There was a time in this country when guns were a virtual necessity, fulfilling vital needs for early pioneers and settlers. They put food on the table and protected against attack from hostile natives.

But that was at least a century ago.

*Id.* However, Professor McClurg's inference that the passage of time diminishes the importance that guns play in our society may not be entirely true. Such history is all the more reason for some citizens to strive to maintain the freedom to possess a gun as they have over the past one hundred years.

Amendment right "to keep and bear arms"<sup>218</sup> strikes a powerful chord in many Americans, while the products of tobacco companies have never enjoyed such a reputation.

Finances may be the most important consideration for the cities seeking millions of dollars for the reimbursement of public expenses. While cigarette manufacturers have sales of over \$45 billion in the United States, gun manufacturers receive only about \$1.4 billion in annual sales, a mere three percent of tobacco sales.<sup>219</sup> Therefore, although tobacco companies could afford to sign a \$206 billion deal with the states,<sup>220</sup> gun manufacturers may only be able to afford an amount in the range of \$6 billion. Split between thirty cities, this figure may barely cover the cities' legal bills.

Additionally, few groups spoke up for smoker's rights, but gun owners harbor no such indifferent attitudes.<sup>221</sup> In fact, the NRA has positioned itself as a very significant player in the conflict by encouraging federal and state legislation which would prohibit lawsuits against the industry.<sup>222</sup> Moreover, the

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218. U.S. CONST. amend. II.

219. See Barrett, *supra* note 187, at A1.

220. See Mansnerus, *supra* note 188, at D5.

221. See Barrett, *supra* note 187, at A1.

222. The NRA was founded in 1871 by former Union Army officers who were concerned that many Northern soldiers could not properly use their weapons. See Melissa Ann Jones, *Legislating Gun Control in Light of Printz v. United States*, 32 U.C. DAVIS L. REV. 455, 483 n.4 (1999). The formal views of the NRA include the idea that, "[t]he concept of using lawsuits to destroy a lawful and constitutionally-protected activity violates long-standing American principles." NATIONAL RIFLE ASSOCIATION, FABLES, MYTHS & OTHER TALL TALES ABOUT GUN LAWS, CRIME AND CONSTITUTIONAL RIGHTS 18 (1999). Furthermore, the organization stresses that courts have routinely rejected the allegations that manufacturers should be held liable because they should have known that a criminal could misuse a gun and that guns are socially unacceptable products whose risk outweighs their social utility. The organization quotes the decision of *Eichstedt v. Lakefield Arms Ltd.*, 849 F. Supp. 1287, 1293 (E.D. Wis. 1994), where the court said, "[o]ne should never point a gun at another, thinking it is unloaded. And one should never compound the felony by pulling the trigger. When these cardinal rules are violated, the victim has an airtight negligence suit against the shooter. He has no case against the gun maker." *Id.*

The NRA is not the only source for legislation discouraging gun suits. Some states have taken steps to see that the responsibility remains with the person, not the manufacturer of the product, and they already have forms of such statutes. See Bumann, *supra* note 44, at 732. For example, Maryland's commercial code states:

A person or entity may not be held strictly liable for damages of any kind resulting from injuries to another person sustained as a result of the criminal use of any firearm by a third person, unless the person or entity conspired with the third person to commit, or willfully aided, abetted, or caused the commission of the criminal act in which the firearm was used.

MD. CODE art. 27, § 36-19(h) (2000). California, Colorado, Idaho, Montana, Texas, North Carolina, and Washington have also enacted some form of gun control laws with restrictions on plaintiffs. See Bumann, *supra* note 44, at 732.

fractured make-up of the gun industry may prevent any consensus among the companies, unlike the brokered deal secured against all the major tobacco companies.<sup>223</sup> In fact, the gun industry is composed of dozens of small, mainly privately held companies that expressed a variety of reactions to the litigation.<sup>224</sup> The diversity present in the gun industry is also illustrated by the manufacturers' wide variety of products, which is unlike the situation among tobacco companies.<sup>225</sup> This lack of homogeneity will make obtaining an industry-wide agreement a tough battle. Some of the better-established companies that make higher-quality guns for hunters, competitive shooters, and law enforcement officials are reluctant to be associated with the companies that make the cheaper, smaller, more concealable guns that are often used in crimes.<sup>226</sup> Still, other manufacturers want to try to shift the responsibility to the retailers.<sup>227</sup> These differences highlight why cities face significant obstacles in their lawsuits and negotiations.

However, if the cities can focus on reforming the practices of the industry, instead of going after large financial settlements, they might be able to strike a deal with some of the manufacturers.<sup>228</sup> To most effectively tackle problems of gun violence, the cities should concentrate on forcing the industry to improve their safety devices. Specifically, installing locking technology to prevent unauthorized access and misuse could prevent thousands of tragedies, especially among children.<sup>229</sup> In addition, requiring tighter controls over the industry's distribution channels would drastically decrease illegal trafficking while eradicating a major source of guns for criminals and juveniles.

### C. National Influence

In mid-December 1999, the federal government added some weight to the suits already filed by the municipalities by pledging to file a large class-action lawsuit against the industry unless the companies agree to change their business practices.<sup>230</sup> The goal of the administration was to encourage negotiations between the two groups, but the White House discussed the organization of a lawsuit among approximately 3300 public housing authorities, which would have alleged that the industry designs unsafe products and knowingly distributes them to criminals.<sup>231</sup> However, the political landscape of the gun debate completely

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223. See Barrett, *supra* note 187, at A1.

224. See Paul M. Barrett, *Courting Trouble? As Lawsuits Loom, Gun Industry Presents a Fragmented Front*, WALL ST. J., Dec. 9, 1998, at A1.

225. See Barrett, *supra* note 187, at A1.

226. See Barrett, *supra* note 224, at A1.

227. See *id.*

228. See Siebel, *supra* note 12, at 289.

229. See *id.* at 289-90.

230. See Bai, *supra* note 131, at 38.

231. See *id.* However, some government officials were concerned that the White House would rush to strike a deal with the industry in order to claim a political victory before the November 2000



changed with President Bush was inaugurated in January 2001. Considered a strong ally of the NRA, Bush eliminated the possibility of a federal lawsuit or any pressure from the federal government on the gun industry.<sup>232</sup> In fact, Bush pledged to back federal legislation that would prohibit cities from suing gun manufacturers, similar to the state legislation he helped push through as governor of Texas.<sup>233</sup> Although Bush does support instituting background checks at gun shows, a major issue in the debate, he does so only with the caveat that such checks be instantaneous, while opponents contest that three days is a more reasonable time period.<sup>234</sup>

While the clash over guns continues, it is clear that anti-gun groups have lost an ally in the Executive Branch, but the impact that this change in power will have on the gun debate remains to be seen. As between a compromise and courtroom victories, a compromise among the gun manufacturers and the cities is more likely. However, a long fight still looms ahead and monetary damages will be nearly impossible to achieve in a suit against gun makers when considering the involvement and strength of the NRA and the differences between the tobacco and gun industries. Consequently, individual plaintiffs and the cities have very little chance of winning damages in any court, and the prospects for a broadly successful negotiation are also small. As a result, the clear response to the question of whether *Hamilton* is a good predictor of what the future holds for gun manufacturers is an unambiguous no.

#### CONCLUSION

The prevalence of handguns in society, the notoriety of public shootings, and the ease of going to court, have led victims and anti-gun supporters to join the litigation fray. However, successful courtroom battles will remain out of reach for plaintiffs. The consistent failure of suits against gun manufacturers shows the unwillingness of judges to impose such severe liability on a lawfully made, properly functioning product. It is highly unlikely that one verdict could overturn such strong precedent. The lax distribution methods of some manufacturers may have convinced one jury that a number of gun companies need to tighten up their relationships with distributors and retailers, but this does not illustrate the viability of widespread liability.<sup>235</sup> The *Hamilton* verdict may have provided a

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election. See Paul M. Barrett & Shailagh Murray, *Some Plaintiffs Fear Clinton's Role in Gun Suits*, WALL ST. J., Dec. 15, 1999, at A16. Although some cities were willing to work with the President's team, others refused to meet because the administration was not pursuing the goals in which their city was interested. See *id.*

232. See Ben White & Terry M. Neal, *Bush Plans Gun Lock Giveaway; Governor Envisions Expanding Texas Program Nationwide*, WASH. POST, May 13, 2000, at A10.

233. See *id.*

234. See *id.*

235. The *Patterson* court predicted that if a defective distribution theory was adopted, a jury may be able to conclude that a car dealer who indiscriminately sold a car to a non-minor with enough money to buy the product was a defective method of distribution; therefore, manufacturers

wake-up call to those manufacturers, but the reluctance of the jury to assess damages for any of the deceased victims is symbolic. This verdict was not a preview of future success in gun litigation; it was an erratic decision, made specific to the facts and circumstances at the time, and it would be nearly impossible to repeat. For these reasons, along with the uniqueness of Judge Weinstein's courtroom, this verdict will provide no momentum for plaintiffs across the country.

In addition, the suits filed by the municipalities will not reap comparable financial awards to the tobacco negotiations. Gun manufacturers do not possess the cash reserves available to tobacco companies and the gun industry is so segregated that presenting a unified front will be extremely problematic. The influence of pro-gun groups is also a component not to be underestimated. There is a powerful force of gun owners and Second Amendment supporters that will fight hard to overcome any possible regulation. The NRA certainly proved their strength as well by helping to get state legislation passed which makes it illegal for a municipality to sue a gun manufacturer. If tobacco companies had enjoyed similar support, there may not be any settlements today. Any possible outcome of the cities' suits will more likely encompass limited restrictions on industry practices than actual monetary damages from legal liability.

Finally, our society is not ready, nor should it be ready, to impose such drastic legal liability on an acceptable product. Holding a manufacturer liable for a product regardless of the intervening act of a criminal is beyond the realm of products liability.<sup>236</sup> Helping to compel stricter background checks for purchases at gun shows is one issue, but pursuing the goal of earning a verdict worth millions of dollars for the expenses of crime is too far removed from acceptable causal connections. The ramifications of this level of liability would lead plaintiffs to try to topple other industries in court, creating a domino effect. With every dangerous product sold legitimately there are public policy choices that must be made that balance the costs and benefits of the product. In the realm of guns, the choice was made a very long time ago, and instituting such drastic legal changes now should be left to the democratic process. Courts are not well-equipped to handle problems of handgun abuse because they decide individual cases on the basis of evidentiary records; thus, they cannot monitor the effects of their decisions or make alterations when needed.<sup>237</sup> Each factfinder also brings a different set of values to the case which leads to the inevitable result that decisions in gun suits will vary widely and provide little or no guidance to manufacturers.<sup>238</sup> Furthermore, asking a jury to balance the potential for reduced violence against the strong desire of many citizens to own handguns is too momentous of a decision for twelve laypersons.

Finally, the emotional level of the debate over handguns suggests that people

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should compensate all victims of automobile accidents. *See Patterson v. Rohn Gesellschaft*, 608 F. Supp. 1206, 1215 n.27 (N.D. Tex. 1985).

236. *See Bumann, supra* note 44, at 735-36.

237. *See Note, supra* note 127, at 1925.

238. *See id.*

favor or oppose gun control not because of the impact that new regulations may have on society, but because of their own opinions about the role that guns should play in the United States.<sup>239</sup> This analysis illustrates why the courtroom is not the place for legislating. If changes are made at all, they should come in incremental steps through the legislative and executive branches because gun control is an issue that implicates the personality of our society and the goals of our country.<sup>240</sup>

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239. *See id.*

240. *See id.*

