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## Tort Liability for the Sale of Non-Defective Products: An Analysis and Critique of the Concept of Negligent Marketing

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# **TORT LIABILITY FOR THE SALE OF NON-DEFECTIVE PRODUCTS: AN ANALYSIS AND CRITIQUE OF THE CONCEPT OF NEGLIGENT MARKETING**

RICHARD C. AUSNESS\*

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I. INTRODUCTION	

Until recently, those who were harmed by criminal acts involving handguns were forced to seek recovery for their injuries by relying upon design defect and failure to warn theories. However, courts usually rejected claims based on defective design because the products performed exactly as they were intended to perform,<sup>1</sup> while failure to warn claims failed when courts characterized gun-related hazards as obvious risks for which no warning was needed.<sup>2</sup>

However, during the past decade legal commentators and plaintiffs' attorneys have developed a new theory of liability known as negligent marketing.<sup>3</sup> This theory assumes that gun manufacturers and other sellers have a duty to market their products in a manner that will not affirmatively increase a product's inherent risk

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1. See, e.g., *Downs v. R.T.S. Security, Inc.*, 670 So. 2d 434, 439 (La. Ct. App. 1996) ("Every type of ammunition in a gun is a dangerous product, however, that danger relates to its function and it cannot be said to be unreasonably dangerous because it has that function.").

2. See, e.g., *Resteiner v. Sturm, Ruger & Co., Inc.*, 566 N.W.2d 53, 56 (Mich. Ct. App. 1997) (White, J., concurring in part and dissenting in part) ("[T]he manufacturer of a simple product has no duty to warn of the product's potentially dangerous conditions or characteristics when they are readily apparent.").

3. For a general discussion of negligent marketing theory, see Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability Is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777, 806-18 (1996).

to consumers and third parties.<sup>4</sup> At first, virtually all courts rejected negligent marketing claims,<sup>5</sup> but several years ago the tide seemed to turn when some courts concluded that such claims might be actionable.<sup>6</sup> The first case to allow a negligent marketing claim was *Hamilton v. Accu-Tek*,<sup>7</sup> decided by a federal district court in New York in 1999. Shortly thereafter, a California intermediate appellate court reached a similar conclusion in *Merrill v. Navegar, Inc.*<sup>8</sup> These decisions had provided plaintiffs' lawyers with a new and powerful legal theory to use against handgun manufacturers. Furthermore, if injured parties eventually recovered damages against handgun manufacturers, similar negligent marketing claims were almost certain to be brought against the makers of handguns, cigarettes, alcoholic beverages, pornography, and other potentially harmful but non-defective products.

Unfortunately for potential claimants (and their lawyers), much of the momentum behind negligent marketing quickly dissipated. In 2001, the California Supreme Court reversed the lower appellate court's decision in *Merrill*.<sup>9</sup> In addition, when the handgun manufacturer appealed the district court's decision in *Hamilton*, the Second Circuit Court of Appeals certified the negligent marketing issue to the New York Court of Appeals,<sup>10</sup> which eventually rejected negligent marketing as a source of liability for producers of non-defective products.<sup>11</sup>

One year later, the status of negligent marketing remains very much in doubt. This Article will evaluate the concept of negligent marketing to see whether it ought to become a part of our legal jurisprudence or whether it should be discarded as doctrinally unsound, possibly harmful to important social and economic interests.

Part II of this Article provides an overview of the negligent marketing theory. Negligent marketing can be divided into three categories: (1) product designs that make the product more attractive to criminals; (2) advertising and promotional activities that target inappropriate users; and (3) product distribution practices that facilitate retail sales of dangerous products to vulnerable or unsuitable users. The first category of negligent marketing involves product design. Claims based on product design rest on the notion that the manufacturer has designed the product in such a way that it particularly appeals to those who are likely to misuse it.<sup>12</sup> Claims

4. *Id.* at 806 (advertising and promoting), 814 (noting distribution practices that target consumers likely to misuse the product).

5. *See infra* Part III.A.

6. *See, e.g.,* *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 829 (E.D.N.Y. 1999) (involving handguns); *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 189 (Ct. App. 1999) (involving semiautomatic assault weapons).

7. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

8. 89 Cal. Rptr. 2d 146 (Ct. App. 1999).

9. *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001), *rev'g* *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Ct. App. 1999).

10. *See* *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 46 (2d Cir. 2000).

11. *See* *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001) (rejecting the federal district court's interpretation of New York law in *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999)).

12. *See, e.g.,* *Merrill*, 89 Cal. Rptr. 2d at 154-55 (describing features of the defendant's semiautomatic pistol that made it appealing to criminals).

that arise from negligent advertising or promotion typically involve targeting consumers that are more likely than the general population to misuse the product and thereby injure themselves or others.<sup>13</sup> The third category of negligent marketing includes negligent distribution practices, which facilitate access to the product at the retail level by unsuitable or undesirable users. This category of negligent marketing also imposes liability upon manufacturers that fail to control retail sales practices in order to keep their products out of the hands of criminals and underage consumers.<sup>14</sup>

Part III traces the history of negligent marketing in the courts. Negligent marketing made its first appearance in the mid-1980s in such cases as *Linton v. Smith & Wesson*,<sup>15</sup> *Riordan v. International Armament Corp.*,<sup>16</sup> and *Knott v. Liberty Jewelry & Loan, Inc.*<sup>17</sup> However, judicial reaction to negligent marketing claims was universally hostile until 1997, when a federal appeals court decided *McCarthy v. Olin Corp.*<sup>18</sup> Although the court affirmed the lower court's dismissal of the case, Judge Guido Calabresi, in a dissenting opinion, presented a strong argument for the negligent marketing theory and urged the court to certify the question to the New York Court of Appeals.<sup>19</sup> Since then, two courts have recognized negligent marketing claims. In the first case, *Hamilton v. Accu-Tek*,<sup>20</sup> Judge Jack Weinstein allowed several victims of gun violence to present their negligent marketing claims to a jury. However, on appeal the negligent marketing issue was certified to the New York Court of Appeals,<sup>21</sup> which concluded that New York law did not require a defendant to exercise due care with respect to the marketing of its products.<sup>22</sup> In a second case, *Merrill v. Navegar, Inc.*,<sup>23</sup> a California intermediate appellate court also recognized a negligent marketing claim against a gun manufacturer. However, this decision was reversed by the California Supreme Court in 2001.<sup>24</sup> Part III of the Article also discusses some of the lawsuits that have been brought against gun manufacturers by cities and other local governmental entities to recoup Medicaid and law enforcement costs.

Part IV discusses some of the doctrinal issues that must be addressed if the courts decide to impose liability upon product sellers for negligent marketing. These issues involve the standard of care, cause-in-fact, and duty. The traditional

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13. *Id.* at 155-58 (describing how the manufacturer allegedly directed its marketing efforts at violence-prone groups).

14. *See Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 829-31 (E.D.N.Y. 1999) (reviewing evidence suggesting that marketing practices of defendant gun manufacturer facilitated distribution of its products to criminals through black market sales).

15. 469 N.E.2d 339 (Ill. App. Ct. 1984).

16. 477 N.E.2d 1293 (Ill. App. Ct. 1985).

17. 748 P.2d 661 (Wash. Ct. App. 1988).

18. 119 F.3d 148 (2d Cir. 1997).

19. *Id.* at 157-75 (Calabresi, J., dissenting).

20. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

21. *See Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36 (2d Cir. 2000).

22. *See Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1066 (N.Y. 2001).

23. 89 Cal. Rptr. 2d 146 (Ct. App. 1999).

24. *See Merrill v. Navegar, Inc.*, 28 P.3d 116, 134 (Cal. 2001).

negligence standard of reasonable care provides little guidance to juries, particularly in cases where manufacturers are charged with targeting vulnerable or violent individuals. Problems also exist with applying the traditional standard of care in cases where the manufacturer is accused of failing to prevent its products from being sold illegally.

Causation issues are also troublesome in negligent marketing cases. Since plaintiffs would normally be unable to prove cause-in-fact using the traditional “but for” or “*sine qua non*” test, courts would have to allow other methods of proving causation, such as the “substantial factor” test or a probabilistic analysis if plaintiffs are to have any chance of winning. However, these approaches are highly controversial and arguably unfair to defendants. Another causation issue arises where a number of defendants manufacture similar products. Plaintiffs will seldom prevail in such cases unless the courts are willing to apply novel theories of causation, such as enterprise liability or market share liability.<sup>25</sup>

Duty is the key doctrinal issue in most negligent marketing cases. For many courts, the distinction between nonfeasance and misfeasance is critical to the existence of a duty on the part of product manufacturers. Thus, a court is likely to conclude that a manufacturer owes a duty to a person who is injured by a non-defective product if it believes that the manufacturer’s affirmative conduct created or increased the risk of harm. On the other hand, courts are less likely to conclude that such a duty exists if it characterizes the manufacturer’s conduct as nonfeasance, that is, failure to protect the plaintiff against criminal attack by third parties. So far, the latter view seems to have prevailed.<sup>26</sup>

Part V addresses a number of other issues. One concern is that private interest groups and government entities will bring negligent marketing suits against certain types of product manufacturers as a way of advancing their own regulatory agendas. For example, they may bring suit against a particular manufacturer or industry in order to obtain settlement terms that supplement existing regulatory measures with respect to the promotion, sale, or use of their products. In other cases, lawsuits may be brought for the sole purpose of obtaining judgments that will be substantial enough to bankrupt companies that produce products the plaintiffs do not approve of.

Another concern is that negligent marketing claims may unreasonably interfere with the constitutional right of commercial speech. This particular problem arises in cases where the seller’s advertising provides factually correct information about a product or expresses an opinion about lifestyle choices, such as “women need handguns to protect themselves” or “smoking is cool.” Imposing tort liability in such cases arguably inhibits the free flow of information about products to certain groups of consumers.

Finally, the negligent marketing theory of liability is inherently paternalistic and elitist. It assumes that some consumers are incapable of making rational

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25. See *Hamilton*, 62 F. Supp. 2d at 843-46 (accepting market share liability).

26. See *infra* Part IV.C.

decisions about what products to buy. This assumption, even if partly correct, is troublesome when it is invoked to punish advertising that is directed at women, minorities, or other “vulnerable” groups.

While acknowledging that imposing liability for negligent marketing would encourage product sellers to act more responsibly and would also provide a source of compensation for some accident victims, this Article concludes that doctrinal and policy concerns outweigh these benefits.

## II. AN OVERVIEW OF NEGLIGENT MARKETING THEORY

The principle of negligent marketing assumes that product sellers should not engage in marketing strategies that increase the risk that their products will be purchased by unsuitable users—persons who are more likely than ordinary consumers to injure either themselves or others. Claims based on negligent marketing can be divided into at least three categories, including those based on product design, those based on advertising or promotional activities, and those based on inadequate supervision of retail sellers.<sup>27</sup> Each of these forms of negligent marketing is discussed in more detail below.

### A. *Claims Based on Product Design*

Negligent marketing claims based on product design should be distinguished from a more conventional design defect claim. Normally, when a plaintiff brings a design defect claim against a manufacturer, he alleges that the product, as designed, is defective because the manufacturer has failed to use a safer, yet feasible, alternative design.<sup>28</sup> However, in a negligent marketing case the plaintiff normally contends that some non-essential design feature enhances the product’s attractiveness to unsuitable users, thereby increasing the chance that these users will cause injury to themselves or others. Perhaps the best known example of negligent marketing based on product design involved the TEC-9 and TEC-DC9 semiautomatic pistols in *Merrill v. Navegar, Inc.*<sup>29</sup> In this case, the plaintiff claimed that these weapons were designed to accept large capacity magazines and also had trigger systems that would permit them to be fired rapidly.<sup>30</sup> In addition, the manufacturer equipped these weapons with a sling device that allowed them to be fired from the hip and threaded their barrels to enable silencers or flash suppressors to be attached to them.<sup>31</sup> According to the plaintiff, the TEC-9 and TEC-DC9 were

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27. See generally McClurg, *supra* note 3, at 800-18 (discussing categories of negligent marketing).

28. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

29. 89 Cal. Rptr. 2d 146 (Ct. App. 1999).

30. *Id.* at 154.

31. *Id.*

not designed for sporting or self-defense purposes, but rather were designed to appeal to drug dealers and other criminals.<sup>32</sup>

In cases like *Merrill*, the negligent marketing theory will often be more useful to plaintiffs than a conventional design defect claim. In a design defect case, the plaintiff must prove that the product's design is defective. This effort typically requires the plaintiff to show that marginal benefits of a feasible and safer alternative design outweigh the marginal costs of the proposed design.<sup>33</sup> When complex products are involved, plaintiffs sometimes lose because they cannot obtain credible evidence about the cost and feasibility of safer alternative designs. The problem of proving the existence of a defect is even greater for plaintiffs who are injured by inherently dangerous products, such as handguns, because there are no safer alternative designs available for these products.<sup>34</sup> However, since negligent marketing focuses on the marketing process rather than whether the product is defective, it allows parties who sue under this theory to sidestep the defect issue.

### *B. Claims Based on Advertising and Promotional Activities*

Negligent marketing claims based on advertising and promotional activities would impose liability on manufacturers and other sellers whose advertising and promotional efforts induce certain types of consumers to purchase their products. Specifically, product sellers would be subject to liability for such marketing practices when they are specifically directed at vulnerable or dangerous consumers.

#### *1. Targeting Vulnerable Consumers*

One form of negligent marketing provides that a manufacturer may be held liable if it deliberately targets consumers who are underage, inexperienced, mentally unstable, or psychologically vulnerable. Anti-smoking advocates, for example, contend that a considerable amount of cigarette advertising is deliberately calculated to encourage teenagers to smoke.<sup>35</sup> For instance, they claim that the

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32. *Id.* at 154-55.

33. See James A. Henderson, Jr., *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773, 776 (1979) ("[I]t is necessary to assess the relative costs and benefits of both the defendant's design and safer alternatives in order to determine whether a given product design is unreasonably risky and therefore legally defective."); see also Michael D. Green, *The Schizophrenia of Risk-Benefit Analysis in Design Defect Litigation*, 48 VAND. L. REV. 609, 619 (1995) ("Risk-benefit analysis operates at the margin—the utility of the existing design compared to the alternative—not at the level of the entire product.").

34. See Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. KY. L. REV. 423, 426-29 (1997).

35. See Carl T. Bogus, *Gun Litigation and Societal Values*, 32 CONN. L. REV. 1353, 1368 (2000); Bruce A. Levin, *The Liability of Tobacco Companies—Should Their Ashes Be Kicked?*, 29 ARIZ. L. REV. 195, 242-43 (1987); Daniel Hays Lowenstein, "Too Much Puff": *Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1213 (1988); Frank J. Vandall, *Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers*, 52 OHIO ST. L.J. 405, 419-20 (1991).



infamous cartoon character, Joe Camel, was introduced to create a favorable impression of smoking in the minds of young children.<sup>36</sup> Likewise, some years ago, Smith & Wesson initiated an advertising campaign that allegedly preyed on the fears of women in order to induce them to purchase handguns for protection against criminal attacks.<sup>37</sup> Arguably, putting firearms into the hands of individuals who are likely to be inexperienced in handling guns would greatly increase the risk of injury to these individuals and to those around them.<sup>38</sup>

## 2. Targeting Dangerous Consumers

Another form of negligent marketing involves directing advertising and other promotional efforts at persons who are likely to misuse the product and thereby harm others.<sup>39</sup> Advertising handguns or assault weapons to a “criminal clientele” is an obvious example of this type of negligent marketing.<sup>40</sup> In *Merrill*, the plaintiffs contended that the defendant engaged in negligent marketing practices by advertising its product in “soldier-of-fortune” and survivalist-type magazines, emphasizing the TEC-DC9’s high volume of firepower and its paramilitary appearance, and touting the weapon’s excellent resistance to fingerprints.<sup>41</sup> The intermediate appellate court concluded that this sort of promotional activity increased the risk of product misuse by criminals and was sufficient to subject the defendant to liability.<sup>42</sup>

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36. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1481 (1999) (concluding that Joe Camel appeals to underage consumers); Kathleen J. Lester, Note, *Cowboys, Camels, and Commercial Speech: Is the Tobacco Industry’s Commodification of Childhood Protected by the First Amendment?*, 24 N. KY. L. REV. 615, 628-29 (1997) (arguing that Joe Camel-type advertising “encourage[s] acceptance of smoking as a social norm in young children”); Erica Swecker, Note, *Joe Camel: Will “Old Joe” Survive?*, 36 WM. & MARY L. REV. 1519, 1519 (1995) (“Cigarette advertisements featuring a ‘sunglass-sporting, phallic-nosed’ camel named Joe, surrounded by his ‘cool, jazz-playing, pool-hustling, poker-playing, cigarette-smoking crowd’ of camel-friends, have been accused of enticing children to smoke.”). But see Clay Calvert, *Excising Media Images to Solve Societal Ills: Communication, Media Effects, Social Science, and the Regulation of Tobacco Advertising*, 27 SW. U. L. REV. 401, 422-27 (1998) (questioning whether “Joe Camel” advertisements affect the future smoking behavior of children).

37. See Debra Dobray & Arthur J. Waldrop, *Regulating Handgun Advertising Directed Toward Women*, 12 WHITTIER L. REV. 113, 114 (1991) (describing Smith & Wesson advertisements that offered tips to women on how to avoid being attacked).

38. See Hanson & Kysar, *supra* note 36, at 1464 (claiming that female gun owners tend to take gun safety less seriously than male gun owners).

39. See McClurg, *supra* note 3, at 806.

40. *Id.*

41. *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 156-57 (Ct. App. 1999).

42. *Id.* at 170-85. But see *McCarthy v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997) (rejecting imposing a duty to protect against criminal acts by a buyer, based on negligent marketing, in the absence of a special relationship); *Leslie v. United States*, 986 F. Supp. 900, 912 (D.N.J. 1997) (same); *First Commercial Trust Co. v. Lorcin Eng’g, Inc.*, 900 S.W.2d 202, 205 (Ark. 1995) (same).

### C. Claims Based on Negligent Distribution Practices

A third form of negligent marketing would impose liability upon manufacturers for engaging in negligent distribution practices. For example, liability might be imposed when manufacturers distribute the product in such a way that unauthorized users are more easily able to obtain access to it at the retail level. Courts might also hold manufacturers responsible for failing to supervise the actions of unscrupulous retail sellers.

#### 1. *Distributing a Product so as to Facilitate Access to It by Unauthorized Users*

This type of negligent marketing assumes that manufacturers should be held liable when they employ methods of distribution that enable minors or other unauthorized persons to illegally purchase their products on the retail market.<sup>43</sup> Many handguns are shipped to one area of the country only to be transported elsewhere and sold on the black market.<sup>44</sup> In fact, this very argument was made in *Hamilton v. Accu-Tek*.<sup>45</sup> The plaintiffs alleged that gun manufacturers had distributed large numbers of handguns to southeastern states, where gun regulations were relatively lax, knowing that the guns would be bought, shipped to urban centers in the Northeast, and sold illegally.<sup>46</sup> The federal district court concluded that the gun manufacturers had a duty to exercise due care in order to protect third parties from being injured by illegal users of their products.<sup>47</sup> Specifically, in the court's view, the defendants could be required to reduce the flow of handguns to the Southeast.<sup>48</sup> In addition, the court found that the defendants could have reduced illegal gun sales by refusing to sell to disreputable gun dealers and by limiting sales at unregulated gun shows.<sup>49</sup>

Recently, the distribution practices of Purdue Pharma, the manufacturer of the prescription painkiller OxyContin, have been called into question. This drug is sold in time-release form and is intended to treat those who suffer chronic pain from such diseases as arthritis, back trouble, or cancer.<sup>50</sup> However, when OxyContin pills are crushed, users can achieve an immediate heroin-like high.<sup>51</sup> OxyContin abuse is a serious problem in many parts of the country, particularly Appalachia and a

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43. See Doug Morgan, Comment, *What in the Wide, Wide World of Torts Is Going On? First Tobacco, Now Guns: An Examination of Hamilton v. Accu-Tek and the Cities' Lawsuits Against the Gun Industry*, 69 Miss. L.J. 521, 550 (1999).

44. See Mark D. Polston, *Civil Liability for High Risk Gun Sales: An Approach to Combat Gun Trafficking*, 19 SETON HALL LEGIS. J. 821, 829-36 (1995) (discussing distribution of guns on the black market).

45. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

46. *Id.* at 830.

47. *Id.* at 824.

48. *Id.* at 832.

49. *Id.* at 826.

50. See Paul Tough, *The Alchemy of OxyContin*, N.Y. TIMES MAG., July 29, 2001, at 32, 32.

51. *Id.*

number of urban areas.<sup>52</sup> In one class action suit, the plaintiffs alleged that the manufacturer and others “were and are facilitating the inappropriate use of OxyContin by supplying pharmacies in Mexico with OxyContin because they are aware that members of the public can obtain OxyContin from these pharmacies without a prescription.”<sup>53</sup> Although the makers of OxyContin deny that this sort of abuse has occurred, the plaintiffs’ claim is similar to the charges that have been made in some cases against gun manufacturers.

## 2. *Failing to Require Retailers to Take Reasonable Measures to Reduce Product-Related Risks*

Another form of negligent marketing would impose liability on manufacturers who fail to warn retail sellers about the dangers of selling their products to persons likely to misuse them.<sup>54</sup> Under this theory of negligent marketing, a manufacturer may be required to provide retailers with a written “safe sales policy,” notifying them of the product’s high potential for misuse or providing them with behavioral profiles of likely misusers.<sup>55</sup>

For several years, victims of gun violence have urged courts to recognize this form of negligent marketing. For example, in *First Commercial Trust Co. v. Lorcin Engineering*,<sup>56</sup> the plaintiff argued that a handgun manufacturer should be held liable for failing to provide its distributors and retailers with a safe-sales policy and a profile of the point-of-purchase appearance and conduct of potential misusers.<sup>57</sup> In another case, the plaintiff unsuccessfully argued that the manufacturer of “Black Talon” ammunition should be held liable for failing to get retailers to remove the product promptly from their shelves once the manufacturer had taken it off the market.<sup>58</sup>

Negligent failure to supervise retailers is also becoming a problem for manufacturers of prescription drugs. For example, users of the diet drug combination Fen-Phen accused manufacturers of doing nothing to discourage physicians from prescribing the drug to mildly overweight people for long-term use even though nothing was known about the risks of such treatment.<sup>59</sup> The drug was approved by the Federal Drug Administration (FDA) for use on a short-term basis only by seriously obese persons.<sup>60</sup> Plaintiffs in the OxyContin litigation will no

52. *Id.*

53. Rob Modic, *OxyContin Class-Action Suit Filed*, DAYTON DAILY NEWS (Ohio), July 20, 2001, at 1B.

54. See McClurg, *supra* note 3, at 814-15.

55. *Id.* at 814.

56. 900 S.W.2d 202 (Ark. 1995).

57. *Id.* at 203; see also Knott v. Liberty Jewelry & Loan, Inc., 748 P.2d 661, 664 (Wash. Ct. App. 1988) (noting plaintiff argues that gun wholesaler had a duty to provide retailer “safe marketing guidelines”).

58. Leslie v. United States, 986 F. Supp. 900, 911 (D.N.J. 1997).

59. See Caren A. Cristani, Comment, *Product Liability and Prescription Diet Drug Cocktail, Fen-Phen: A Hard Combination to Swallow*, 15 J. CONTEMP. HEALTH L. & POL’Y 207, 221-23 (1998).

60. *Id.* at 211.

doubt claim that the drug's manufacturer should have attempted to exercise some control over some of the pain clinics in Appalachia that, until recently, prescribed and sold huge amounts of OxyContin.

### III. NEGLIGENT MARKETING CLAIMS IN THE COURTS

The first suits against handgun manufacturers were based on such theories as failure-to-warn, defective design, and strict liability for abnormally dangerous activities. Failure-to-warn claims were predicated on the notion that manufacturers should warn purchasers to prevent firearms from falling into the hands of children or criminals. But courts tended to regard these risks as obvious and declined to impose an affirmative obligation on gun manufacturers to warn about them.<sup>61</sup> Design defect claims, for the most part, were also unsuccessful.<sup>62</sup> Courts required plaintiffs to show that handguns were *defective* as a prerequisite to liability; the fact that a handgun was inherently dangerous was not sufficient to establish that it was defectively designed.<sup>63</sup> Courts also rejected the theory, known as "product category liability,"<sup>64</sup> under which guns could be labeled as defective simply because the risks associated with their use exceeded the social utility of gun ownership.<sup>65</sup> Finally, courts refused to subject gun manufacturers to liability on the theory that they were engaged in an abnormally dangerous activity.<sup>66</sup> These courts observed that the

61. See, e.g., *Raines v. Colt Indus., Inc.*, 757 F. Supp. 819, 825-26 (E.D. Mich. 1991) (ruling that manufacturer had no duty to warn because risk of pistol firing round left in the chamber after clip was removed was "open and obvious"); *Resteiner v. Sturm, Ruger & Co.*, 566 N.W.2d 53, 56 (Mich. Ct. App. 1997) (White, J., concurring in part and dissenting in part) (declaring that handgun manufacturer did not have a duty to warn purchasers about the risk of theft).

62. See, e.g., *Bolduc v. Colt's Mfg. Co.*, 968 F. Supp. 16, 18 (D. Mass. 1997) (rejecting claim that handgun was defectively designed because it did not have "magazine disconnect" feature).

63. See *Downs v. R.T.S. Security, Inc.*, 670 So. 2d 434 (La. Ct. App. 1996).

64. See Ausness, *supra* note 34; James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1297-1300 (1991); Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429, 1440-54 (1994); Shaun R. Bonney, Comment, *Using Courts to Target Firearm Manufacturers*, 37 IDAHO L. REV. 167, 177-81 (2000).

65. See, e.g., *Armijo v. Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326 (9th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985); *Delahanty v. Hinckley*, 564 A.2d 758, 760-62 (D.C. 1989); *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293 (Ill. App. Ct. 1985); *Richardson v. Holland*, 741 S.W.2d 751 (Mo. Ct. App. 1987); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. Ct. App. 1988). *But see* *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1159 (Md. 1985) (holding that the risks of "Saturday Night Special" handguns outweighed their utility).

66. See, e.g., *Copier ex rel Lindsey v. Smith & Wesson*, 138 F.3d 833, 838 (10th Cir. 1998); *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988); *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326, 1328 (9th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1268 (5th Cir. 1985); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1203-05 (7th Cir. 1984); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 531-32 (S.D. Ohio 1987), *aff'd*, 849 F.2d 608 (6th Cir. 1988); *Delahanty v. Hinckley*, 564 A.2d 758, 760-62 (D.C. 1989); *Coulson v. DeAngelo*, 493 So. 2d 98, 99 (Fla. Ct. App. 1986); *Addison v. Williams*, 546 So. 2d 220, 223-24 (La. Ct. App. 1989); *King v. R.G. Indus., Inc.*, 451 N.W.2d 874, 875 (Mich. Ct. App. 1990); *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118, 120-22

doctrine of strict liability for abnormally dangerous activities, as codified by the Restatement of Torts, was aimed at dangerous activities on one's land and did not apply to the manufacture or sale of dangerous products.<sup>67</sup>

Frustrated in their efforts to recover from handgun manufacturers under traditional principles of products liability law, in the 1980s plaintiffs' lawyers began to embrace negligent marketing as a potential basis of recovery for gun-related injuries. At first, the courts showed little enthusiasm for this new theory, concluding that manufacturers had no duty to prevent their products from falling into the hands of criminals.<sup>68</sup> Beginning in 1997, however, this attitude began to change. In *McCarthy v. Olin Corp.*,<sup>69</sup> for example, former Yale Law School Dean Guido Calabresi, in a lengthy and well-reasoned dissent, argued that New York courts might (and should) recognize a duty on the part of gun manufacturers to market their products more responsibly.<sup>70</sup> Two years later, Judge Jack Weinstein, another distinguished legal scholar, concluded in *Hamilton v. Accu-Tek*<sup>71</sup> that gun manufacturers were in fact subject to such a duty under New York law. In that same year, a California intermediate appellate court also upheld a plaintiff's negligent marketing claim in *Merrill v. Navegar*.<sup>72</sup> However, all of this forward progress came to a halt in 2001 when lower court decisions in *Hamilton* and *Merrill* were effectively reversed.<sup>73</sup>

#### A. Early Cases

One of the first negligent marketing cases was *Linton v. Smith & Wesson*,<sup>74</sup> decided in 1984. In that case, the plaintiff, who was shot in a tavern brawl, argued that the defendant manufacturer had "a duty to use 'reasonable means to prevent the sale of its handguns to persons who are likely to cause harm to the public.'"<sup>75</sup> To

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(Or. 1985); *Diggles v. Horwitz*, 765 S.W.2d 839, 841-42 (Tex. Ct. App. 1989); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661, 664-65 (Wash. Ct. App. 1988); see also Charles E. Cantu, *Distinguishing the Concept of Strict Liability for Ultrahazardous Activities from Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning That Should Never Meet*, 35 AKRON L. REV. 31 (2001).

67. Andrew O. Smith, Comment, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369, 380-83 (1987).

68. See, e.g., *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202, 204-05 (Ark. 1995) (finding no duty for tort liability resulting from third party's criminal acts without special duty); *Linton v. Smith & Wesson*, 469 N.E.2d 339, 340 (Ill. App. Ct. 1984) (finding no Illinois precedent for a duty); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661, 664 (Wash. Ct. App. 1988) (concluding that defendants met legislative guidelines for marketing guns and these regulations preempted finding a duty in this case).

69. 119 F.3d 148 (2d Cir. 1997).

70. *Id.* at 157-75 (Calabresi, J., dissenting).

71. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

72. 89 Cal. Rptr. 2d 146 (Ct. App. 1999).

73. See *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001); *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001).

74. 469 N.E.2d 339 (Ill. App. Ct. 1984).

75. *Id.* at 340.

support his claim that a duty existed, the plaintiff relied on *Semeniuk v. Chentis*<sup>76</sup> and *Moning v. Alfano*.<sup>77</sup> In *Semeniuk*, a retailer was held liable for selling an air rifle to an adult and his seven-year-old son.<sup>78</sup> The court concluded that it should have been obvious to the seller that the child, for whom the air rifle was purchased, lacked sufficient judgment and experience to use the rifle safely.<sup>79</sup> In *Moning*, the Michigan Supreme Court remanded for a new trial, finding that a manufacturer who marketed dangerous toy slingshots directly to young children owed a "legal obligation of due care to a bystander affected by use of the product."<sup>80</sup> However, the court in *Linton* determined that these cases were not controlling and concluded that the defendant did not owe any duty to control the distribution of its products to adults at the retail level.<sup>81</sup>

The following year, another Illinois intermediate appellate court reached the same conclusion in *Riordan v. International Armament Corp.*<sup>82</sup> *Riordan* involved a claim by several shooting victims that the defendant "manufacturers and distributors were negligent in marketing its[sic] handguns to the general public without taking adequate precautions to prevent the sale of its' [sic] handguns to persons who were reasonably likely to cause harm to the general public."<sup>83</sup> In effect, the plaintiffs contended that the manufacturers and distributors of "Saturday Night Specials" had an affirmative duty to oversee the conduct of retail sellers in order to prevent these firearms from falling into the hands of unsuitable buyers.<sup>84</sup> However, the court, relying on *Linton*, refused to find that such a duty existed and affirmed the lower court's dismissal of the plaintiffs' case.<sup>85</sup>

The plaintiff in *Knott v. Liberty Jewelry & Loan, Inc.*<sup>86</sup> made a similar argument. Because the gun in question, also a "Saturday Night Special," was produced by a foreign manufacturer, the plaintiff was forced to sue the wholesaler and distributor instead. The plaintiff alleged that "Saturday Night Specials" had no legitimate purpose and were often used to commit crimes.<sup>87</sup> In addition, the plaintiff claimed that the wholesaler and distributor were aware of the risk that gun sales posed to the public.<sup>88</sup> Consequently, the plaintiff argued, the wholesaler and distributor had a duty to warn retailers of the dangerous propensities of "Saturday Night Specials" and to provide them with guidelines to help them market these handguns safely.<sup>89</sup> Nevertheless, the Washington court refused to find that such a

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76. 117 N.E.2d 883 (Ill. App. Ct. 1954).

77. 254 N.W.2d 759 (Mich. 1977).

78. *Semeniuk*, 117 N.E.2d at 883.

79. *Id.* at 884.

80. *Moning*, 254 N.W.2d at 775.

81. *Linton*, 469 N.E.2d at 340.

82. 477 N.E.2d 1293 (Ill. App. Ct. 1985).

83. *Id.* at 1295.

84. *Id.*

85. *Id.* at 1299.

86. 748 P.2d 661 (Wash. Ct. App. 1988).

87. *Id.* at 664.

88. *Id.*

89. *Id.*

duty existed and instead affirmed the lower court's dismissal of the plaintiff's negligence suit.<sup>90</sup>

In *First Commercial Trust Co. v. Lorcin Engineering, Inc.*,<sup>91</sup> the victim was killed by her former boyfriend, a psychopath who had been in and out of mental institutions prior to the shooting.<sup>92</sup> The killer had purchased a cheap handgun manufactured by the defendant three days before the murder was committed.<sup>93</sup> The victim's personal representative argued that the defendant was negligent in promoting and selling inexpensive handguns to a market that included a substantial number of persons who were likely to commit criminal acts.<sup>94</sup> Affirming a judgment of the lower court in favor of the defendant, the Arkansas Supreme Court concluded that the manufacturer owed no duty to protect the victim against criminal misuse of its products in the absence of a special relationship.<sup>95</sup>

Plaintiffs also brought a negligent marketing claim in *Forni v. Ferguson*.<sup>96</sup> *Forni* involved a suit in the New York state courts against the manufacturers of a semi-automatic handgun, magazine, and ammunition that Colin Ferguson used in an assault on a commuter train in 1993.<sup>97</sup> The plaintiffs alleged that the defendants breached their duty of care by marketing such dangerous products to the general public.<sup>98</sup> However, the court concluded that the manufacturers were not obliged to refrain from marketing non-defective, legal products so they breached no duty to the plaintiffs merely by placing such products in the stream of commerce.<sup>99</sup>

In *Resteiner v. Sturm, Ruger & Co.*,<sup>100</sup> a Michigan intermediate appellate court rejected a negligent marketing claim brought by the personal representatives of two individuals who Ronnie Johns intentionally shot and killed during the summer of 1991.<sup>101</sup> The murders were committed with a .44 caliber Redhawk magnum revolver manufactured by defendant Sturm Ruger, which had been stolen from the house of another defendant, Brent Walker, in May 1991.<sup>102</sup> The plaintiffs claimed, *inter alia*, "that Sturm, Ruger was negligent for marketing its Redhawk revolvers to members of the general public, such as Walker."<sup>103</sup> Relying on *Buczowski v. McKay*<sup>104</sup> and *King v. R. G. Industries, Inc.*,<sup>105</sup> the Michigan court concluded that the

90. *Id.*

91. 900 S.W.2d 202 (Ark. 1995).

92. See McClurg, *supra* note 3, at 811.

93. *Id.*

94. *Lorcin Eng'g*, 900 S.W.2d at 203.

95. *Id.* at 205.

96. 648 N.Y.S.2d 73 (App. Div. 1996).

97. *Id.* Six passengers were killed in the attack and another nineteen people were wounded. *McCarthy v. Olin Corp.*, 119 F.3d 148, 151 (2d Cir. 1997).

98. *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996).

99. *Id.* at 370-71.

100. 566 N.W.2d 53 (Mich. Ct. App. 1997).

101. *Id.* at 55.

102. *Id.*

103. *Id.* at 56.

104. 490 N.W.2d 330 (Mich. 1992), *reh'g denied*, 491 N.W.2d 830 (Mich. 1992).

105. 451 N.W.2d 874 (Mich. Ct. App. 1990).

gun manufacturer owed no duty to refrain from selling its products to the general public.<sup>106</sup> In *Buczowski*, the Michigan Supreme Court refused to hold a retailer liable for selling shotgun shells to an intoxicated customer who subsequently shot the plaintiff.<sup>107</sup> The court in *King* held that the manufacturer of a non-defective "Saturday Night Special" was not liable for injuries to a third party committed by a retail customer who was mentally unstable and had a criminal record.<sup>108</sup> The *Resteiner* court concluded that these cases supported the principle that sellers ordinarily had no duty to exercise control over the distribution of non-defective products to the general public.<sup>109</sup>

*Leslie v. United States*<sup>110</sup> involved a suit by individuals who were killed or wounded by Christopher Green during an attempted robbery at a post office in Montclair, New Jersey.<sup>111</sup> The plaintiffs brought suit against the manufacturer of Black Talon bullets, which were used by the robber to kill or wound them.<sup>112</sup> Among other things, the plaintiffs alleged that the manufacturer, Olin Corporation, negligently marketed the Black Talon bullets by emphasizing their destructive capability in a way that would appeal to criminals.<sup>113</sup> The plaintiffs also argued that Olin was negligent because it failed to ensure that retailers promptly removed the Black Talon bullets from their shelves after Olin stopped selling the bullets to the general public.<sup>114</sup>

Like other courts before it, the federal district court in *Leslie* also focused on the duty issue, observing that duty involves more than the foreseeability of harm.<sup>115</sup> The court observed that no special relationship existed between the defendant and Green, the purchaser of the ammunition, that would enable it to control or prevent Green's criminal behavior.<sup>116</sup> In the court's view, "[t]he absence of any such relationship, even where Green's misconduct was arguably foreseeable, militates against imposing on Olin a duty to refrain from advertising the distinguishing characteristics of its ammunition."<sup>117</sup> Furthermore, since the manufacturer could not exercise any control over the conduct of others, the court concluded that it would be futile to impose such a duty on it.<sup>118</sup>

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106. *Resteiner*, 566 N.W.2d at 56.

107. *Buczowski*, 490 N.W.2d at 332, 336.

108. *King*, 451 N.W.2d at 875.

109. *Resteiner*, 566 N.W.2d at 56.

110. 986 F. Supp. 900 (D.N.J. 1997).

111. *Id.* at 902.

112. *Id.* The plaintiffs also sued the federal government for failing to provide adequate security at the post office. *Id.*

113. *Id.* at 911.

114. *Id.*

115. *Id.*

116. *Leslie*, 986 F. Supp. at 912.

117. *Id.*

118. *Id.* at 913.



*B. McCarthy v. Sturm, Ruger & Co.*

The plaintiffs in *McCarthy v. Sturm, Ruger & Co.*,<sup>119</sup> like those in *Forni*, were victims of Colin Ferguson's shooting spree on a Long Island Railroad passenger train.<sup>120</sup> Unlike *Forni*, the *McCarthy* lawsuit was directed solely at the Olin Corporation, which had allegedly manufactured the ammunition Ferguson used in the shooting.<sup>121</sup> These hollow-point bullets, which were marketed under the "Black Talon" trademark, employed a design that greatly enhanced their destructive power.<sup>122</sup> The plaintiffs argued that Olin was negligent in marketing Black Talon ammunition to the general public instead of restricting its sale to law enforcement agencies as the company had originally intended.<sup>123</sup> The plaintiffs also claimed that advertisements for the Black Talon bullets emphasized their destructive characteristics in a way that appealed to criminals.<sup>124</sup> Finally, the plaintiffs contended that the mere act of marketing Black Talon ammunition gave rise to a duty on the part of the manufacturer to protect all those who might be affected by such a dangerous product.<sup>125</sup> A federal district court judge granted Olin Corporation's motion to dismiss<sup>126</sup> and this decision was affirmed on appeal.<sup>127</sup> The plaintiff argued that the manufacturer owed a duty when it marketed the Black Talon ammunition to the general public because misuse of its product by criminals was foreseeable.<sup>128</sup> The court, however, interpreting New York law, rejected the notion that duty could be based solely on the foreseeability of harm.<sup>129</sup> Rather, in the court's view, foreseeability served only to define the scope of an existing duty.<sup>130</sup> The court also observed that New York state courts had traditionally been reluctant to impose a duty on someone to control the actions of another in the absence of a special relationship that gave the defendant some control over that person's conduct.<sup>131</sup> In this case, the court concluded, there was no special relationship between the defendant and Ferguson that enabled it to control Ferguson's actions.<sup>132</sup> Absent such a relationship, the federal appellate court

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119. 916 F. Supp. 366 (S.D.N.Y. 1996), *aff'd sub nom. McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997). In addition to negligent marketing, the plaintiffs also based their claims on negligent manufacturing, defective design and ultrahazardous (or abnormally dangerous) activity. *Id.* at 369-72.

120. *Id.* at 368.

121. *Id.*

122. *Id.*

123. *Id.* at 369. Prior to Ferguson's attack, Olin Corporation had withdrawn the Black Talon bullets from the public market and restricted their sale to law enforcement officers. Ferguson, however, purchased the ammunition before it was withdrawn from the market. *McCarthy v. Olin Corp.*, 119 F.3d at 152.

124. *McCarthy v. Sturm Ruger & Co.*, 916 F. Supp. at 369.

125. *Id.*

126. *Id.* at 372.

127. *McCarthy v. Olin Corp.*, 119 F.3d at 157.

128. *Id.* at 156.

129. *Id.*

130. *Id.*

131. *Id.* at 157.

132. *Id.*

declined to hold the Olin Corporation liable for its marketing practices.<sup>133</sup> The court also expressed concern that imposing liability for negligent marketing in this case would subject the defendant to unlimited liability and drive a legal, and possibly useful, product off the market.<sup>134</sup> Finally, the court suggested that the legislature and not the courts should determine what products should or should not be sold to the public.<sup>135</sup>

In a dissenting opinion, Judge Guido Calabresi maintained that the court should have certified the negligent marketing issue to the New York Court of Appeals instead of upholding the district court's dismissal of the plaintiffs' claim.<sup>136</sup> According to Judge Calabresi, negligent marketing theory arguably fits within the scope of a traditional negligence claim and the New York Court of Appeals might well adopt the theory even though the lower New York courts had not yet done so.<sup>137</sup> To support this conclusion, Calabresi discussed each of the elements of a traditional negligence claim—unreasonable conduct, damages, causation and duty—in the context of the defendant's conduct.<sup>138</sup>

First, Judge Calabresi determined that the manufacturer's decision to market Black Talon ammunition to the general public might be considered unreasonable if one weighed its destructive capability against its limited value to ordinary members of the public.<sup>139</sup> Thus, selling Black Talon ammunition to private individuals might be likened to selling firearms to children or supplying liquor to intoxicated adults.<sup>140</sup> Secondly, Calabresi concluded that the plaintiffs had sustained substantial injuries as a consequence of the defendant's decision to sell Black Talon ammunition to members of the general public.<sup>141</sup> Furthermore, Calabresi found that the defendant's conduct was both a cause-in-fact and a proximate cause of the plaintiffs' injuries.<sup>142</sup> Specifically, Calabresi observed that the possibility of intervening criminal conduct, such as that of Colin Ferguson, was precisely the type of risk that made the defendant's conduct unreasonable, thereby undermining the argument that Ferguson's intervening criminal act was an unforeseeable superseding cause.<sup>143</sup>

On the issue of duty, Judge Calabresi agreed with the majority that under New York law, duty was not based solely on foreseeability of harm to another, but rather depended on public policy.<sup>144</sup> While acknowledging that the New York courts had not explicitly imposed a duty of care on manufacturers with respect to their

133. *McCarthy v. Olin Corp.*, 119 F.3d at 157.

134. *Id.*

135. *See id.*

136. *Id.* (Calabresi, J., dissenting).

137. *Id.* at 168 n.20 (Calabresi, J., dissenting).

138. *Id.* at 161-70 (Calabresi, J., dissenting).

139. *McCarthy v. Olin Corp.*, 119 F.3d at 162 (Calabresi, J., dissenting).

140. *Id.* at 163 (Calabresi, J., dissenting).

141. *Id.* at 164 (Calabresi, J., dissenting).

142. *Id.* at 164-65 (Calabresi, J., dissenting).

143. *Id.* at 165 (Calabresi, J., dissenting).

144. *Id.* at 165-66 (Calabresi, J., dissenting).

marketing decisions, Calabresi pointed out that the courts had historically recognized the obligation of sellers to protect others, including bystanders, against the risks associated with their products, including risks created by product misuse.<sup>145</sup> In view of the dangerous nature of the defendant's product and its ability to reduce product-related risks by more restrictive marketing practices, Calabresi reasoned that New York courts could appropriately impose a duty on the manufacturers to exercise greater care in the way they marketed dangerous products.<sup>146</sup>

### C. *Hamilton v. Accu-Tek*

In *Hamilton v. Accu-Tek*,<sup>147</sup> a group of plaintiffs brought negligent marketing claims in a New York federal district court against twenty-five handgun manufacturers.<sup>148</sup> The plaintiffs argued that the defendants had a duty to market and distribute their products in a manner that would minimize the chances that the handguns would fall into the hands of persons likely to use them to commit crimes.<sup>149</sup> The plaintiffs alleged that the defendants shipped large numbers of firearms to southeastern states with less stringent gun regulations knowing that these guns would be eventually transported to northeastern states and sold illegally.<sup>150</sup>

The defendants maintained that they had no duty to protect shooting victims from the criminal acts of third parties.<sup>151</sup> They also denied that their marketing practices were negligent and further contended that the plaintiffs had failed to satisfactorily prove cause-in-fact.<sup>152</sup> However, Jack Weinstein, the trial judge, concluded that the defendants did have a duty to market their products in a reasonable and prudent manner.<sup>153</sup> In addition, he relieved the plaintiffs of the burden of showing which specific product caused which injury and instead allowed them to establish causation through a market share liability approach.<sup>154</sup>

Judge Weinstein's opinion discussed a variety of legal issues associated with the plaintiffs' claims, including: (1) whether gun manufacturers owed any legal duty to bystanders who might be injured by firearms;<sup>155</sup> (2) whether the defendants failed to exercise due care with respect to their marketing activities;<sup>156</sup> (3) whether the marketing practices of the defendants caused the victims' injuries;<sup>157</sup> (4) whether

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145. *McCarthy v. Olin Corp.*, 119 F.3d at 166-67 (Calabresi, J., dissenting).

146. *Id.* at 168-69 (Calabresi, J., dissenting).

147. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

148. *Id.* at 808.

149. *Id.* at 825.

150. *Id.* at 832.

151. *Id.* at 817.

152. *Id.* at 817-18.

153. *Hamilton*, 62 F. Supp. 2d at 827.

154. *Id.* at 843-44.

155. *Id.* at 818-27.

156. *Id.* at 827-33.

157. *Id.* at 833.

the criminal acts of third persons amounted to a superseding cause, thereby relieving the defendants of any responsibility for the shooting victims' injuries;<sup>158</sup> and (5) whether gun manufacturers collectively could be held liable for damages on a market share basis.<sup>159</sup>

The first issue in *Hamilton* was the scope of the defendants' duty toward the plaintiffs. One aspect of the duty issue was whether the defendants were obliged to protect casual bystanders from injuries caused by non-defective products. While admitting that New York law subjected a manufacturer to strict liability only when it placed a *defective* product into the stream of commerce,<sup>160</sup> the court concluded that negligence principles were broad enough to support a duty of due care even in the case of *non-defective* products.<sup>161</sup> The court acknowledged that New York courts had not yet recognized a duty of care toward bystanders in connection with marketing and distributing dangerous, non-defective products, but predicted that the courts would eventually do so because "[c]hanging dangers and relationships in the real world create the need for the law continually to redefine the parameters of duty."<sup>162</sup>

The court also considered whether manufacturers were legally obligated to protect individuals against the criminal acts of others. The court examined three reasons for imposing such a duty on the defendants. First, a duty to protect against third-party criminal behavior could arise out of the relationship between the defendant and the victim.<sup>163</sup> Thus, the relationship between carrier and passenger or tavern owner and patron, which provides the defendant with the power to minimize a risk, would thereby obligate him to take reasonable measures to protect the plaintiff against such a risk, including the risk of criminal misconduct by another.<sup>164</sup> In *Hamilton*, the court concluded that a manufacturer's special ability to detect and to guard against the risks associated with its products gave rise to a "protective relationship" with those who might be injured.<sup>165</sup> According to the court, recognition of such a relationship was especially appropriate when the risk of injury due to criminal misconduct was not merely foreseeable, but actually highly likely to occur.<sup>166</sup>

The court observed that a duty to protect against third parties might also arise out of a relationship between the defendant and a third party, such as a parent and child or an employer and an employee.<sup>167</sup> This duty is traditionally based on the ability of the defendant to control the actions of the third party. According to the court, such a relationship might be found to exist between gun manufacturers and

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158. *Id.* at 833-34.

159. *Hamilton*, 62 F. Supp. 2d at 839-40.

160. *Id.* at 823.

161. *Id.* at 823-24.

162. *Id.* at 824.

163. *Id.* at 820.

164. *Id.* at 824.

165. *Hamilton*, 62 F. Supp. 2d at 821.

166. *Id.*

167. *Id.* at 820.

downstream distributors and retailers.<sup>168</sup> Gun manufacturers could refuse to supply firearms to distributors or retailers who habitually allowed firearms to fall into the hands of criminals.<sup>169</sup>

Finally, a duty to protect against third-party acts could also arise when the defendant affirmatively enhanced an inherent risk.<sup>170</sup> In this case, while there was some risk that criminals would acquire handguns and use them to harm others regardless of what the manufacturer did, the court concluded that the manufacturers' marketing practices greatly increased this background risk by making it easier for criminals to get their hands on firearms.<sup>171</sup>

Having concluded that gun manufacturers owed a duty to protect potential shooting victims from criminal attack, the court then considered whether the manufacturers had breached this duty. The court observed that the risk of injury was very great if handguns fell into the hands of those who were likely to use them to commit crimes.<sup>172</sup> According to expert testimony presented at the trial, gun-related deaths and injuries, particularly among young people, had risen dramatically since 1985.<sup>173</sup> Moreover, contrary to popular belief, most guns used in crimes were not stolen, but were purchased, directly or indirectly, from federally licensed firearms dealers.<sup>174</sup> The evidence showed that minors and felons often used "straw men" to purchase guns for them, and disreputable dealers falsified ATF Firearm Transaction Records at the time of purchase.<sup>175</sup> In the court's view, the defendants could have reduced these illegal sales by refusing to do business with careless or unscrupulous gun dealers, by limiting sales at unregulated gun shows, and by requiring that handguns be sold to the public only in responsibly operated retail stores.<sup>176</sup> The court also found that the defendants were fully aware that their marketing practices facilitated moving guns from the Southeast into the underground markets in the Northeast.<sup>177</sup> Even though some gun manufacturers and distributors had tried to regulate retail sales, many others had turned a blind eye to the problem.<sup>178</sup>

Another issue was whether the defendants' marketing practices were a cause-in-fact of shooting deaths generally, and whether there was some causal connection between these practices and the injuries suffered by specific individuals.<sup>179</sup> The trial

168. *Id.*

169. *Id.* at 821-22.

170. *Id.* at 822.

171. *Hamilton*, 62 F. Supp. 2d at 822. The court described the defendants' conduct as an "enabling tort" because it greatly facilitated the ability of others to do harm. This concept of enabling torts was first articulated by Professor Robert Rabin. See Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

172. *Hamilton*, 62 F. Supp. 2d at 825-26; see also *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1313-14 (E.D.N.Y. 1995) (reviewing data and supporting sources).

173. *Hamilton*, 62 F. Supp. 2d at 825-26.

174. *Id.* at 825.

175. *Id.* at 826.

176. *Id.*

177. *Id.* at 832.

178. *Id.*

179. *Hamilton*, 62 F. Supp. 2d at 834-35.

court accepted the plaintiffs' contention that negligently marketing handguns should be treated like a toxic tort case.<sup>180</sup> In such cases, the plaintiffs were often permitted to prove general causation by using epidemiological evidence.<sup>181</sup> Plaintiffs could then use medical testimony to show that the toxic substance in question more likely than not caused a specific plaintiff's injuries.<sup>182</sup> In addition, when more than one defendant has marketed an essentially fungible product, a number of states have shifted the burden of proof on this aspect of the causation issue.<sup>183</sup> In this case, the court found that there was ample evidence to support the conclusion that the defendants' marketing practices had facilitated an influx of illegal firearms into New York City<sup>184</sup> and made them readily available to the sort of person who had injured the plaintiff, Stephen Fox.<sup>185</sup>

The fourth issue before the court involved proximate cause. The defendants argued the traditional position that the criminal actions of third parties should be treated as unforeseeable superseding events that broke the chain of causation and relieved them of liability.<sup>186</sup> However, the court pointed out that an intervening act would not be sufficient to insulate a defendant from liability when it was a natural and foreseeable consequence of a condition created by the defendant.<sup>187</sup> Since the court had already determined that the defendants had a duty to anticipate and guard against misuse of its products by third parties, the court had no difficulty concluding that such misuse, when it did occur, was not a superseding cause.<sup>188</sup>

The final issue before the court was the applicability of market share liability.<sup>189</sup> The court observed that gun manufacturers were in a better position than victims to bear the costs of gun-related injuries; that it was fair to impose this burden upon gun manufacturers because they had voluntarily chosen to employ marketing practices that increased the risk of injury to individuals like the plaintiffs; that forcing gun manufacturers to internalize the social costs of their enterprise would encourage them to produce safer products; and that accident victims in such cases have not chosen to expose themselves to these sorts of product-related risks.<sup>190</sup> In

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180. *Id.* at 834.

181. *Id.*

182. *Id.*

183. *Id. See, e.g.,* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989) (involving DES); Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980) (involving DES).

184. *Id.* at 836-37.

185. *Hamilton*, 62 F. Supp. 2d at 837-38.

186. *Id.* at 818, 833.

187. *Id.* at 833 (quoting *Kush v. City of Buffalo*, 449 N.E.2d 725, 729 (N.Y. 1983)).

188. *Id.* at 834.

189. *Id.* For a discussion of market share liability, see DAVID G. OWEN, M. STUART MADDEN & MARY J. DAVIS, 2 MADDEN & OWEN ON PRODUCTS LIABILITY § 24:6 (3d ed. 2000) [hereinafter MADDEN & OWEN ON PRODUCTS LIABILITY]; David A. Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Frank J. Gilberti, *Emerging Trends for Products Liability: Market Share Liability, Its History and Future*, 15 TOURO L. REV. 719 (1999); Andrew R. Klein, *Beyond DES: Rejecting the Application of Market Share Liability in Blood Products Litigation*, 68 TUL. L. REV. 883 (1994).

190. *Hamilton*, 62 F. Supp. 2d at 843-44.

addition, the court concluded that the relative fungibility of handguns strengthened the case for imposing market share liability on the defendant gun manufacturers.<sup>191</sup> Accordingly, the trial court approved instructions that allowed the jury to apportion damages among the gun manufacturers according to their respective shares of the handgun market.<sup>192</sup>

At the end of the trial, the jury found fifteen of the twenty-five defendants negligent and returned damages in favor of one of the plaintiffs.<sup>193</sup> The defendants moved for a judgment NOV, and when the trial court denied this motion, the defendants appealed.<sup>194</sup> On appeal, the defendants cited *McCarthy* and *Forni* for the proposition that they owed no duty to the plaintiffs under New York law.<sup>195</sup> They also contended that apportioning damages on a market share basis was “impermissible under New York law.”<sup>196</sup> The Second Circuit Court of Appeals decided to certify the following questions to the New York Court of Appeals: (1) did New York recognize a duty on the part of gun manufacturers to exercise due care with respect to the marketing and distribution of firearms; and (2) can damages in negligent marketing cases be apportioned according to principles of market share liability?<sup>197</sup> The New York Court of Appeals agreed to answer these certified questions.

In its discussion of the duty issue, the New York court observed that in order to avoid the possibility of unlimited liability, the plaintiff could not recover damages by alleging that a product manufacturer owed “a general duty to society” at large, but was required to show that it owed “a specific duty to him or her.”<sup>198</sup> In addition, the court showed considerable reluctance to impose a duty upon a defendant to control the conduct of others.<sup>199</sup> To be sure, such a duty would be recognized when a relationship exists between the defendant and a third-party tortfeasor that gives the defendant actual control over the third person’s actions.<sup>200</sup> This sort of relationship might include that of employer and employee or parent and child.<sup>201</sup> A duty might also exist when there was a special relationship between the defendant and the plaintiff, such as the relationship of common carriers to their passengers, which required a defendant to protect the plaintiff from the acts of others.<sup>202</sup>

In this case, the court found that the connection between manufacturer and criminal, as well as the connection between manufacturer and victim, to be

191. *Id.* at 844-46.

192. *Id.* at 846-47.

193. *Id.* at 808.

194. *See* *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 41 (2d Cir. 2000).

195. *Id.* at 42; *see McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997); *Forni v. Ferguson*, 648 N.Y.S. 2d 73 (App. Div. 1996).

196. *Hamilton*, 222 F.3d at 41.

197. *Id.* at 46.

198. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1060 (N.Y. 2001).

199. *Id.* at 1061.

200. *Id.*

201. *Id.*

202. *Id.*

extremely remote.<sup>203</sup> According to the court, the typical chain of distribution included the manufacturer, a federally licensed wholesaler or distributor, the first retailer, subsequent legal purchasers, and the person who actually committed the crime.<sup>204</sup> In view of the attenuated connection between the manufacturer and either the tortfeasor or the victim, the court felt it was unrealistic to expect the manufacturer to exercise any meaningful control over the conduct of others further down the chain of distribution.<sup>205</sup> That being the case, the court saw little sense in imposing a duty upon the manufacturer to protect victims against the criminal acts of third parties.<sup>206</sup>

The New York Court of Appeals rejected several other duty-related theories proposed by the plaintiffs. For example, the plaintiffs suggested that the manufacturer's superior ability to detect and prevent product-related risks created a "protective relationship" between the manufacturer and those who might be harmed by its products.<sup>207</sup> However, the court refused to impose such a duty upon a manufacturer unless its products were defective.<sup>208</sup> The plaintiffs also contended that the manufacturer owed a duty to potential victims because of its ability to reduce the risk of illegal trafficking by controlling the distribution process.<sup>209</sup> This argument also failed to persuade the court, which concluded that imposing a general duty of care on this basis would not only create an indeterminate class of potential plaintiffs, but would also impose liability in cases where such liability might not have any effect on illegal gun sales.<sup>210</sup> Finally, the court declined to impose a duty of care upon gun manufacturers under the negligent entrustment doctrine.<sup>211</sup> While the court acknowledged that a plaintiff might invoke the negligent entrustment doctrine where the manufacturer sold its products to specific distributors who were known to be engaged in illegal gun trafficking on a significant and consistent basis, it refused to apply the doctrine in a case where the plaintiffs produced merely general evidence of gun trafficking.<sup>212</sup>

Turning to the question of market share liability, the New York Court of Appeals also agreed with the defendants' position. The trial court had permitted the jury to apportion the plaintiff's damage award according to the principles of market share liability,<sup>213</sup> and the jury had accordingly apportioned damages among three

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203. *Id.* at 1061-62.

204. *Hamilton*, 750 N.E.2d at 1062.

205. *Id.*

206. *Id.* at 1061-62.

207. *Id.*

208. *Id.* at 1062-63.

209. *Id.* at 1063.

210. *Hamilton*, 750 N.E.2d at 1063.

211. *Id.* at 1064. For a discussion of negligent entrustment, see generally MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 189, § 19.1; Robert M. Howard, Note, *The Negligent Commercial Transaction Tort: Imposing Common Law Liability on Merchants for Sales and Leases to "Defective" Customers*, 1988 DUKE L.J. 755.

212. *Id.*

213. See *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 843-46 (E.D.N.Y. 1999).



gun manufacturers.<sup>214</sup> However, the New York Court of Appeals determined that market share liability was inappropriate in gun injury cases because firearms were not a fungible product like DES, and victims, at least in theory, could identify the actual manufacturers.<sup>215</sup> In addition, because the degree of risk created by gun manufacturers varied considerably, the court concluded that apportioning liability on market share basis alone would be unfair.<sup>216</sup>

Upon receiving the answer of the New York Court of Appeals to its certified questions, the Second Circuit ordered that the plaintiffs' lawsuit be dismissed, thereby ending their seven-year-long effort to obtain damages from defendant gun manufacturers.<sup>217</sup>

#### D. Merrill v. Navegar, Inc.

*Merrill v. Navegar, Inc.*<sup>218</sup> involved a suit against the manufacturer of two semiautomatic assault weapons, the TEC-9 and the TEC-DC9 (hereinafter referred to collectively as the "TEC-DC9"). Gian Ferri used these weapons to kill eight persons and wound six others before killing himself.<sup>219</sup> Ferri apparently purchased the guns from properly licensed dealers; however, he violated the law by transporting the weapons from Nevada, where they were legal, to California, where they were not.<sup>220</sup> The plaintiffs argued, *inter alia*, that even though the guns sales were legal, the defendant, Navegar, should be held liable because it had promoted and marketed its products in a way that increased their appeal to those who were likely to commit criminal acts.<sup>221</sup> The trial court granted the defendant's motion for summary judgment and the plaintiffs appealed.<sup>222</sup>

According to the California intermediate appellate court, both the physical characteristics of these weapons and the manner in which they were marketed greatly increased the risk that they would be acquired and used for criminal purposes.<sup>223</sup> The court observed that the weapons were designed to accept large capacity fifty-round magazines and equipped with "barrel shrouds," which allowed the user to more easily spray fire.<sup>224</sup> The barrels were threaded to allow attaching silencers or flash suppressors.<sup>225</sup> The weapons were fitted with a sling device, which

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214. *Id.* at 811.

215. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1066-67 (N.Y. 2001).

216. *Id.*

217. *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 32 (2d Cir. 2001).

218. 89 Cal. Rptr. 2d 146 (Ct. App. 1999).

219. *Id.* at 152.

220. *Id.* at 153.

221. *Id.* at 159-60. The plaintiffs also claimed that the manufacture and sale of the TEC-DC9 semi-automatic pistol was an ultrahazardous activity. *Id.* at 152. The court affirmed the lower court's dismissal of that claim. *Id.* at 190-92.

222. *Id.* at 152.

223. *Id.* at 165-69.

224. *Merrill*, 89 Cal. Rptr. 2d at 154.

225. *Id.*

enabled them to be fired rapidly from the hip.<sup>226</sup> They were compact and capable of being broken down for better concealment, and they were compatible with a "Hell Fire" trigger system, which permitted the weapon to be fired at a much faster rate than a normal semiautomatic weapon.<sup>227</sup> Moreover, a TEC-DC9 equipped with such a trigger mechanism could easily be modified to perform like a fully automatic weapon.<sup>228</sup> These features not only made the TEC-DC9 function like a military-style submachine gun, they also substantially reduced the weapon's utility for legitimate purposes such as hunting, sport shooting, or self defense.<sup>229</sup>

The court also pointed out that Navegar seemed to have deliberately targeted their marketing of the TEC-DC9 toward persons, like Ferri, who were attracted to or associated with violence.<sup>230</sup> First of all, the defendant advertised its products in magazines, such as *Soldier of Fortune*, *SWAT*, *Combat Handguns*, *Guns*, *Firepower*, and *Heavy Metal Weapons*, that were widely read by militarists and survivalists.<sup>231</sup> Moreover, this advertising emphasized the paramilitary character of its weapons by referring to their "'military non-glare' finish and 'combat-type' sights."<sup>232</sup> In addition, Navegar's promotional materials called attention to certain features of the TEC-DC9 that would make it particularly suitable for criminal use.<sup>233</sup> In addition to the combat sling and threaded barrel, Navegar extolled the fact that the TEC-DC9's surface had "excellent resistance to fingerprints."<sup>234</sup> Furthermore, Navegar displayed its weapons at the sort of gun shows that violence-oriented persons often attended.<sup>235</sup> Finally, Navegar provided TEC-DC9s for use in violent films and television programs, such as "Robocop," "Freejack," and "Miami Vice" in order to create an association in the public eye between its products and acts of violence.<sup>236</sup>

In deciding whether the lower court should have allowed the plaintiffs' case against Navegar to go to trial, the appellate court examined the issues of duty and causation.<sup>237</sup> The court relied primarily upon *Rowland v. Christian*<sup>238</sup> for its analysis

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226. *Id.*

227. *Id.*

228. *Id.* at 157.

229. *Id.* at 154-55.

230. *Merrill*, 89 Cal. Rptr. 2d at 156.

231. *Id.*

232. *Id.*

233. *Id.* at 157.

234. *Id.* Navegar pointed out that this claim merely meant that the surface was resistant to damage from oil or sweat when handled, and that Navegar's finishing process had no actual effect on the ability to obtain fingerprints from the weapon. *Id.* at 159. However, the trial court concluded that some purchasers would interpret Navegar's claim as an assurance that they could use the TEC without fear of leaving behind fingerprints that might identify them to the police. *Id.*

235. *Id.* at 156.

236. *Merrill*, 89 Cal. Rptr. 2d at 157.

237. *Id.* at 161.

238. 443 P.2d 561 (Cal. 1968).

of the duty issue.<sup>239</sup> Under *Rowland*, the existence of a duty depends upon a miscellany of factors. The major factors include

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.<sup>240</sup>

The court conceded that neither the manufacturer nor the distributor of a non-defective firearm could be held liable merely for placing it in the market.<sup>241</sup> However, the court interpreted the plaintiffs' complaint as acknowledging an existing baseline level of criminal conduct due to the presence of firearms in the community and seeking to impose a duty on Navegar not to increase the already existing risk.<sup>242</sup> The court cited *Knight v. Jewett*<sup>243</sup> for the proposition that individuals could be held liable if they increased the inherent risks associated with a particular activity.<sup>244</sup> Like the game of touch football involved in *Knight*, the sale of firearms in *Merrill* presented an element of danger that could not be eliminated without effectively barring the activity altogether. However, the court agreed with the plaintiffs that manufacturers and distributors should refrain from *affirmatively* increasing the risks associated with their products.<sup>245</sup> In its analysis, the court distinguished between misfeasance and nonfeasance: ordinarily a person has no duty to intervene in order prevent the increase of a risk in the absence of a special relationship; however, in some cases, such a duty may be imposed in the absence of a special relationship when a person's affirmative acts increase the risk to another.<sup>246</sup>

Turning to the first of the *Rowland* court's factors, the court looked to see whether the risk associated with the defendant's conduct was foreseeable.<sup>247</sup> Although Navegar denied that it could have foreseen that its products would be used in a killing spree, the court found that the manufacturer was well aware that the TEC-DC9 was often used in criminal assaults and that many of its features were

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239. *Merrill*, 89 Cal Rptr. 2d at 165.

240. *Rowland*, 443 P.2d at 564.

241. *Merrill*, 89 Cal. Rptr. 2d at 163.

242. *Id.*

243. 834 P.2d 696 (Cal. 1992).

244. *Merrill*, 89 Cal. Rptr. 2d at 163-64.

245. *Id.* at 164.

246. *Id.* at 164-65.

247. *Id.* at 165-69.

designed to appeal to criminal users.<sup>248</sup> Consequently, the court concluded that criminal acts, such as those of the plaintiffs' killer, were indeed foreseeable.<sup>249</sup> The court also determined that Navegar's conduct was "morally blameworthy."<sup>250</sup> Evidence of blameworthy conduct included: (1) Navegar's marketing of the TEC-DC9 in a way that was calculated to bring it to the attention of those who were likely to use it for criminal purposes; (2) Navegar's indifference to the fact that their product was commonly used for criminal purposes; and (3) Navegar's marketing director furnishing manuals and videotapes that demonstrated how to illegally convert the TEC-DC9 into a fully automatic weapon.<sup>251</sup>

Another consideration, according to the *Rowland* court, was the public interest in preventing future harm.<sup>252</sup> The court in *Merrill* observed that the direct costs of gunshot-related injuries amounted to \$2.3 billion annually.<sup>253</sup> Other costs included such things as lost wages, pain and suffering, police resources, and "the psychological insecurity we all suffer from living in a gun-infested society."<sup>254</sup> The court pointed out that public policy, as expressed by courts and legislative institutions, strongly supported reducing these social costs.<sup>255</sup>

The final *Rowland*-based factor that the court examined was the burden that such a duty would impose on the defendant and on the community.<sup>256</sup> As the court in *Merrill* explained, this element refers to the reasonable preventative measures that the defendant would have to take to guard against a particular danger if a duty to exercise due care was imposed.<sup>257</sup> In this case, the gun manufacturers would simply have to refrain from marketing their products to high-risk consumers, a burden that the court felt was relatively easy for them to satisfy.<sup>258</sup> Furthermore, the court concluded that the adverse consequences to society also would be slight since the TEC-DC9 had very little social utility anyway.<sup>259</sup>

In sum, the *Merrill* court determined that at least three of the *Rowland* considerations supported imposing a duty upon Navegar not to market the TEC-DC9 "in such a way as to increase the inherent risks posed by such a weapon."<sup>260</sup> In response, Navegar contended that imposing such a duty would conflict with the California Assault Weapons Control Act of 1989 (AWCA).<sup>261</sup> According to Navegar, since the manufacture, marketing, and out-of-state sale of the TEC-DC9

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248. *Id.* at 166.

249. *Id.* at 167.

250. *Merrill*, 89 Cal. Rptr. 2d at 169.

251. *Id.*

252. *Id.*

253. *Id.* at 169-70 (citing Philip J. Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 282 JAMA 447, 454 (1999)).

254. *Id.* at 170 (quoting McClurg, *supra* note 3, at 792).

255. *Id.*

256. *Merrill*, 89 Cal. Rptr. 2d at 170.

257. *Id.* (citing *Parsons v. Crown Disposal Co.*, 936 P.2d 70 (Cal. 1997)).

258. *Id.* at 171.

259. *Id.* at 172.

260. *Id.* at 172.

261. *Id.* at 173; see CAL. PENAL CODE §§ 12275-12277 (West 2000).

were not prohibited by AWCA, imposing tort liability would be inappropriate as long as the gun was not defective.<sup>262</sup> However, the court disagreed with this analysis; it emphatically declared that AWCA did not determine the scope of Navegar's duty of care.<sup>263</sup> Therefore, compliance with the statute would not relieve the manufacturer of its duty to exercise due care in the marketing of the TEC-DC9.<sup>264</sup>

Navegar also argued that imposing tort liability for negligent marketing would constitute an impermissible judicial ban on manufacturing and selling its products.<sup>265</sup> The court responded, somewhat disingenuously, by distinguishing between state action that absolutely prohibited certain conduct and that which merely required the actor to pay damages to those who were injured as a result of this conduct.<sup>266</sup> According to the court, imposing tort liability on Navegar did not prevent it from continuing its current marketing practices; instead, it merely allowed shooting victims to recover damages.<sup>267</sup> The court regarded this prospect as desirable since it would force Navegar to internalize the costs of its conduct and create an incentive to reduce the risks associated with its present marketing efforts.<sup>268</sup> Furthermore, the court rejected Navegar's assertion that imposing tort liability "would invade the prerogative of the legislature."<sup>269</sup> Rather, the decision to recognize the existence of a duty to exercise due care with respect to marketing semi-automatic handguns did not constitute a judicial decision that such products should not be sold, but simply reflected the view that juries should be allowed to decide whether Navegar's marketing practices were negligent or not.<sup>270</sup>

Having concluded that Navegar owed a duty to market its products in a reasonable manner, the *Merrill* court proceeded to consider whether the defendant's marketing practices actually caused the plaintiffs' injuries.<sup>271</sup> Not surprisingly, Navegar argued that there was no causal relation between its marketing efforts and Ferri's criminal behavior.<sup>272</sup> In particular, the gun manufacturer contended that the plaintiffs had produced no evidence that Ferri ever saw any of the company's advertisements or promotions.<sup>273</sup> In response, the court declared that the plaintiffs did not have to prove that Navegar's conduct was the sole cause of their injuries; rather, they could satisfy the causation requirement by showing that Navegar's conduct was a "substantial factor" in bringing about these injuries.<sup>274</sup> The court also concluded that a defendant's conduct could be characterized as a contributing cause

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262. *Merrill*, 89 Cal. Rptr. 2d at 173.

263. *Id.*

264. *Id.* at 174-78.

265. *Id.* at 178.

266. *Id.* at 178-79.

267. *Id.*

268. *Merrill*, 89 Cal. Rptr. 2d at 179.

269. *Id.*

270. *Id.* at 179-80.

271. *Id.* at 185.

272. *Id.*

273. *Id.* at 186.

274. *Merrill*, 89 Cal. Rptr. 2d at 186.

“if it created or increased the risk of such criminal or negligent acts even though the defendant did not control the party” that actually caused the harm.<sup>275</sup>

Finally, the court responded to Navegar’s claim that Ferri had not been influenced by any of its marketing efforts by citing *Stevens v. Parke, Davis & Co.*,<sup>276</sup> In *Stevens*, a drug company was accused of “overpromoting” a drug and, thereby, vitiating the warnings it provided to physicians.<sup>277</sup> Although the doctor who had prescribed the drug for the plaintiff testified that he could not specifically recall having read any of the defendant’s promotional material, the California Supreme Court nevertheless ruled that a jury could still reasonably conclude that the company’s promotional efforts consciously or subconsciously induced the doctor to prescribe the drug.<sup>278</sup> The *Merrill* court concluded that the plaintiffs’ case was even stronger than the plaintiffs in *Stevens*.<sup>279</sup> Since Ferri subscribed to numerous gun and survivalist magazines, the court concluded that it was likely that he had seen some of Navegar’s promotional material since the company advertised heavily in those publications.<sup>280</sup> Furthermore, the court found that Navegar’s promotional material not only encouraged Ferri to purchase several of its semi-automatic pistols, but they also assured him that he would have sufficient firepower to carry out his intended plan to kill a large number of people.<sup>281</sup>

The majority opinion in *Merrill* provoked a lengthy dissent from Judge Haerle.<sup>282</sup> First, the dissent accused the majority of mischaracterizing the plaintiffs’ claim as one based on a duty not to increase an inherent risk whereas the plaintiffs were actually seeking to hold Navegar liable for selling TEC-DC9s to the general public.<sup>283</sup> In addition, the dissent expressed doubts about whether there was any doctrinal foundation for the majority’s newly-discovered duty not to increase an existing risk.<sup>284</sup> The dissent also objected to the majority recognizing the plaintiffs’ negligent marketing claim, declaring that it had not been considered by any other California court.<sup>285</sup> Furthermore, the dissent argued that under existing California law, an individual had no duty to prevent criminal misconduct by another in the absence of a special relationship.<sup>286</sup> Finally, the dissent took issue with the conclusion that there was a causal connection between Ferri’s shooting spree and

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275. *Id.*

276. *Id.* at 187. See *Stevens v. Parke, Davis & Co.*, 507 P.2d 653 (Cal. 1973).

277. *Stevens*, 507 P.2d at 656.

278. *Id.* at 662.

279. *Merrill*, 89 Cal. Rptr. 2d at 188.

280. *Id.* at 188.

281. *Id.*

282. See *id.* at 193 (Haerle, J., concurring in part and dissenting in part). Judge Haerle concurred in the majority opinion’s treatment of the ultrahazardous activity claim. *Id.* (Haerle, J., concurring in part and dissenting in part).

283. *Id.* at 194-96 (Haerle, J., concurring in part and dissenting in part).

284. *Id.* at 196-99 (Haerle, J., concurring in part and dissenting in part).

285. *Merrill*, 89 Cal. Rptr. 2d at 199-200 (Haerle, J., concurring in part and dissenting in part).

286. *Id.* at 200-01 (Haerle, J., concurring in part and dissenting in part) (citing *Richards v. Stanley*, 271 P.2d 23 (Cal. 1954)).

Navegar's marketing practices.<sup>287</sup> Judge Haerle felt that once Ferri intended to injure the plaintiffs, his choice of Navegar's weapons to carry out the crime was purely coincidental.<sup>288</sup>

On appeal, the California Supreme Court reversed the intermediate appellate court's decision and reinstated the trial court's judgment for the defendant.<sup>289</sup> The court held that the plaintiffs' suit was based on a theory of product category liability that was foreclosed by California Civil Code § 1714.4(a).<sup>290</sup> Furthermore, even if the plaintiffs were able to prove that the statutory provision did not apply, the California court did not believe that there was any causal connection between the defendant's marketing activities and the plaintiffs' injuries.<sup>291</sup>

First of all, the court characterized the plaintiffs' case as a "products liability action" within the purview of California Civil Code § 1714.4 (a).<sup>292</sup> This provision declared that "[i]n a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged."<sup>293</sup> The plaintiffs argued that their lawsuit was not a product liability action within the purview of the statute because they were seeking to hold Navegar liable because it "negligently designed, distributed, and marketed" the TEC-DC9.<sup>294</sup> However, the court rejected this argument, concluding that the plaintiffs' real claim was that the weapon was defective in design because the risks of making it available to the general public outweighed the product's benefits.<sup>295</sup> In addition, the court determined the plaintiffs had failed to prove cause-in-fact because they offered no evidence to show that Ferri was influenced by, or had even seen, the defendant's promotional materials.<sup>296</sup> According to the court, Ferri never asked for the defendant's product by name, but apparently purchased the weapons from a retail seller on the basis of price and performance characteristics.<sup>297</sup>

### *E. Suits by Governmental Entities Against Gun Manufacturers*

Encouraged by the success of government lawsuits against tobacco companies,<sup>298</sup> a number of municipalities have brought "recoupment" suits against

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287. *Id.* at 209-14 (Haerle, J., concurring in part and dissenting in part).

288. *Id.* at 212 (Haerle, J., concurring in part and dissenting in part).

289. *Merrill v. Navegar, Inc.*, 28 P.3d 116, 133 (Cal. 2001).

290. *Id.*

291. *Id.* at 131.

292. *Id.* at 119; *see* CAL. CIV. CODE § 1714.4(a) (West 1998).

293. *Merrill*, 28 P.3d at 119.

294. *Id.* at 124.

295. *Id.* at 126.

296. *Id.* at 132.

297. *Id.* at 133.

298. *See* Brent W. Landau, Note, *State Bans on City Gun Lawsuits*, 3 HARV. J. ON LEGIS. 623, 624 (2000). For a discussion of state suits against tobacco companies and the resulting settlements, *see* Hanock Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 363-73 (2000); Mark D. Fridy, Note, *How the Tobacco Industry May Pay for Public Health*

gun manufacturers to recover for gun-related governmental expenses.<sup>299</sup> The City of New Orleans brought the first of these suits in October 1998,<sup>300</sup> suing fifteen gun manufacturers, five local pawnshops, and three firearms trade associations for the “costs of ‘police protection, emergency services, police pensions, medical care, and lost tax revenue related to handgun violence.’”<sup>301</sup> A few weeks later, the City of Chicago and Cook County sued twenty-two gun manufacturers, twelve suburban retail gun stores, and four distributors.<sup>302</sup> The Chicago suit sought \$433 million for police, medical, and welfare costs associated with gunshot wounds.<sup>303</sup> Since then, more than twenty other municipalities, including Bridgeport, Miami, Atlanta, Philadelphia, San Francisco, Los Angeles, St. Louis, Seattle, St. Paul, Minneapolis, Cleveland, and Detroit, have brought claims against gun manufacturers and their trade associations.<sup>304</sup>

In many of these lawsuits, the cities claimed that the guns in question are defectively designed because they are not equipped with appropriate safety features.<sup>305</sup> In addition, some cities have contended that the gun manufacturers failed to provide adequate warnings to consumers.<sup>306</sup> Finally, many cities have

*Care Expenditures Caused by Smoking: A Look at the Next Wave of Suits Against the Tobacco Industry*, 72 IND. L.J. 235, 240-51 (1996); Tiffany S. Griggs, Comment, *Medicaid Reimbursement from Tobacco Manufacturers: Is the States' Legal Position Equitable?*, 69 U.COLO.L.REV. 799, 805-15 (1998).

299. See generally H. Sterling Burnett, *Suing Gun Manufacturers: Hazardous to our Health*, 5 TEX. REV. L. & POL. 433, 484-85 (2001) (discussing the status of the municipalities' lawsuits); Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 54-61 (2000) (recounting the municipal suits and the gun industry's response); Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 ST. LOUIS U. PUB. L. REV. 247 (1999) (presenting two model approaches for municipalities' lawsuits, based on the New Orleans and Chicago suits, plus other possible approaches); Frank J. Vandall, *O.K. Corral II: Policy Issues in Municipal Suits Against Gun Manufacturers*, 44 VILL. L. REV. 547 (1999) (discussing the economic, cause-in-fact, and proximate cause policy issues of cities' suits against gun manufacturers); Morgan, *supra* note 43 (discussing cities' tort actions against gun manufacturers).

300. Burnett, *supra* note 299, at 440; Landau, *supra* note 298, at 624-25.

301. Morgan, *supra* note 43, at 528-29 (quoting *New Orleans Sues Manufacturers for Handgun Violence*, ANDREWS CONSUMER PROD. LITIG. RPT., Dec. 1998).

302. *Id.*

303. Vandall, *supra* note 299, at 549.

304. Jon S. Vernick & Stephen P. Teret, *New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufacturers and Constitutional Challenges to Gun Laws*, 36 HOUSTON L. REV. 1713, 1745-46 (1999); Morgan, *supra* note 43, at 533-37.

305. See Anne Giddings Kimball & Sarah L. Olson, *Municipal Firearm Litigation: Ill Conceived from Any Angle*, 32 CONN. L. REV. 1277, 1280-81 (2000). For example, plaintiffs contend that the defendants' handguns are defectively designed because they do not have a device that indicates when there is a bullet in the chamber or a mechanism that would disable the weapon when the magazine is removed. In addition, they argue that handguns should have “smart gun” technology, which would allow only authorized persons to fire them. See James H. Warner, *Municipal Anti-Gun Lawsuits: How Questionable Litigation Substitutes for Legislation*, 10 SETON HALL CONST. L.J. 775, 784 (2000).

306. See, e.g., Morgan, *supra* note 43, at 533-36 (stating that suits by Bridgeport, Miami, and Atlanta included failure to warn claims).



invoked a “public nuisance” theory<sup>307</sup> under which liability may be imposed upon those who create “an unreasonable interference with a right common to the general public.”<sup>308</sup> The cities claim that threats to public safety, and the economic costs of gun-related violence caused by the marketing practices of gun manufacturers, constitute just such an interference with public rights.<sup>309</sup> For example, Chicago alleged in its lawsuit that the defendants had created a public nuisance by inundating suburban stores with firearms, knowing that they would be purchased illegally by residents of Chicago.<sup>310</sup> In another case, the city of Bridgeport, Connecticut, alleged that the gun industry had “targeted [Bridgeport] because of its high minority population.”<sup>311</sup>

The public nuisance theory described above bears a strong resemblance to that form of negligent marketing based on unreasonable product distribution practices. In both cases, liability is predicated upon distribution practices that make it easy for people to obtain firearms illegally. In negligent marketing cases, individual plaintiffs seek to recover damages for personal injuries, while in public nuisance cases, municipal plaintiffs seek to recover damages for economic costs to the community.<sup>312</sup>

It is too soon to tell how significant municipal suits against gun manufacturers will be; many of these suits are still in the preliminary stages of the litigation process. Among reported cases, the results are mixed, but the trend seems to be running in favor of the handgun manufacturers.<sup>313</sup> For example, the Third Circuit Court of Appeals recently rejected “public nuisance” claims against handgun

307. Landau, *supra* note 298, at 625; Morgan, *supra* note 43, at 533; Vernick & Teret, *supra* note 304, at 1747-48.

308. See RESTATEMENT (SECOND) OF TORTS § 821B (1) (1977).

309. See Morgan, *supra* note 43, at 550-52; Scott R. Preston, Comment, *Targeting the Gun Industry: Municipalities Aim to Hold Manufacturers Liable for Their Products and Actions*, 24 SO. ILL. U. L.J. 595, 603-05, 612-13 (2000).

310. Landau, *supra* note 298, at 625; Jill R. Baniewicz, Note, *Is Hamilton v. Accu-tek a Good Precursor of What the Future Holds for Gun Manufacturers?*, 34 IND. L. REV. 419, 438-39 (2001).

311. Morgan, *supra* note 43, at 533.

312. In some cases, municipal plaintiffs have asked for injunctions to compel gun manufacturers to change their marketing practices and to implement measures to reduce injuries associated with the use of firearms. Kimball & Olson, *supra* note 305, at 1286-88. The NAACP has also brought suit in New York to compel gun manufacturers to change the way they market their products. Vernick & Teret, *supra* note 304, at 1754.

313. See, e.g., *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 133-34 (Conn. 2001) (affirming dismissal of suit by City of Bridgeport for lack of standing); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1044-45 (Fla. Dist. Ct. App. 2001) (affirming dismissal of suit by Miami-Dade county); *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 19 (La. 2001) (holding that suit by New Orleans was barred by subsequently enacted statute). But see *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 833 (N.D. Ohio 2000) (refusing to dismiss suit by city of Cleveland).

manufacturers brought by local governments in Camden, New Jersey<sup>314</sup> and Philadelphia, Pennsylvania.<sup>315</sup>

#### *F. The Future of Negligent Marketing Litigation*

Just a few years ago, it appeared that negligent marketing was about to become a powerful tool in products liability litigation, particularly where the products involved were not “defective” in the traditional sense. The doctrinal and policy arguments for a negligent marketing theory were laid out by Professor McClurg,<sup>316</sup> and a number of lawsuits against manufacturers of handguns and ammunition had begun to work their way through the courts.<sup>317</sup> Judge Jack Weinstein endorsed the concept of negligent marketing in *Hamilton v. Accu-Tek*,<sup>318</sup> as did Judge Guido Calabresi in the dissenting opinion in *McCarthy v. Olin Corp.*<sup>319</sup> The favorable decision by a California intermediate appellate court in *Merrill v. Navegar, Inc.*<sup>320</sup> provided additional support toward what appeared to be an emerging consensus. Plaintiffs’ lawyers (and state officials) no doubt looked forward to bringing negligent marketing claims on behalf of their clients against a wide variety of product manufacturers. However, a dramatic turnabout occurred in 2001 when the New York Court of Appeals and the California Supreme Court both rejected negligent marketing claims brought against gun manufacturers by victims of gun-related violence.<sup>321</sup>

At the present time, no one knows whether other courts will agree with those of California and New York or whether they will view the negligent marketing theory in a more favorable light. A number of outstanding issues must be resolved before our nation’s courts can truly embrace the concept of negligent marketing. On the doctrinal front, courts must confront troublesome issues in the areas of standard of care, cause-in-fact, and duty. In addition, legal scholars need to give more attention to the relationship between negligent marketing and private regulatory agendas, commercial speech, and personal autonomy.

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314. *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 542 (3d Cir. 2001) (affirming dismissal of the suit by a federal district court). *See* *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245 (D.N.J. 2000).

315. *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002) (affirming dismissal of the suit by a federal district court for lack of standing). *See* *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000).

316. *See* McClurg, *supra* note 3.

317. *See supra* Part III.A-D.

318. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

319. 119 F.3d 148, 157-75 (2d Cir. 1997) (Calabresi, J., dissenting).

320. 89 Cal. Rptr. 2d 146 (Ct. App. 1999).

321. *See* *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001).

## IV. DOCTRINAL ISSUES

Negligent marketing cases present certain doctrinal problems for plaintiffs, particularly in the areas of standard of care, cause-in-fact, and duty. The traditional “reasonable prudent person” standard of care provides no objective standard to determine whether a particular marketing technique is “negligent” or not. Most plaintiffs will not likely be able to prove cause-in-fact using the traditional “but for” test, thereby requiring courts to develop other approaches to determine causation issues. Finally, the traditional distinction between nonfeasance and misfeasance or malfeasance may have to be modified if plaintiffs are to recover under a theory of negligent marketing.

A. *Standard of Care*

Unlike most forms of products liability, negligent marketing is a fault-based theory.<sup>322</sup> This distinction means that the plaintiff in a negligent marketing case must show that the seller has failed to exercise “reasonable care” in some aspect of the marketing process.<sup>323</sup> The problem is to ascertain what reasonable care means in these circumstances.

Generally courts and juries can easily determine what the applicable standard of care should be in a particular case. For example, when the defendant is engaged in a commonplace activity, such as driving an automobile, members of the jury can rely upon their own personal experience to evaluate the defendant’s conduct.<sup>324</sup> In other cases, the applicable standard of care may be officially promulgated by a legislative body or administrative agency, and courts will treat any deviation from this standard as “negligence per se.”<sup>325</sup> This rule means that one who violates the official standard of conduct is deemed to be negligent as a matter of law.<sup>326</sup> Customary practices within a trade or profession often provide strong evidence of acceptable conduct. For example, the “generally accepted . . . standards” of the medical profession establishes the controlling standard of care in medical malpractice cases.<sup>327</sup> Finally, safety standards or practices formally endorsed by

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322. See, e.g., McClurg, *supra* note 3, at 795-96 (advocating *negligent* marketing claims against gun manufacturers since strict liability claims have not been successful).

323. See *id.* at 806.

324. 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 189, § 27:8, at 837-39.

325. See *Gressman v. McClain*, 533 N.E.2d 732, 735 (Ohio 1988) (holding that selling liquor to an intoxicated person in violation of the law constitutes negligence per se); *McIntyre v. Balentine*, 833 S.W.2d 52, 59 (Tenn. 1992) (declaring that violation of a criminal statute is negligence per se).

326. See *Staudinger v. Barrett*, 544 A.2d 164, 167 (Conn. 1988); *Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d 274, 278 (Tex. 1979).

327. See *Keebler v. Winfield Carraway Hosp.*, 531 So. 2d 841, 844 (Ala. 1988); see also *Purtill v. Hess*, 489 N.E.2d 867 (Ill. 1986) (determining whether a particular expert was qualified to testify to standard of care for medical malpractice case).

industry trade associations, while not determinative, are often accorded considerable weight in negligence cases.<sup>328</sup>

However, when no generally accepted standard of conduct exists juries must decide standard-of-care issues by comparing the defendant's conduct with what a hypothetical reasonable prudent person would have done in the same or similar circumstances.<sup>329</sup> Unfortunately, this formulation does not provide much guidance in negligent marketing cases.

### 1. *Negligent Marketing Claims Based on Product Design*

Unlike other negligent marketing claims, those claims based on negligent product design do require a jury to evaluate the defendant's conduct by reference to relatively objective criteria. In a conventional design defect case, the plaintiff must normally show that the existing design directly caused the harm in question and that a feasible alternative design would have reduced the risk of this harm occurring.<sup>330</sup> At the same time, expert witnesses can provide information about the cost of the plaintiff's proposed alternative design as well as evidence about the potential accident cost savings that will accrue from adopting the alternative design. In theory, a manufacturer can calculate these risks and benefits before marketing the product in question and presumably a jury can do the same after an injury has occurred. Thus, the "standard of care" or standard for defectiveness is based on principles of cost-benefit analysis.

In a negligent marketing case, the plaintiff's expert witness would argue that certain features of the product, which increased its attractiveness to unsuitable users, could be omitted without impairing the product's essential function. This approach also involves employing cost-benefit analyses to determine whether the defendant's conduct was reasonable or not. The only difference seems to be that in ordinary design defect cases, the plaintiff's expert witness usually claims that the product would have been less dangerous if certain safety features had been *added*, while in negligent marketing cases, the plaintiff's expert would argue that the product would have been less dangerous if certain features had been *removed* from the existing design.

The TEC-DC9 semi-automatic pistol in *Merrill v. Navegar, Inc.*<sup>331</sup> provides a good illustration of a product that contained certain design features that allegedly

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328. See *Tampa Drug Co. v. Wait*, 103 So.2d 603, 610 (Fla. 1958); *Reil v. Lowell Gas Co.*, 228 N.E.2d 707, 719 (Mass. 1967); see also Dr. S. David Hoffman & Matthew E. Hoffman, *Use of Standards in Products Liability Litigation*, 30 DRAKE L. REV. 283 (1980-81) (studying the increasing use of safety standards in products liability litigation).

329. See *Mansfield v. Circle K. Corp.*, 877 P.2d 1130, 1132 (Okla. 1994); *Miller v. City of Portland*, 604 P.2d 1261, 1264 (Or. 1980); *Gossett v. Jackson*, 457 S.E.2d 97, 100 (Va. 1995).

330. See *Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1479 (10th Cir. 1993) (applying Utah law); *Gen. Motors Corp. v. Edwards*, 482 So. 2d 1176, 1191 (Ala. 1985); *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 208 (N.Y. 1983); see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998).

331. 89 Cal. Rptr. 2d 146 (Ct. App. 1999), *rev'd*, 28 P.3d 116 (Cal. 2001).

made it more attractive to criminals. Barrel shrouds, threaded barrels, and fingerprint-resistant surfaces were not inherently dangerous in themselves, but at least as far as the plaintiffs were concerned, they made TEC-DC9s more suitable for criminal use than ordinary semi-automatic pistols.<sup>332</sup>

## 2. *Negligent Marketing Claims Based on Advertising and Promotion*

Negligent marketing claims based on advertising and promoting products typically arise from actions by sellers that direct their marketing efforts at potential consumers who are likely to harm themselves or others.<sup>333</sup> Of course, no one would suggest that advertising is wrongful *per se*. Advertising is a \$350 billion a year business;<sup>334</sup> virtually all sellers engage in advertising and other marketing strategies to retain their existing market share or to increase it either by inducing existing users to increase consumption or by persuading other consumers to purchase the product.<sup>335</sup> Since sellers want to maximize the value of their advertising dollars, they naturally tend to target particular groups on the basis of wealth, gender, age, race, education, or other commercially relevant factors.<sup>336</sup> While some forms of targeting are clearly legitimate, others may not be. But how is good targeting distinguished from bad targeting? The discussion below evaluates three different approaches.

### a. *Targeting Minors*

The first approach would confine negligent marketing liability to targeting those who cannot legally use or consume the product in question. Thus, tobacco companies and purveyors of alcoholic beverages would be subject to liability for negligent marketing if they directed their advertising at minors with the intent to induce them to purchase or consume the products in violation of the law. This approach would clearly identify the type of targeting that is deemed to be negligent; however, it would leave product manufacturers free to target everyone else.<sup>337</sup>

332. *Id.* at 156.

333. *See supra* Part II.B.

334. Hanson & Kysar, *supra* note 36, at 1430. *See* James A. Henderson, Jr. & Jeffrey J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 223 (2000) (citing Hanson & Kysar for the proposition that manufacturers spend large amounts of money to “match the intricacies of human judgment and thought”).

335. *See* Karl A. Boedecker et al., *Excessive Consumption: Marketing and Legal Perspectives*, 36 AM. BUS. L.J. 301, 314 (1999).

336. *See* Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 649 (2000).

337. Even this approach does not provide a complete answer to the liability question because it does not define what constitutes “targeting.” Presumably only young children would watch a cigarette smoking Mickey Mouse on television, but suppose a tobacco company chose Bart Simpson to be its pitchman. Is the company targeting children as well as adults?

*b. Taking Advantage of Human Weaknesses*

Another way to evaluate marketing practices is to determine whether the seller has taken advantage of human weakness or vulnerability.<sup>338</sup> In determining whether a particular class of consumer might be more likely than the general population to misuse the product and thereby harm themselves or others, a court might take into account such characteristics as ethnic or racial affinity, education level, physical or mental condition, socio-economic status, age, experience, or maturity. Unfortunately, this approach has serious problems. One problem is the familiar "slippery slope." Almost any identifiable group can be classified as vulnerable for some purposes. Thus, in theory, liability could be imposed on tobacco companies who develop cigarettes specifically for women or African-Americans, beer companies who market special brands of beer to Native Americans or who develop malt liquor products specifically for African-Americans, or handgun manufacturers who tout the safety benefits of their products in women's magazines. One might take this approach a step further and argue that tort liability should be imposed on automobile companies whose advertising emphasizes the speed and power of their cars and is presumably aimed at those who habitually drive too fast.<sup>339</sup> Indeed, one could also advocate liability for companies that advertise high-sugar cereal on children's television programs<sup>340</sup> or purveyors of fast food who encourage the elderly to consume high-fat cuisine,<sup>341</sup> or even product sellers that advertise dietary supplements in sports magazines.<sup>342</sup>

Another problem with focusing on the supposed weakness or vulnerability of particular segments of the consuming public is that target audiences are not necessarily monolithic. For example, ninety-nine percent of a particular group may be fully capable of using the product safely, while the remaining one percent is not. Would advertising that targets such a group be negligent simply because a small portion of the group is likely to cause harm? Would it be negligent for a gun manufacturer to advertise its products at gun shows because a small fraction of the

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338. For an early discussion of this issue, see A.A. White, *The Intentional Exploitation of Man's Known Weaknesses*, 9 HOUSTON L. REV. 889 (1972).

339. See Gina M. DeDominicis, Note, *No Duty at Any Speed?: Determining the Responsibility of the Automobile Manufacturer in Speed Related Accidents*, 14 HOFSTRA L. REV. 403, 426 (1986) ("Advertisements emphasizing speed and power are presumably targeted at a receptive audience of drivers who frequently exceed the speed limit.").

340. See *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 676 (Cal. 1983) (observing that defendant cereal companies were "engaged in a nationwide, long-term advertising campaign designed to persuade children to influence their parents to buy sugared cereals").

341. See Boedecker et al., *supra* note 335, at 303 ("McDonalds targeted the Arch Deluxe sandwich, an item with high fat content, at older population segments already affected by blood cholesterol levels.").

342. See Jennifer J. Spokes, Note, *Confusion in Dietary Supplements Regulation: The Sports Products Irony*, 77 B.U.L. REV. 181, 206 (1997) ("Sports bars and beverages are marketed to athletes, as evidenced by their presence in sporting goods and health food stores, as well as by numerous advertisements in sports magazines.").

people attending might be criminals or terrorists? Or should a cigarette company be liable for using cartoon characters in advertising directed at adults, knowing that young children may see them as well?

*c. The Learned Hand Approach*

A third approach focuses more explicitly on risks and benefits in the manner proposed by Judge Learned Hand in *United States v. Carroll Towing Co.*<sup>343</sup> In that case, Judge Learned Hand suggested that a defendant's conduct would be considered unreasonable when the burden of taking precautions against a particular harm was less than the cost of the harm multiplied by the probability of the harm occurring.<sup>344</sup> When applied in the context of negligent marketing, one side of the equation would be the burden to the seller of changing its existing marketing practices. This burden would primarily involve lost profits because of reduced sales. The other side of the equation would involve a statistical calculation of product-related injuries that were attributable to existing marketing practices. A manufacturer would be guilty of negligence if the costs associated with changing existing marketing practices were less than the costs associated with the risk of injuries that could be avoided by making the changes.

Like the risk-utility test used in design defect cases, the Learned Hand test's usefulness depends upon whether the parties can come up with specific and credible numbers to plug into the equation. If reliable, quantifiable information about costs and benefits is not available, the Learned Hand approach will not be very useful.

*3. Negligent Marketing Claims Based on Negligent Distribution Practices*

Distribution practices are another potential source of liability under negligent marketing theory. These practices include distributing a dangerous product so as to facilitate access to it by unsuitable users and failing to require retailers to take reasonable measures to reduce product-related risks.

*a. Facilitating Access to Unsuitable Users*

One type of claim would hold a manufacturer liable for negligent marketing if its distribution methods contribute to operating a black market for the product. In *Hamilton v. Accu-Tek*,<sup>345</sup> for example, the plaintiffs alleged that gun manufacturers sent large numbers of firearms to southern states with weak gun regulations, knowing that many of these weapons would ultimately be resold illegally in states that regulated legal gun sales more strictly.<sup>346</sup> According to the plaintiffs, the

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343. 159 F.2d 169 (2d Cir. 1947).

344. *Id.* at 173.

345. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

346. *Id.* at 830-32.

manufacturers knew that the number of guns being shipped to gun dealers in the South greatly exceeded the expected demand based on population and demographic data.<sup>347</sup> This assertion was apparently enough for the jury in *Hamilton* to conclude that the defendant's distribution practices amounted to negligent marketing.<sup>348</sup>

Based on the result in *Hamilton*, the primary issue in a negligent marketing case based on product distribution practices would seem to be whether the defendant knew or should have known how its products would be distributed after leaving its possession. Under this form of negligent marketing, the focus would be on: (1) what the manufacturer knew or should have known and (2) whether the manufacturer actually had the ability to reduce the risk of illegal sales by modifying its distribution practices in some way.

The first consideration is largely a matter of fact. For some products, manufacturers may have a good deal of information about consumer demand for its products. If this demand suddenly increases without any apparent reason, a reasonable manufacturer should try to discover what has caused this increase. In addition, distributors, government sources, or news accounts might also alert the manufacturer to the existence of a problem. For example, the manufacturer of the prescription painkiller OxyContin had no warning that its product was being widely misused in Appalachia until a newspaper reporter broke the story.<sup>349</sup> Once a manufacturer knows that its products are being purchased illegally, it must then decide whether to restructure its distribution practices in order to respond to the problem. This decision involves considering feasibility and cost. At the very least, the manufacturer would have to exercise greater control over the activities of its distributors. In many cases, the manufacturer can control the behavior of its distributors by contractual agreement; in other cases, some sort of physical monitoring might be needed. Obviously, these efforts will be costly and may not solve the problem.

#### *b. Exercising Control Over Retail Sales*

Another basis for negligent marketing liability is failure to supervise retail gun sellers in order to prevent them from selling guns to unsuitable persons. This basis of liability assumes that gun manufacturers must supplement the existing scheme of federal regulation over retail handgun sales.<sup>350</sup> Handgun manufacturers would be expected to train retail sellers on how to identify criminals and "straw man" purchasers, restrict distribution of handguns to franchised retail outlets, and refuse

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347. *Id.*

348. *Id.* at 810-11.

349. See Tough, *supra* note 50.

350. For a discussion of current federal regulation of handgun sales, see Polston, *supra* note 44, at 824-28.



to sell handguns to dealers who have sold a disproportionate number of guns involved in the commission of crimes.<sup>351</sup>

Of course, there are two problems with imposing this sort of duty upon firearm manufacturers. First, monitoring the behavior of distant retailers to ensure they live up to their obligations would be very expensive. Second, all of these efforts are likely to be ineffective as long as criminals are able to obtain weapons from second-hand sellers and black market sources.

### B. Causation

Normally, the plaintiff is required to prove that the defendant's conduct was a cause-in-fact of his injury. The "but for" test is the legal test for causation that is most often employed. However, plaintiffs are likely to have great difficulty proving causation on a "but for" basis in negligent marketing cases. Because of this, some courts may permit injured parties to invoke less restrictive tests of causation in order to prove their case.

#### 1. The "But For" Test

Courts generally apply the traditional "but for" or "*sine qua non*" test to determine causation issues in personal injury cases.<sup>352</sup> Under this approach, the plaintiff must prove that he would not have been injured if the defendant's act had not occurred.<sup>353</sup> Obviously, a great many negligent marketing claims would fail if courts required plaintiffs to prove "but for" causation. For example, in order to prove causation in a negligent marketing case based on product design, the plaintiff would have to show that his injury would not have occurred if the defendant had not designed its product in a particular way. In other words, the plaintiff would have to convince a jury that the person who committed the injury did so only because of the product's design and would not have chosen some other product to commit the art.

Proving causation might be even harder for plaintiffs who base their negligent marketing claims on the seller's advertising and promotional activities. It is difficult enough to show a causal connection between advertising and general consumption

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351. See Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1256 (2000); Siebel, *supra* note 299, at 251.

352. DAN B. DOBBS, *THE LAW OF TORTS* § 168, at 409 (2000).

353. *Id.*

patterns;<sup>354</sup> it is likely to be even harder to prove that the defendant's advertising induced a particular consumer to purchase a specific product.<sup>355</sup>

Proof of causation may also be a problem in cases where the manufacturer distributes its product in a way that allegedly facilitates black market sales. Greater control by manufacturers over the activities of distributors and retail sellers might reduce the scale of black market activities somewhat, but they cannot eliminate these activities entirely. Despite the government's best efforts at regulation, unauthorized persons have always been able to obtain handguns, alcoholic beverages, and cigarettes. Thus, plaintiffs will have a difficult time persuading a judge and jury that they would not have been injured had the defendant exercised greater control over the product's distribution.

## 2. *The Substantial Factor Test*

Some states now allow plaintiffs to use the "substantial factor" test instead of the traditional "but for" test.<sup>356</sup> Under the substantial factor approach, the defendant's act is treated as a cause-in-fact of the plaintiff's injury even though the injury would have occurred anyway, if the jury determines that the act is a substantial factor in causing the injury.<sup>357</sup> This test is properly used in cases where two actions occur and either one alone is sufficient to cause the injury.<sup>358</sup>

At least one court has employed the substantial factor test in a negligent marketing case.<sup>359</sup> The California intermediate appellate court would have enabled the plaintiff to establish causation, using the substantial factor test, even though it acknowledged that the killer would probably have committed the crime if the defendant's product has not been produced and marketed.<sup>360</sup> Fortunately for the defendant, the California Supreme Court overruled the lower appellate court, concluding that the plaintiff had failed to prove causation even under the substantial factor test.<sup>361</sup> Nevertheless, the fact remains that there is no objective standard that

354. See Timothy D. Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681, 704 (1998) ("The alleged causal connection between marketing firearms and violent crime remains largely unsubstantiated."); Jeff I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U. L. REV. 1147, 1153 (1996) (declaring that numerous studies have failed to verify the existence of a direct causal connection between cigarette advertising and smoking levels).

355. See *Merrill v. Navegar*, 28 P.2d 116, 132 (Cal. 2001) (concluding that there was no evidence that defendant's advertising influenced the killer to purchase that particular brand of firearm).

356. See *Vandall*, *supra* note 299, at 558 (discussing causation issues in cigarette and handgun product liability litigation).

357. See RESTATEMENT (SECOND) OF TORTS § 432 (1965).

358. See, e.g., *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 179 N.W. 45 (Minn. 1920) (representing a seminal case for the substantial factor test).

359. See *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Ct. App. 1999).

360. See *id.* at 186-89. One member of the court concluded that "Ferri was going to buy *some* gun to commit his planned carnage; he did not commit it because he had two TEC-DC9s as opposed to some other model of weapon." *Id.* at 212 (Haerle, J., concurring in part and dissenting in part).

361. *Merrill v. Navegar, Inc.*, 28 P.3d 116, 130-33 (Cal. 2001).

can be used to determine whether the defendant's action is a "substantial" factor in causing the plaintiff's injury or whether it is merely an insubstantial one. Except in the most obvious case, the substantial factor test provides scant protection to defendants, especially unpopular ones, when the causation issue is left to the jury.

### 3. *The Probabilistic Approach*

A novel theory of causation, which originated in mass toxic tort cases, would allow plaintiffs who have been exposed to toxic substances to satisfy the causation requirement by: (1) establishing a probability of causation, usually by reference to epidemiologic studies and (2) showing a specific causal link between their injuries and exposure to the defendant's product, typically by medical testimony to the effect that there is no other explanation to account for the injuries.<sup>362</sup> Once the plaintiff offers proof of causation under these criteria, the burden of proof then shifts to the defendant to disprove causation by showing that the plaintiff could not have been exposed to its product.<sup>363</sup>

The plaintiffs attempted to apply a version of this theory of causation in *Hamilton v. Accu-Tek*, arguing that the defendants' distribution practices with respect to handguns was analogous to releasing toxic substances into the environment.<sup>364</sup> The court in that case expressed sympathy with this novel causation theory, but declined to specifically adopt it, concluding that the plaintiffs had satisfied their burden of proof on the causation issue under a traditional approach.<sup>365</sup>

### 4. *Enterprise Liability*

Some courts have adopted causation rules that effectively impose collective liability on the industry as a whole rather than requiring a plaintiff prove which manufacturer caused the injury in question. One example of this trend is "enterprise liability," a doctrine that permits a plaintiff to sue an industry trade association on the theory that promulgating standards, or some other action by the association, contributed to his injuries.<sup>366</sup> The rationale for enterprise liability is that the trade association owes a duty to promulgate adequate safety standards when individual companies within the association delegate this power to it.

The plaintiff in *Hamilton v. Accu-Tek* attempted to rely on the enterprise liability theory in order to avoid identifying the party who actually manufactured

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362. See Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2122-29 (1997).

363. See, e.g., *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989) (involving market share liability and DES), *cert. denied*, 493 U.S. 944 (1989).

364. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 834 (E.D.N.Y. 1999).

365. *Id.*

366. See *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972) (holding an industry trade association liable for failing to promulgate adequate standards for blasting cap warning labels); Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978) (suggesting that enterprise liability theory be used in DES cases).

the handgun used to shoot him. The trial court refused to apply this theory, concluding that the gun manufacturers did not exercise joint control over the risk.<sup>367</sup> Despite this setback, courts may eventually prove more receptive to the enterprise liability theory in cases where it can be shown that industry trade associations helped to develop common marketing strategies.

### 5. Market Share Liability

The concept of market share liability enables plaintiffs to recover from each member of an entire industry based on its market share of the product sold. Under traditional causation rules, the plaintiff must prove that a specific defendant caused his injury. To recover, a plaintiff who is injured by a product made by several manufacturers must identify the actual maker.<sup>368</sup> However, the principle of market share liability, first articulated by the California Supreme Court in *Sindell v. Abbott Laboratories*,<sup>369</sup> allows a plaintiff to sue all of the makers of the offending product and to recover a pro-rata share from each manufacturer based on their respective share of the product's market.<sup>370</sup>

Not surprisingly, proponents of greater liability for handgun manufacturers argue that market share liability should be applied in negligent marketing cases,<sup>371</sup> and in fact, Judge Weinstein did allow the jury to apportion the plaintiff's damage award according to the principles of market share liability.<sup>372</sup> In *Hamilton v. Accu-Tek*, the plaintiff conceded that the gun that caused his injury was not recovered, so he could not identify the weapon's manufacturer.<sup>373</sup> Applying the concept of market share liability, the jury apportioned damages among three gun manufacturers.<sup>374</sup> However, when the market share liability issue was certified to the New York Court of Appeals, that court concluded that market share liability was inappropriate in gun injury cases because firearms were not fungible products like DES; therefore, it was not impossible for victims to identify the actual manufacturer.<sup>375</sup> In addition, the court observed that the degree of risk created by various gun manufacturers varied considerably.<sup>376</sup> Consequently, apportioning liability solely on the basis of market share would be unfair in a negligence case.<sup>377</sup>

The concept of market share liability is extremely helpful to plaintiffs in cases where they cannot identify the product that caused the harm, or where many

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367. See *Hamilton*, 62 F. Supp. 2d at 843.

368. See Fischer, *supra* note 189, at 1625.

369. 607 P.2d 924 (Cal. 1980).

370. Klein, *supra* note 189, at 886.

371. See, e.g., Vandall, *supra* note 299, at 560-61 (stating that the *Sindell* rule would enable courts to hold gun manufacturers liable based on their market share).

372. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 843-46 (E.D.N.Y. 1999).

373. *Id.* at 808-09.

374. *Id.* at 811.

375. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1066-67 (N.Y. 2001).

376. *Id.* at 1067.

377. *Id.*

products have contributed to the harm. It is also an effective way to burden an entire industry with liability. When courts award damages on a market share liability basis in class actions or other forms of “mass tort” litigation, these awards act very much like an excise tax levied (without going through any sort of legislative process) upon the defendant industry.

### C. Duty

Courts tend to resolve the duty issue by distinguishing between nonfeasance and affirmative misconduct—misfeasance, particularly when deciding whether or not someone has a duty to protect another from harm caused by a third person.<sup>378</sup> The general rule, at least as far as affirmative acts are concerned, is that each person owes a duty of due care to avoid causing physical harm to others.<sup>379</sup> Producing and marketing a product is considered an affirmative act, so product sellers generally owe a duty to users and consumers, as well foreseeable bystanders, to refrain from placing *defective* goods into the stream of commerce.<sup>380</sup>

On the other hand, there is normally no affirmative duty to protect another from harm when one has neither expressly assumed such a duty nor affirmatively created the risk.<sup>381</sup> However, certain “special relationships” may be sufficient to impose a duty to act—either a duty to rescue one who is endangered or to prevent a potential risk from arising in the first place. Special relationships between defendant and victim may include employer and employee,<sup>382</sup> teacher and student,<sup>383</sup> common

378. For a discussion of the nonfeasance/misfeasance dichotomy, see John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 872-77 (1991); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 251-58 (1980).

379. See DOBBS, *supra* note 352, § 227.

380. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1962) (“A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”).

381. See *Osterlind v. Hill*, 160 N.E. 301, 302 (Mass. 1928) (affirming dismissal of wrongful death action against defendant who failed to rescue drowning man whose canoe had overturned); *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959) (affirming dismissal of suit against defendant for failing to come to the aid of individual who voluntarily jumped into water-filled pit and drowned); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 682-85 (1994) (discussing the traditional “no duty” rule); Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U.L. REV. 833, 841-46 (1997) (discussing rationales for the traditional “no duty” rule in nonfeasance cases).

382. See *Anderson v. Atchison, Topeka & Santa Fe Ry. Co.*, 333 U.S. 821, 823 (1948) (holding that railroad company was required to search for employee who fell off moving train in very cold weather); *Carey v. Davis*, 180 N.W. 889, 890-92 (Iowa 1921) (declaring that farm owner had a duty to render assistance to unconscious farm laborer); *Szabo v. Pennsylvania R.R. Co.*, 40 A.2d 562, 563 (N.J. 1945) (finding that employer had a duty to aid employee who suffered from sunstroke); *Rival v. Atchison, Topeka & Santa Fe Ry. Co.*, 306 P.2d 648, 651-53 (N.M. 1957) (affirming lower court judgment against railroad company for failing to provide prompt medical care to employee who became ill from heat prostration).

383. See *Pirkle v. Oakdale Union Grammar Sch. Dist.*, 253 P.2d 1, 2-3 (Cal. 1953) (declaring that school employees owe a general duty of reasonable care to their students); *Schultz v. Gould Academy*, 332 A.2d 368, 372 (Me. 1975) (holding that boarding school had a duty to protect female

carrier and passenger,<sup>384</sup> jailor and prisoner,<sup>385</sup> innkeeper and guest,<sup>386</sup> and shopkeeper and customer.<sup>387</sup> The second type of special relationship may exist between the defendant and a third party whose behavior may pose a threat to the plaintiff.<sup>388</sup> This type includes such relationships as employer and employee,<sup>389</sup>

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student attacked by intruder while sleeping in her dormitory room).

384. *See* *Yu v. N.Y., New Haven & Hartford R.R. Co.*, 144 A.2d 56, 58-59 (Conn. 1958) (holding railroad company liable for failing to help disabled passenger exit train); *Middleton v. Whitridge*, 108 N.E. 192, 197-98 (N.Y. 1915) (declaring that railroad company employees had a duty to aid passenger who appeared to be ill).

385. *See* *Iglesias v. Wells*, 441 N.E.2d 1017, 1021 (Ind. Ct. App. 1982) (concluding that a sheriff may be held liable for frostbite injuries suffered by mentally incompetent prisoner released from jail during inclement weather); *Farmer v. State*, 79 So. 2d 528, 530-31 (Miss. 1955) (holding that jail officials had a duty to provide medical treatment for prisoner's ulcers while he was in their custody); *Dunham v. Vill. of Canisteo*, 104 N.E.2d 872, 875, 877 (N.Y. 1952) (concluding that police had a duty to provide medical assistance to unconscious man placed in their custody).

386. *See* *West v. Spratling*, 86 So. 32, 36 (Ala. 1920) (affirming that hotel had a duty to warn sleeping guest when fire broke out); *Texas Hotel Co. of Longview v. Cosby*, 131 S.W.2d 261, 262-63 (Tex. Civ. App. 1939) (same).

387. *See* *Morgan v. Bucks Assocs.*, 428 F. Supp. 546, 549-550 (E.D. Pa. 1977) (concluding that owner of shopping center had a duty to protect customers against assaults in its parking lot); *Winn-Dixie Stores, Inc. v. Johnstoneaux*, 395 So. 2d 599, 599-600 (Fla. Dist. Ct. App. 1981) (upholding jury verdict finding that supermarket could be held liable for injuries to customer robbed in its parking lot); *Connelly v. Kaufmann & Baer Co.*, 37 A.2d 125 (Pa. 1944) (affirming that a department store may be held liable for negligent delay in coming to the aid of child who had caught his finger in the store's escalator).

388. *See* *Adler*, *supra* note 378, at 876-77.

389. *See* *Hogle v. H. H. Franklin Mfg. Co.*, 92 N.E. 794, 795 (N.Y. 1910) (affirming employer could be held liable for allowing employees to throw pieces of iron out of upper windows of factory, thereby injuring occupant of adjacent lot).

parent and child,<sup>390</sup> teacher and student,<sup>391</sup> landlord and tenant,<sup>392</sup> common carrier and passenger,<sup>393</sup> jailor and prisoner,<sup>394</sup> and innkeeper and guest.<sup>395</sup>

In many of the negligent marketing cases discussed earlier, the courts have tended to place a great deal of emphasis on the duty issue. Since the question of whether a duty exists is normally one for the court to decide,<sup>396</sup> presumably courts focus on duty when they want to decide the ultimate question of liability themselves instead of leaving it to the jury.

In negligent marketing cases, courts have used one of two types of duty analysis, depending on how they characterize the defendant's conduct. When they believe that marketing practices have affirmatively created a risk of harm to others, courts tend to employ a balancing test to determine whether a defendant owes a duty of reasonable care. For example, the intermediate appellate court in *Merrill*, concluded that no special relationship need be established when the defendant's conduct "affirmatively increased the risk."<sup>397</sup> In order to determine the scope of the

390. See *Bieker v. Owens*, 350 S.W.2d 522, 524-26 (Ark. 1961) (stating that parents could be held liable for failing to prevent their sons from attacking smaller children); *Basler v. Webb*, 544 N.E.2d 60, 62-63 (Ill. App. Ct. 1989) (reversing dismissal of suit against guardians of six-year-old girl who injured nine-year-old plaintiff while riding a bicycle); *Caldwell v. Zaher*, 183 N.E.2d 706, 707 (Mass. 1962) (holding that parents had a duty to supervise child who was known to assault and molest younger children); *Bocock v. Rose*, 373 S.W.2d 441, 442-445 (Tenn. 1963) (holding that plaintiff stated a cause of action against parents for failure to prevent attack against him by their minor children).

391. See *Brahatcek v. Millard Sch. Dist.*, 273 N.W.2d 680, 687 (Neb. 1979) (stating that school personnel had a duty to supervise physical education class in which student was accidentally struck by golf club wielded by another student).

392. See *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 480-81 (D.C. Cir. 1970) (holding that owner of apartment building has a duty to exercise reasonable care to protect tenant from being assaulted and robbed in hallway); *Johnston v. Harris*, 198 N.W.2d 409, 410-11 (Mich. 1972) (declaring that landlord may owe a duty to tenant who was attacked and robbed in foyer of apartment house); *Trentacost v. Brussel*, 412 A.2d 436, 445 (N.J. 1980) ("[A] landlord has a legal duty to take reasonable security measures for tenant protection on the premises.").

393. See *McPherson v. Tamiami Tours, Inc.*, 383 F.2d 527, 533 (5th Cir. 1967) (holding that bus driver had a duty to protect African-American passenger against unprovoked assault by another passenger); *Bullock v. Tamiami Tours, Inc.*, 266 F.2d 326, 332 (5th Cir. 1959) (holding that bus driver had a duty to warn inter-racial couple from Jamaica about risk of sitting together).

394. See *Breaux v. State*, 326 So. 2d 481, 483 (La. 1976) (holding that prison officials had a duty to protect prisoner against being stabbed to death by another inmate); *Taylor v. Slaughter*, 42 P.2d 235, 236-37 (Okla. 1935) (concluding that officials at city jail were required to use reasonable care to protect prisoner against attack by other prisoners).

395. See *Fortney v. Hotel Rancroft, Inc.*, 125 N.E.2d 544, 546-47 (Ill. App. Ct. 1955) (reversing a judgment against a plaintiff who was assaulted in his hotel room by an intruder); *Miller v. Derusa*, 77 So. 2d 748, 749 (La. Ct. App. 1955) (concluding that the proprietor of a bar had a duty to protect a patron against an unprovoked attack by another bar patron); *McFadden v. Bancroft Hotel Corp.*, 46 N.E.2d 573, 575 (Mass. 1943) (affirming judgment in favor of a hotel guest who was attacked in the hotel dining room by another guest).

396. To note how gun cases have recognized this premise, see *McCarthy v. Olin Corp.*, 119 F.3d 148, 156 (2d Cir. 1997); *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 818 (E.D.N.Y. 1999); *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 162 (Ct. App. 1999); *Merrill v. Navegar, Inc.*, 28 P.3d 116, 123 (Cal. 2001); *Linton v. Smith & Wesson*, 469 N.E.2d 339, 340 (Ill. App. Ct. 1984).

397. *Merrill*, 89 Cal. Rptr. 2d at 165.

defendant manufacturer's duty, the court examined factors enumerated by the California Supreme Court in *Rowland v. Christian*.<sup>398</sup> These factors included the foreseeability of the plaintiff's harm, the certainty of plaintiff's injury, the closeness of the connection between the defendant's actions and the plaintiff's injury, the culpability of the defendant's conduct, the desirability of preventing future harm, and the burdens and benefits of imposing such a duty.<sup>399</sup> Based on these factors, the court concluded that the manufacturer did owe a duty not to engage in marketing practices that increased the inherent risks associated with the production and distribution of firearms.<sup>400</sup> Judge Calabresi, dissenting in *McCarthy v. Olin Corp.*,<sup>401</sup> suggested that, if it could be justified on public policy grounds, courts might extend a duty to protect a person from harm by third parties even in the absence of some relationship between the manufacturer and either the victim or the individual who caused the harm.<sup>402</sup>

However, most of the time courts refuse to impose a duty upon manufacturers in the absence of a special relationship. Apparently, many of these courts reject the notion that the defendant's marketing activities have directly created a risk and, therefore, constitute affirmative acts of misfeasance. Rather, the assumption, mostly unspoken, seems to be that the defendant's conduct can best be characterized as nonfeasance. Accordingly, these courts usually conclude that the defendant has no duty to protect another against the criminal acts of a third party unless some sort of special relationship exists.<sup>403</sup> The opinion of the federal appeals court in *McCarthy v. Olin Corp.*<sup>404</sup> illustrates this reasoning. In that case, the court noted the absence of any special relationship between the defendant and the third party who used the defendant's Black Talon bullets to shoot the plaintiff.<sup>405</sup> As the court observed, the defendant has no way to control the actions of a remote and unknown retail purchaser; hence there was no reason to impose a duty upon the defendant to prevent such acts from occurring.<sup>406</sup> The New York Court of Appeals in *Hamilton v. Beretta U.S.A. Corp.*<sup>407</sup> expressed concern that imposing a duty to protect someone from harm in the absence of a special relationship would open the door to unlimited liability.<sup>408</sup> According to the court, the special relationship requirement effectively limited the class of potential plaintiffs who could bring claims against the defendant and ensured that the defendant would not be held liable for injuries it could not possibly prevent.<sup>409</sup>

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398. 443 P.2d 561 (Cal. 1968).

399. *Id.* at 564.

400. *Merrill*, 89 Cal. Rptr. 2d at 165-73.

401. 119 F.3d 148 (2d Cir. 1997).

402. *Id.* at 168 (Calabresi, J., dissenting).

403. *See Leslie v. United States*, 986 F. Supp. 900, 912 (D.N.J. 1997); *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202, 204-05 (Ark. 1995).

404. 119 F.3d 148 (2d Cir. 1997).

405. *Id.* at 157.

406. *Id.*

407. 750 N.E.2d 1055 (N.Y. 2001).

408. *Id.* at 1061-62.

409. *Id.*



Finally, some judges have accepted the need for a special relationship requirement, but also have been willing to expand the category of relationships upon which a duty to act has traditionally been predicated. For example, in *Hamilton v. Accu-Tek*,<sup>410</sup> Judge Weinstein contended that the relationship between Accu-Tek and its downstream distributors and retailers gave it sufficient control over the downstream conduct to support a duty on Accu-Tek's part to ensure that the first time their products were sold, the sale would be by a responsible merchant to a responsible purchaser.<sup>411</sup>

The duty analysis in negligent marketing cases apparently depends on whether the defendant's conduct involves negligence in product designing, marketing, or distributing. Product design clearly involves affirmative acts, and there is no real difference in that respect between defective and non-defective products. Thus, if the design of a semi-automatic pistol creates additional risks to bystanders because it appeals to criminals, courts might reasonably conclude that the manufacturer has a duty to take the bystander's safety into account when it designs the product.<sup>412</sup> This same analysis can be applied to advertising and promotional efforts by a manufacturer. Advertising and other forms of promotion involve affirmative acts and, therefore, may give rise to a duty of due care.

Negligent distribution is more complicated. Arguably, developing specific distribution networks and procedures are affirmative acts, which may create a duty of due care. On the other hand, a manufacturer's failure to actively monitor retail sales or to supervise the conduct of distributors and retail sellers seems more like nonfeasance than misfeasance. Accordingly, traditional duty analysis under the nonfeasance/misfeasance dichotomy would suggest that no duty exist in such cases.

## V. OTHER ISSUES

Imposing tort liability on sellers who negligently market dangerous products arguably promotes a number of desirable social objectives. First, additional tort liability would create a financial incentive for manufacturers to exercise greater care in choosing marketing strategies. Second, courts recognizing negligent marketing claims would enable victims to obtain compensation for their injuries. Finally, by awarding damages, particularly punitive damages, juries could express their disapproval of business practices that violate minimum standards of decency.

In theory, allowing plaintiffs to recover damages would force manufacturers to internalize accident costs.<sup>413</sup> Manufacturers that deliberately market their products to teenagers, criminals, or mentally unstable individuals will have a financial

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410. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

411. *Id.* at 820.

412. Of course, this analysis does not preclude a finding that the manufacturer exercised due care in designing its product and thereby satisfied its duty to the bystander.

413. See, e.g., Craig Brown, *Deterrence and Accident Compensation Schemes*, 17 U. W. ONT. L. REV. 111, 128 (1978-79) (discussing market deterrence theory and the efficacy of placing accident costs on those engaged in a particular activity).

incentive not to target such buyers if they are required to pay for the injuries that these consumers inflict upon themselves or innocent third parties. By incentivizing more responsible marketing activities, this liability will reduce the risk of injury to consumers and third parties. Negligent marketing liability may also incentivize manufacturers to discourage retail sellers from allowing dangerous products to fall into unauthorized hands. Negligent marketing liability may also have the desirable consequence of compensating accident victims who may otherwise be left without a remedy for their injuries. This imposition of tort liability allows accident costs to be shifted from injured parties to product manufacturers who can then spread these costs in small increments to individual consumers.<sup>414</sup>

Finally, allowing negligent marketing claims will increase litigation against manufacturers of dangerous products. This increase can serve an educational purpose by informing the public about the risks associated with consuming or using certain products.<sup>415</sup> In addition, plaintiffs lawyers can obtain information about questionable business practices on the part of manufacturers by examining documents during the discovery process.<sup>416</sup>

Nevertheless, courts should be cautious about recognizing any new theory of liability based on negligent marketing. First, some litigants will bring negligent marketing claims against product manufacturers in order to put them out of business or to force them to accept quasi-regulatory limitations on their activities.<sup>417</sup> Second, liability for negligent marketing may impose an unreasonable burden on commercial speech.<sup>418</sup> Also, negligent marketing is based on a paternalistic and elitist view of society that is incompatible with the principle of personal autonomy.<sup>419</sup>

#### A. Promoting Private Regulatory Agendas

Although tort law is primarily intended to compensate accident victims, it may sometimes be used for prohibitionist or regulatory purposes as well. Public advocacy groups finance or sponsor lawsuits against manufacturers in order to force

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414. See Tyrone Hughes, Note, *Hamilton v. AccuTek [sic]: Potential Collective Liability of the Handgun Industry for Negligent Marketing*, 13 *TOURO L. REV.* 287, 301 (1996) ("One of the policy reasons for recognizing a collective liability theory against the handgun industry in a negligent marketing claim is that manufacturers are in a better position than victims to absorb or spread the cost.").

415. See Robert Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 *STAN. L. REV.* 853, 877 (1992).

416. See Lytton, *supra* note 351, at 1264 (observing that plaintiffs have obtained information about the marketing practices of the gun industry through examination of internal documents); Cliff Sherrill, Comment, *Tobacco Litigation: Medicaid Third Party Liability and Claims for Restitution*, 19 *U. ARK. LITTLE ROCK L.J.* 497, 509-10 (1997) (discussing how such information was obtained from cigarette company documents).

417. See *infra* Part V.A.

418. See *infra* Part V.B.

419. See *infra* Part V.C.

them to take certain products off the market.<sup>420</sup> Another litigation tactic often employed by governmental entities is to bring suits against product manufacturers with the intention of forcing them to accept quasi-regulatory measures as part of a negotiated settlement.<sup>421</sup> If negligent marketing were to be generally accepted by the courts, prohibitionists and regulators will quickly use it to advance their own private agendas.

### 1. *Lawsuits as a Mechanism for Putting Product Sellers Out of Business*

Proponents of negligent marketing often argue that accident costs associated with using handguns or consuming cigarettes and other undesirable products should not fall on individual victims or on the public at large, but instead should be shifted back to the manufacturer and treated as a cost of production; this shift would cause the price of such products to rise and thus reduce demand for them.<sup>422</sup> However, in reality many of those who extol the benefit of tort liability for gun manufacturers or cigarette companies view tort litigation as a means of crippling or destroying these industries rather than simply a mechanism for internalizing accident costs.<sup>423</sup> Furthermore, certain developments in the litigation process during the past several decades have increased the chances of bankrupting product manufacturers by means of huge damage awards. One such development is the class action, which enables plaintiffs to aggregate their claims in products liability cases;<sup>424</sup> another development is the practice of awarding punitive damages in products liability cases.<sup>425</sup>

Plaintiffs enjoy definite advantages when aggregating their claims in a class action. If the class is large enough, the plaintiffs will be able to hire large law firms to represent them.<sup>426</sup> These firms can afford to spend whatever it takes to prepare a case for trial and, if necessary, can finance the case through the appellate process as well.<sup>427</sup> Similarly governmental agencies, medical insurers, and large pension plans can also retain large law firms.

420. See Timothy A. Burnann, *A Products Liability Response to Gun Control Legislation*, 19 SETON HALL LEGIS. J. 715, 733 (1995); David B. Kopel & Richard E. Gardner, *The Sullivan Principles: Protecting the Second Amendment From Civil Abuse*, 19 SETON HALL LEGIS. J. 737, 750, 768-72 (1995).

421. See *infra* Part V.A.2.

422. See Fridy, *supra* note 298, at 236; Joi Gardner Pearson, Comment, *Make It, Market It, and You May Have to Pay for It: An Evaluation of Gun Manufacturer Liability for Criminal Use of Uniquely Dangerous Firearms in Light of In re 101 California Street*, 1997 BYUL REV. 131, 158-59.

423. Burnann, *supra* note 420, at 733; Kopel & Gardner, *supra* note 420, at 750.

424. See 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 189, § 26:7.

425. See, e.g., 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 189, § 18:1, at 218 (reporting bankruptcy of asbestos industry).

426. Indeed, many of these firms actively pursue such cases. See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1025 (1993); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 480 (1994).

427. Weinstein, *supra* note 426, at 480.

Punitive damage awards pose an even greater threat to product manufacturers, particularly in class actions and other cases that involve aggregated claims. For example, a Miami jury recently awarded \$145 billion in punitive damages against cigarette manufacturers, illustrating the serious threat punitive damages pose to an unpopular product manufacturer.<sup>428</sup> Negligent marketing cases can pose similar concerns since plaintiffs will inevitably try to characterize product sellers as greedy, predatory, and indifferent to the safety of customers or innocent third parties. In theory, trial judges or appellate courts are supposed to reduce excessive or unreasonable punitive damage awards; there is no guarantee that they will actually do so.<sup>429</sup>

## 2. Regulation Through Litigation

Recently, former Secretary of Labor Robert Reich identified a practice known as “regulation through litigation,” by which government entities bring lawsuits against manufacturers of products like handguns or cigarettes.<sup>430</sup> The ostensible purpose of these lawsuits is to recoup medical costs and other expenses borne by state and local governments as the result of injuries caused by the defendants’ products.<sup>431</sup> However, in many instances, the real purpose of these lawsuits is to procure a settlement that will impose quasi-regulatory conditions on the manufacturer with respect to the production, design, or marketing of the product in question.<sup>432</sup> The tentative settlement between the tobacco industry and various state officials, ultimately rejected by Congress, was a classic case of regulation through litigation.<sup>433</sup> Other examples include the recent settlement between the Federal Department of Housing and Urban Development and Smith & Wesson<sup>434</sup> and the RICO action the Justice Department brought against the tobacco industry in 1999.<sup>435</sup>

428. See *Engle v. RJ Reynolds Tobacco Co.*, No. 94-08273 CA-22, 2000 WL 33534572, at \*13 (Fla. Cir. Ct. Nov. 6, 2000). For a discussion of the *Engle* case, see Virginia A. Canipe, Note, *Crossing the Effectiveness Line: The Implications of BMW v. Gore on Multi-Billion Dollar Tobacco Litigation Punitive Damages*, 36 WAKE FOREST L. REV. 1157 (2001).

429. See 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 189, § 18:6, at 306-28 (discussing remittitur of punitive damage awards).

430. See Robert B. Reich, *Regulation Is Out, Litigation Is In*, USA TODAY, February 11, 1999, at 15A; see also Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 435-37 (2000) (finding the lack of congressional action to regulate the tobacco industry gave rise to an increased number of lawsuits); Ed Dawson, Note, *Legigation*, 79 TEX. L. REV. 1727, 1728 (2001) (noting that “such suits serve as an engine to achieve policy goals which have not been achieved through the legislative process”).

431. *Id.*

432. *Id.*

433. The terms of the proposed settlement contained a number of quasi-regulatory provisions. For a brief description of the settlement’s terms, see David S. Samford, *Cutting Deals in Smoke-Free Rooms: A Case Study in Public Choice Theory*, 87 KY. L.J. 845, 879-90 (1998-99).

434. See Warner, *supra* note 305, at 785-93.

435. See Sandra L. Gravanti, Note, *Tobacco Litigation: United States Versus Big Tobacco—An Unfiltered Attack on the Industry*, 52 FLA. L. REV. 671, 672 (2000).

Governmental entities can be powerful adversaries. They typically represent thousands of injured parties; consequently, large sums of money are at stake in cases that governmental entities bring against product manufacturers. Furthermore, governmental entities often have more credibility with jurors than private plaintiffs, and government officials and their allies in the community can attack defendants out of court through “public interest” advertisements, press releases, and interviews. All of this power is likely to put intense pressure on defendants to settle negligent marketing suits brought by government entities, even though the settlement agreement may severely restrict their management powers.<sup>436</sup>

Many individuals and organizations regard regulation through litigation as a perfectly legitimate tactic. In their view, special interests exercise excessive influence over legislatures and administrative agencies and often prevent useful regulatory measures from being enacted or enforced.<sup>437</sup> For example, the tobacco industry has successfully lobbied against substantial tax increases for cigarettes, and the National Rifle Association has thwarted attempts to enact more rigorous gun control measures by the federal government.<sup>438</sup> Lawsuits offer a way to circumvent these special interest groups’ power and to subject the producers of dangerous products to some form of social control.<sup>439</sup> On the other hand, some commentators have expressed concern that this sort of litigation is contrary to democratic principles. As Secretary Reich has declared, these lawsuits amount to “end runs around the democratic process.”<sup>440</sup> The legislative process, though flawed in many respects, operates in the open and is accessible to all interested parties. In contrast, only the immediate parties to a lawsuit draft the terms of a settlement, and negotiations are usually conducted in secret.

Unfortunately, negligent marketing lends itself well to regulation through litigation. Moreover, there are plenty of tempting targets available such as tobacco companies, handgun manufacturers, purveyors of alcoholic beverages, manufacturers of lead paint, and possibly others.<sup>441</sup> And, because the stakes are high and because negligent marketing claims are open-ended and fact-specific,

436. See generally Samford, *supra* note 433 (discussing the elements of government-sponsored settlement agreements).

437. See Lytton, *supra* note 351, at 1247 (“Proponents of the suits argue that litigation is a legitimate way to regulate a powerful industry whose lobbying efforts have distorted the legislative process.”); Reich, *supra* note 430.

438. Reich, *supra* note 430.

439. See Lytton, *supra* note 351, at 1251-52.

440. Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22.

441. See Dagan & White, *supra* note 298, at 355 (“Industries waiting in the wings for this treatment include lead paint makers, and perhaps even brewers, distillers, and producers of fatty foods.”); Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. ILL. U. L.J. 601, 648 (1998) (“[T]here can be no doubt that tobacco is only the first in a long list of products from which the nanny state will protect us. What comes next—coffee, soft drinks, red meat, dairy products, sugar, fast foods, automobiles, sporting goods?”); Sherrill, *supra* note 416, at 515 (“[T]he same reasoning behind the medicaid suits applies equally to products such as milkshakes, cheeseburgers, and other high-fat foods with negative or minimal nutritional value.”).

defendants have no way to predict the probable outcome of lawsuits based on this theory of liability. For this reason, many of them are likely to agree to settlement terms that amount to “faux legislation.”<sup>442</sup>

### *B. Tort Liability as a Unreasonable Burden on Commercial Speech*

Another concern of courts recognizing negligent marketing liability is that this liability may impose an unreasonable burden upon the commercial speech rights of product manufacturers. The First Amendment of the United States Constitution prohibits Congress from enacting laws that restrict free speech or expression.<sup>443</sup> This right of free expression is also protected against legislative restrictions by state and local governments.<sup>444</sup> However, not all speech or expression traditionally receives the same degree of constitutional protection.<sup>445</sup> “Core speech,” which includes political discourse,<sup>446</sup> as well as observations about art, literature, science, religion, and similar subjects,<sup>447</sup> enjoys the highest degree of protection.<sup>448</sup> The government may not regulate this type of speech, at least on the basis of content, except when necessary to advance a compelling governmental interest.<sup>449</sup>

At the other extreme is so-called “low value” speech, such as fighting words, defamation, obscenity, and child pornography, which is thought to present a high risk of social harm without conferring any meaningful benefit upon society.<sup>450</sup> The

442. This term was coined by Secretary Reich. See Reich, *supra* note 430.

443. U.S. CONST., amend. I.

444. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 599 n.2 (1980) (Stewart, J., concurring).

445. See John L. Diamond & James L. Primm, *Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries: From Mickey Mouse Club to Hustler Magazine*, 10 HASTINGS COMM. & ENT. L.J. 969, 971 (1988) (“Since *Chaplinsky*, the Court appears to have consistently stratified speech, finding certain classes to be subordinate to others on a hierarchical scale.”).

446. See *Richmond Newspapers*, 448 U.S. at 587; *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); David A. Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. PITT. L. REV. 493, 497 (1990) (“[P]olitical speech—speech about matters of self-governing importance—is the essence of our democratic system and deserves the full protection of the first amendment.”); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 207 (1982) (“Perhaps the leading theme in the Supreme Court’s cases is the primacy of political speech.”).

447. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (“[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection.”).

448. See Thomas C. Kates, Note, *Publisher Liability for “Gun for Hire” Advertisements: Responsible Exercise of Free Speech or Self-Censorship?*, 35 WAYNE L. REV. 1203, 1206 (1989) (“These divergent views have led to a designation of certain types of speech as ‘core speech,’ entitled to the most stringent first amendment protection.”).

449. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (holding that “[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment”).

450. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983) (discussing the concept of low value speech).

government has considerable leeway to regulate low value speech as long as it can show a rational basis for its actions.<sup>451</sup>

Commercial speech appears to occupy an intermediate position between core speech and low value speech in the First Amendment's protective scheme.<sup>452</sup> Commercial speech may be defined as speech that proposes a commercial transaction<sup>453</sup> or more broadly, "expression related solely to the economic interests of the speaker and its audience."<sup>454</sup> According to the Supreme Court's holding in the *Central Hudson* case, the government can only regulate lawful commercial speech if: (1) regulation is necessary to advance a substantial governmental interest; (2) the regulation in question directly advances the interest; and (3) the regulation is no more extensive than necessary.<sup>455</sup> In the past several decades the Court has struck down numerous governmental attempts to restrict commercial speech.<sup>456</sup>

Although most free expression cases involve direct regulation by governmental entities, clearly courts will protect free expression against the chilling effect of civil liability as well. In a long line of cases, beginning with *New York Times v. Sullivan*,<sup>457</sup> the United States Supreme Court has limited the scope of state defamation law in order to protect First Amendment rights against the chilling effect of damage awards.<sup>458</sup> In addition, a number of federal and state courts have concluded that sellers of books, movies, and records are protected against product

451. See Peter Alan Block, *Modern-Day Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777, 794 (1990).

452. See Howard K. Jeruchimowitz, *Tobacco Advertisements and Commercial Speech Balancing: A Potential Cancer to Truthful, Nonmisleading Advertisements of Lawful Products*, 82 CORNELL L. REV. 432, 443 (1997) ("The Supreme Court has afforded commercial speech a limited measure of protection in recognition of its subordinate First Amendment position."); Lars Noah, *Authors, Publishers, and Products Liability: Remedies for Defective Information in Books*, 77 OR. L. REV. 1195, 1224 (1998) ("At present, the Court utilizes a form of intermediate scrutiny to assess challenges to restrictions on commercial speech."). However, please note that some legal scholars, such as Professor Martin Redish, believe that judgments about the relative values of commercial versus noncommercial expression do not provide an acceptable justification for varied regulatory treatment. See Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 594-97 (1996).

453. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

454. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980).

455. *Id.* at 566.

456. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (striking down federal law forbidding beer manufacturers from revealing the alcoholic content of beer on product labeling); *Edenfield v. Fane*, 507 U.S. 761 (1993) (finding regulation that banned cold calls by accountants to potential clients invalid); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (concluding that ordinance prohibiting newsracks on public property when used to distribute commercial handbills instead of newspapers was invalid); *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. 557 (striking down regulation prohibiting advertisements that advocated the use of electricity); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (invalidating statute prohibiting pharmacists from advertising prescription drug prices).

457. 376 U.S. 254 (1964).

458. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

liability claims when the alleged “defect” is content-based.<sup>459</sup> Presumably, courts would also be willing to grant relief to product sellers if they determined that certain forms of tort liability imposed an unreasonable burden on commercial speech.

A number of concerns exist regarding the impact of negligent marketing liability upon commercial speech. One concern is that liability apparently may be based on the fact that the manufacturer has directed its advertising and promotional activities at a particular audience. To be sure, such liability may be appropriate when the producer of a dangerous product, such as cigarettes or alcoholic beverages, targets those who are forbidden by law from purchasing them. Perhaps, one could justify tort liability against a manufacturer who encourages children to purchase or use any product that is dangerous or unsuitable for those who are underage.<sup>460</sup> However, even if courts were inclined to impose tort liability for negligent marketing based on advertising that improperly targets children, First Amendment issues must still be addressed for negligent marketing claims based on advertising directed towards adults.

As the Supreme Court has observed, the First Amendment not only upholds the right of sellers to communicate with the public, it also ensures that consumers will have access to information about goods and services that are available to them in the marketplace.<sup>461</sup> Obviously, access to such information would be severely reduced if juries were allowed to determine what information was suitable (and what was not) with respect to product advertising aimed at adult consumers.

A second concern about the negligent marketing theory is that liability is not based solely on publishing false or misleading statements, but can also be imposed on manufacturers who disseminate opinions and truthful information about their products. In *Merrill v. Navegar, Inc.*,<sup>462</sup> for example, the court observed that the manufacturer had claimed in its promotional materials that the surface of its semi-automatic pistol had “excellent resistance to fingerprints.”<sup>463</sup> The court apparently believed that because this information would encourage criminals to purchase the

459. See *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988) (holding singer Ozzy Osborne not liable for teenage listener’s suicide based on lyrics in recorded song); *Byers v. Edmondson*, 712 So. 2d 681 (La. Ct. App. 1998), cert. denied, 119 S. Ct. 1143 (1999) (holding that producers of the film *Natural Born Killers* were not liable for copy-cat killings); see also Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Materials*, 52 FLA. L. REV. 603, 641-60 (2000) (addressing First Amendment protection for movies, video games, and web sites).

460. See *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding validity of state statute prohibiting the sale of sexually-oriented but non-obscene magazines to persons under the age of seventeen); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (“The state’s authority over children’s activities is broader than over like actions of adults.”); John C. Cleary, Note, *Telephone Pornography: First Amendment Constraints on Shielding Children from Dial-A-Porn*, 22 HARV. J. ON LEGIS. 503, 523-24 (1985) (pointing out that the state may prohibit disseminating materials to minors that would not be considered obscene under the standards applied to adults).

461. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 437 (1993) (Blackmun, J., concurring); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

462. 89 Cal. Rptr. 2d 146 (Ct. App. 1999).

463. *Id.* at 157.



defendant's product (and presumably put it to criminal use), it should hold the manufacturer liable for publishing it. Likewise, in *McCarthy v. Sturm, Ruger & Co.*,<sup>464</sup> the plaintiffs alleged that "advertisements for the Black Talon bullets highlighted their destructive capabilities and therefore made them attractive to criminals."<sup>465</sup> Although the plaintiffs did not prevail in that case, they obviously felt that the manufacturer should be held liable for disclosing this information to the general public.

Liability based on negligent marketing is not limited to factual statements, but may also extend to expressions of opinion. For example, in *Merrill* the plaintiff cited the manufacturer's slogan, "tough as your toughest customer," as evidence of negligent marketing.<sup>466</sup> Of course, "puffing" is an ancient, if not entirely honorable, marketing practice, and sellers are normally free to emphasize the utility, quality, or desirability of their products as long they confine themselves to expressions of opinion and do not actually make false statements of fact.<sup>467</sup> This approach makes sense because it is very hard, if not impossible, to categorize expressions of opinion as "true" or "false." However, if negligent marketing claims are allowed, manufacturers will be subjected to tort liability for suggesting that smoking or drinking may be desirable, glamorous, or sophisticated.<sup>468</sup> Obviously, imposing liability for such expressions of opinion raises serious free speech issues.

### C. Paternalism Versus Personal Autonomy

The concept of negligent marketing arguably rests on the elitist notion that certain groups of people are incapable of making reasonable decisions about the products they buy. To be sure, this assumption may be justified in the case of young children and teenagers.<sup>469</sup> However, proponents of negligent marketing also believe that substantial numbers of adults cannot act responsibly either.

Certain negligent marketing claims rest on the notion that manufacturers should not target certain groups of people because they are incapable of making reasonable decisions about the products they buy. Obviously, situations may exist where such paternalism is appropriate, as for example, where young children or teenagers are

464. 916 F. Supp. 355 (S.D.N.Y. 1996).

465. *Id.* at 369.

466. *Merrill*, 89 Cal. Rptr. 2d at 157.

467. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS, § 109, at 757 ("The 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific.").

468. See Sylvia A. Law, *Addiction, Autonomy and Advertising*, 77 IOWA L. REV. 909, 919 (1992) (stating that advertisements for alcoholic beverages suggest that drinking is associated with success, glamor, and sophistication); Levin, *supra* note 35, at 238-39 ("Current ads continue leaving the unmistakable impression that smoking is desirable and even associated with healthy activities.").

469. See JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 91 (1996) ("Children often do things that are dumb, thoughtless, impulsive, short-sighted, ill-advised, selfish, and screwy."). Garvey also states that "normal adults" behave this way as well. *Id.*

involved.<sup>470</sup> Thus, a case can be made for imposing civil liability on those that manufacture cigarettes or alcoholic beverages if they knowingly direct their advertising at underage consumers who cannot legally purchase their products. Perhaps this reasoning could also be extended to support tort liability for manufacturers that market dangerous products, such as motorbikes or all-terrain vehicles, to consumers they know are too young or inexperienced to use them safely.

However, some people also believe that certain categories of adult consumers need protection against predatory and seductive advertising as well. They criticize the manufacturers of cigarettes and alcoholic beverages for developing product lines aimed at potential consumers who belong to particular racial or ethnic minorities. For example, R.J. Reynolds was forced to withdraw "Uptown" cigarettes from the market in 1990 due to negative criticism from some members of the black community.<sup>471</sup> Indeed, some commentators have condemned the sale of menthol cigarettes in general because menthol brands appeal most strongly to African-Americans.<sup>472</sup> Commentators have also criticized brewers of malt liquor, particularly the "Colt 45 Premium" brand, for marketing a high-proof alcoholic beverage to black males.<sup>473</sup> Likewise, the targeting of Native Americans by the makers of "Crazy Horse Malt Liquor" was condemned<sup>474</sup> as were efforts to market certain alcoholic beverages in the Latin-American community.<sup>475</sup> Finally, in its lawsuit against handgun manufacturers, the city of Bridgeport, Connecticut, accused the gun industry of directing its marketing efforts at the city because of its high minority population.<sup>476</sup>

Commentators also expressly disapprove of advertising and other promotional efforts by handgun manufacturers that target women.<sup>477</sup> Examples of such targeting include marketing a .32 caliber handgun called "Bonnie" for women to go along with a larger .38 caliber model called "Clyde" for male customers.<sup>478</sup> Another example involves introducing a revolver with a smaller grip, called the

470. *Id.* See Richard C. Ausness, "Waive" Goodbye to Tort Liability: A Proposal to Remove Paternalism From Product Sales Transactions, 37 SAN DIEGO L. REV. 293, 333-35 (2000) (giving examples of young children and teenagers exercising exceedingly bad judgment).

471. See Kathryn A. Kelly, *The Target Marketing of Alcohol and Tobacco Billboards to Minority Communities*, 5 U. FLA. J. L. & PUB. POL'Y 33, 57 (1992).

472. See Vernellia R. Randall, *Smoking, The African-American Community and the Proposed National Tobacco Settlement*, 29 U. TOL. L. REV. 677, 688 (1998) (stating that seventy-five to ninety percent of African-American smokers prefer menthol cigarettes, compared twenty-three to twenty-five percent of white smokers).

473. See Kelly, *supra* note 471, at 58-59.

474. See Celeste J. Taylor, *Know When to Say When: An Examination of the Tax Deduction for Alcohol Advertising that Targets Minorities*, 12 LAW & INEQ. 573, 585 (1994).

475. *Id.* at 586.

476. See Morgan, *supra* note 43, at 533.

477. See Note, *Harnessing Madison Avenue: Advertising and Products Liability Theory*, 107 HARV. L. REV. 895, 905 (1994).

478. See Hanson & Kysar, *supra* note 36, at 1463.

"Ladysmith," for female customers.<sup>479</sup> Another criticism of gun manufacturers is that their advertising suggests to women that gun ownership is "chic" or necessary for personal safety.<sup>480</sup> Cigarette advertising aimed at female consumers has also come under fire in recent years.<sup>481</sup> For example, developing cigarettes like "Virginia Slims" especially for women has been condemned because the ads associated glamor and thinness with smoking.<sup>482</sup>

Commentators have also criticized efforts of cigarette companies to target those in lower socioeconomic groups by increasing their advertising in "blue collar" publications such as *Popular Mechanics* and sports magazines.<sup>483</sup> Another example of alleged exploitation of the working class is the introduction and promotion of "Dakota" brand cigarettes by RJR Nabisco to "young, less-educated females."<sup>484</sup>

With the exception of the Bridgeport suit mentioned above, no one has yet brought suit against product manufacturers for targeting women, racial minorities, or low-income consumers. However, one would expect that claims predicated on this sort of targeting will be brought in the future if the courts embrace the theory of negligent marketing. This prospect is troublesome. To be sure, as critics of such advertising correctly point out, misuse of firearms, cigarettes, and alcohol cause more harm among certain groups than the general population.<sup>485</sup> Consequently, the sale of firearms, cigarettes, and alcohol to these groups would be reduced if courts allowed negligent marketing suits based on targeting to be brought. However, restricting advertising in this manner will place a significant burden on personal autonomy and decision-making.

## VI. CONCLUSION

The theory of negligent marketing would allow an injured party to recover damages from the seller of a non-defective product if the product's design increases its appeal to consumers who are likely to injure themselves or others. In addition, manufacturers may be subject to liability if they market their products in a way that increases the risk that they will be purchased by unsuitable persons. Finally, manufacturers may be held liable under negligent marketing if they fail to supervise retail sellers of their products.

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479. *Id.*

480. See Dobray & Waldrop, *supra* note 37, at 113-15.

481. See Law, *supra* note 465, at 913.

482. See Calvert, *supra* note 36, at 411.

483. See Law, *supra* note 468, at 913.

484. See Boedecker et al., *supra* note 335, at 302.

485. See Raymond E. Gangarosa et al., *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 FORDHAM URB. L.J. 81, 87 (1994) (declaring that abuse of alcohol and tobacco products is more prevalent among lower socioeconomic groups); Kelly, *supra* note 471, at 34 (stating that the black community is plagued by alcohol and tobacco-related health problems); Taylor, *supra* note 474, at 573 (observing that alcohol abuse is common in minority populations).

So far, most negligent marketing cases have involved handguns, but this novel theory of liability could easily be applied to many other products such as cigarettes, alcoholic beverages, or prescription drugs. Until recently, negligent marketing liability appeared that it might be accepted by the courts. However, two cases decided last year, *Hamilton v. Beretta U.S.A. Corp.*<sup>486</sup> and *Merrill v. Navegar, Inc.*,<sup>487</sup> cast serious doubt about the future of negligent marketing as a viable legal theory.

There are a number of problems with negligent marketing. For example, the applicable standard of care is extremely elusive; in most cases, the normal rules of causation will have to be relaxed if the plaintiff is to prevail; and traditional duty rules appear to foreclose liability in most instances. In addition, litigants could easily bring negligent marketing claims against certain manufacturers to put them out of business or force them to agree to quasi-regulatory limitations on the marketing or distributing their products. Furthermore, by imposing liability based on the content of a seller's advertising, negligent marketing claims may place an unreasonable burden on commercial speech. Finally, the concept of negligent marketing liability is paternalistic and inconsistent with personal autonomy. For these reasons, I believe that courts should reject negligent marketing claims and let other branches of government regulate those marketing practices that are truly harmful to public safety.

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486. 750 N.E.2d 1055 (N.Y. 2001).

487. 28 P.3d 116 (Cal. 2001).

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