

# InDret

*City of Cincinnati v. Beretta, U.S.A. Corp. et al.*  
*An analysis of U.S. Lawsuits*  
*against the Firearms Industry*

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## 1. Introduction

Two major features have differentiated the American society<sup>1</sup> of the last thirty years from other western societies: gun violence<sup>2</sup> and litigiousness<sup>3</sup>. The Congress of the United States of America is one of the few legislatures of the world that has authorized the possession of fire arms by private citizens. Therefore, fire arms participate in the American product market as a regular product.

Even though people purchase guns for hunting or for practicing sports where guns are used, very often the purchase of guns is driven by fear. There is an interconnection between the crime market and the perceived need for self-defense and home protection<sup>4</sup>. However, it is difficult to determine whether the possession of fire arms promote people's violence and as a consequence the crime rate raises or instead, people's violence and a high crime rate is what generates the need to possess of fire arms by individuals. Whatever the case would be, though, the crime rate<sup>5</sup> in the United States is significantly high and a concern for American policy makers.

On the other side, American society has a high level of litigiousness. The structure of the American legal system with jury trials and the use of punitive damages, the role of lawyers within the common law system and their compensation scheme through contingency fees are some reasons that explain why the level of litigiousness in the United States is higher than, for example, in Europe.

Since the last ten years, private citizens began to bring suits against manufacturers and distributors involved in the gun industry. These suits have generally been dismissed in favor of the defendants because courts held that the claims did not state a cause of action under either products liability theories, negligent marketing or public nuisance doctrine. However, the legal action reached a turning point in October 1998 when New Orleans became the first municipality to file a suit against the gun industry.<sup>6</sup> Since then, twenty-nine cities have sued manufacturers, distributors or other participants of the gun industry.<sup>7</sup>

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<sup>1</sup> James Dao, *Under Legal Siege, Gun Maker Agrees to Accept Curbs*, N.Y. Times, March 18, 2000; Michael Janofsky, *Pressured by Suits, Gun Makers Turn to Political Effort*, N.Y. Times, Jan. 19 2000; Bill Miller, *District Suing the Gun Industry: damages sought for city's carnage*, Wash. Post, Jan 21, 2000, *Philadelphia Sues 14 Makers of Guns*, N.Y. Times, Apr. 12 2000 .

<sup>2</sup> For statistical information see [www.firearmslitigation.org](http://www.firearmslitigation.org), [www.fbi.gov](http://www.fbi.gov), <http://www.ojp.usdoj.gov/bjs/glance/tables/guncrimetab.htm>; <http://www.ojp.usdoj.gov/bjs/glance/guncrime.htm>

<sup>3</sup> For more information see <http://www.census.gov/prod/2002pubs/01statab/law.pdf>

<sup>4</sup> David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 Conn. L. Rev. 1163, 1168 (2000).

<sup>5</sup> See F.B.I. Crime Report in <http://www.fbi.gov/pressrel/pressrel03/12month2002.htm>

<sup>6</sup> See *Morial v. Smith & Wesson Corp.*, No. 98-18578, 2000 WL 248364 (La. Civ. D. Ct. Feb. 28, 2000) (filed Oct. 30, 1998).

<sup>7</sup> See *Firearms Litigation Clearinghouse, Firearms Litigation: Current Cases*, at <http://www.firearmslitigation.org>.

While the New Orleans case was ultimately unsuccessful,<sup>8</sup> Smith & Wesson felt so threatened by many of these suits that it settled with fifteen of the U.S. municipalities involved. As part of the settlement, Smith & Wesson accepted restrictions on the way it makes, sells and distributes guns each year. However, this agreement was widely criticized by the industry and opened a new avenue for regulating the firearms industry without legislative action.

This paper analyzes the litigation against the firearm industry. The starting point will be one of the ongoing suits brought by a municipality: *City of Cincinnati v. U.S.A. Beretta Corp.*<sup>9</sup> In this case, the City of Cincinnati sued almost all the participants in the gun industry – 16 gun manufacturers and 3 trade associations. The Ohio Supreme Court recently held that the City of Cincinnati properly stated a cause of action on public nuisance, negligence, and products liability theories. In doing so, it reversed the state trial and appellate courts, and remanded the case for further proceedings.

Taking the opinion of the highest court of Ohio as a starting point, this paper studies the grounds on which litigation against the firearms industry is based, and asks whether such litigation is the solution to the gun violence in the United States. Municipalities are the ones who mainly bear the costs of the harm caused by firearms. However, gun control regulation is systematically blocked in the Congress because the likelihood a state will enact a law depends on different political variables<sup>10</sup> such as the percentage of its population that are members of the National Rifle Association, the percentage of votes received by the Republican presidential candidate in the state and the changes in the rates of violent and property crime, among other variables. Given this situation, municipalities tried to capture the public attention of their problem through these lawsuits.

As of June 2003, no U.S. court has awarded a remedy to the plaintiffs in this type of lawsuit<sup>11</sup>. Despite the favorable ruling of the Ohio Supreme Court, the City of Cincinnati ultimately dropped the case, do to mounting costs.<sup>12</sup> However, the importance and special significance of *Cincinnati v. Beretta*<sup>13</sup> is that the Ohio Supreme Court was the first one<sup>14</sup> that

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<sup>8</sup> See *Morial v. Smith & Wesson Corp.*, 785 So.2d 1 (La. 2001) (dismissing the case based on Louisiana legislation that was enacted after filing).

<sup>9</sup> See *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002).

<sup>10</sup> John R. Lott and William M. Landes, *Multiple victim public shootings, bombings, and right-to-carry concealed handgun laws: contrasting private and public law enforcement*, John M. Olin Law & Economics Working Paper no. 73, 19 (1999).

<sup>11</sup> Since 1998, at least 33 municipalities, counties and states have sued gun makers, many supporting their claims on public nuisance doctrine, or considering that gun manufacturers marketed their product in an irresponsible way because weapons reached criminals more or less easily. However, none of the suits has resulted in a manufacturer or distributor paying any damages.

<sup>12</sup> See *Reforming the Gun Industry: City of Cincinnati v. Beretta U.S.A. Corp.* No. A9902369 (Court of Common Pleas, Hamilton County, Ohio), at <http://www.gunlawsuits.org/docket/cities/cityview.asp?RecordNo=11>.

<sup>13</sup> *Id.*

<sup>14</sup> Recently, precisely when the U.S. Congress is considering granting unprecedented legal immunity to the gun industry in *Ileto v. Glock, Inc.* 2003 U.S. App. LEXIS 23659 (California 2003), the U.S. Court of Appeals for the 9<sup>th</sup> Circuit reinstated a case brought by the families of victims of a 1999 shooting at a Los Angeles Jewish Community Center and held that gun manufacturers could be held liable for letting weapons fall into the hands of the ones who should not have them. The plaintiffs in this case claimed

made clear that the claim properly stated a cause of action under different tort doctrines alleged by the plaintiff of the case. However, this did not imply that they would judge for the plaintiff of the case.

Thus, even though the opinion of the Ohio Supreme Court does not yet indicate a change in the jurisprudence concerning suits brought by municipalities against the firearm industry, the arguments presented in its opinion in favor of considering that the plaintiffs properly stated their cause of action are already relevant and worth analyzing.

However, given the growing trend of using civil litigation to combat crime,<sup>15</sup> it is also important to ask whether litigation against the firearm industry<sup>16</sup> is the solution to the gun violence problem in the United States. This paper concludes that litigation should not be the instrument used to solve the firearm-related crime rate in the United States for a number of reasons: first, the existing doctrine in products liability, negligence and public nuisance does not embrace these types of claims. Second, stretching and extending these legal categories does not seem like a good idea because it would be using improperly and discretionally the existing legal instruments. Finally, courts should not be regulating the firearms or any other industry through their decisions. To the extent that such regulation was considered socially necessary, it should be done by the legislative branch.

In sum, this paper stresses the need to differentiate between the decision of whether it is necessary to regulate a certain industry (like the firearm industry) and the decision of how this regulation should be accomplished. The problem presented by the litigation brought by municipalities against the firearms industry is that it confuses these two issues. These suits implicitly assume that because the firearms industry should be regulated and should bear the costs of the harm caused by their products, there must be a legal instrument by which the courts can accomplish this. Such a mechanism, however, as the regulation is now, does not exist, and consequently, the plaintiffs have had to use and to stretch the existing legal categories that are ill-suited for this task. Rather than having the courts create new legal institutions on their own, such legal categories should be created by the legislature after a public debate. Not following this process would both pervert the notion of a separation of powers and weaken the existing legal instruments and the strength and the legitimacy of the claims themselves.

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that several weapon companies produced, distributed and sold more firearms than legal purchasers could buy and knowingly participated and facilitated an underground illegal gun market. Judge Richard Paez, who wrote the opinion of the court, held that:

"Because the plaintiffs have stated a cognizable claim under California tort law for negligence and public nuisance against the manufacturers and distributor of the guns used in the shootings, we reverse the district court's dismissal against the plaintiffs"

<sup>15</sup> See *Developments in the Law – The paths of Civil Litigation II. The use of the Public Nuisance Tort Against the Handgun Industry*, 113 Harv. L. Rev. 1759, 1759 (2000).

<sup>16</sup> For further information about the litigation against the gun industry, see <http://www.vpc.org/litigate.htm>

## 2. A Brief History of Firearm Litigation

### 2.1. Products Liability

The first suits against gun manufacturers were brought as product liability claims.<sup>17</sup> Products liability does not impose liability for dangerous products as such. Instead, it imposes liability only for the harm caused by the products that are deemed to be defective.<sup>18</sup> Thus, lawsuits by or on behalf of individuals who have been shot by guns were unsuccessful except when the gun was shown to be defective.<sup>19</sup> However, the major problem in this type of lawsuit has been that according to products liability theories, guns were not, by their very nature, considered defective products, and therefore this type of claim was generally dismissed in favor of gun manufacturers.

The *Restatement (Third) of Torts: Products Liability*<sup>20</sup> distinguishes between three different types of defects: manufacturing defects,<sup>21</sup> design defects<sup>22</sup> and defects based on inadequate instructions or warnings.<sup>23</sup> These defect categories apply even when the product is egregiously dangerous or potentially very harmful, as firearms are. Some courts have accepted the inherent danger of a product as a basis to hold the product defective but a clear majority of courts that have faced the issue have refused to so hold, and have relied instead on the existence of a defect.

When a defective product has caused harm to a user or a consumer, the Restatement imposes liability on manufacturers in order to make them internalize the real cost of the harm caused by the defective product they put in the market.

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<sup>17</sup> In several states there was common products liability law that later was collected in a text and passed as a products liability statute. An important problem presented by the coexistence between a products liability statute and court-made products liability law is to determine whether the statute preempts the courts' opinions. However, this question is beyond the scope of this paper.

<sup>18</sup> See Gary T. Schwartz, *Tort issues in light of the Cigarette Litigation: Cigarette Litigation's Offspring: Assessing Tort Issues Related to Guns, Alcohol & Other Controversial Products in light of the Tobacco Wars*, 27 Pepp. L.Rev. 751, 752 (2000).

<sup>19</sup> See David Kairys, *Legal Claims Of Cities Against The Manufacturers Of Handguns*, 71 Temple L.Rev. 1, 12 (1998).

<sup>20</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, (1998), hereinafter RESTATEMENT (THIRD).

<sup>21</sup> See RESTATEMENT (THIRD) § 2A.

"A product:

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."

<sup>22</sup> See *id.* § 2B.

"A product:

(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe."

<sup>23</sup> See *id.* § 2C.

"A product:

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe."

According to the Restatement<sup>24</sup> a manufacturing defect<sup>25</sup> is a physical departure from a product's intended design. Courts impose liability on manufacturers for the harm caused by such defective products regardless the manufacturers' level of care. Therefore, it is a non-fault based liability regime. By holding manufacturers liable under strict liability and therefore by making them internalize the cost of the harm caused by their defective products, tort law seeks to create an incentive for manufacturers to invest in safety.

The major problem with applying this theory on guns is that they do not malfunction and are not *per se* defectively manufactured products.<sup>26</sup> Firearms are products that, when used properly, may hurt or kill an individual. Therefore, it has not generally been possible to claim manufacturing defects in the gun context because guns were not, *per se*, defectively manufactured products.

Regarding design defects, the Restatement considers a product defective in design when the specific product unit conforms to the intended design but the intended design itself renders the product not reasonably safe.<sup>27</sup> This test implies an application of the risk utility test based on notions of reasonableness.

The determination of whether an intended product design is reasonably safe is conditioned by the existence of a reasonable alternative design<sup>28</sup> at the time of sale or distribution. The idea behind the reasonable alternative design test is that if a safer reasonable alternative design was available at the time of sale or distribution, the harm caused by the product was preventable. As a result, if the harm was preventable, the manufacturer is held negligent and therefore liable. Consequently, in order to conclude that a product is defective in design, a plaintiff must present a reasonable alternative product design<sup>29</sup> that would reduce the foreseeable risks of harm inherent to the product and that could have been produced at a reasonable cost.

Some courts have applied a strict risk-utility test and have understood that some products are unreasonably dangerous and therefore liability should be imposed even in the absence of a reasonable alternative design. In these courts, a product is deemed unreasonably dangerous if no reasonable person fully aware of the relevant facts would rationally choose the product if he knew that the risks of the product outweigh its benefits.

However, in the absence of an exogenous parameter like the reasonable alternative design test, it is very difficult to describe and to determine that a product is unreasonably

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<sup>24</sup> See *id.* §1, 6 (1998).

<sup>25</sup> See *id.* § 2 cmt. p.

<sup>26</sup> See *Milbrand v. Smith & Wesson Corp.*, 1998 U.S. Dist. LEXIS 19409, (W.D.N.Y. 1998).

<sup>27</sup> See RESTATEMENT (THIRD) § 2 Cmt. d. (1998).

<sup>28</sup> Instead of the Reasonable Alternative Design test, some jurisdictions apply a Consumer Expectations test (i.e. Oregon) or a Two-Prong test (i.e. California) according to which plaintiffs can choose between the reasonable alternative design test and the consumer expectations test depending which one would be better for their interests.

<sup>29</sup> Though some courts apply a consumer expectations test in order to determine whether a product is defective from the design stand point, the discussion of this test is beyond the scope of the topic of this paper. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. g., 27.

dangerous by itself. Moreover, products are not generically defective just because they are dangerous. For example, it is difficult to determine that the risks of guns outweigh the benefits of providing self protection, because guns might be reasonably dangerous for their target market (adults) but unreasonable dangerous for other market segments like, for example, children. Thus, even though undoubtedly guns are dangerous products, this does not mean that they are unreasonably dangerous products. Therefore, given that so far there is not a reasonable alternative design for guns,<sup>30</sup> courts have not considered guns as defective products in design and therefore held manufacturers liable for the harm caused by them.<sup>31</sup>

Finally, the Restatement considers that a product is defective when the absence of instructions or warnings renders it unreasonably unsafe. However, when risks are open and obvious the product seller is not subject to liability for failure to warn or to instruct because the victim could and should have been aware of the risks involved in the product.<sup>32</sup>

The societal risks posed by guns are generally known. Therefore, it is not possible to sustain a claim for defect on inadequate instructions or warnings because the risks involved in this type of product are open and obvious for the general public<sup>33</sup> and especially, for the guns target market (adults). Therefore, the lack of instructions or warnings does not deem guns unreasonably unsafe and thus defective.<sup>34</sup>

Even though the Restatement<sup>35</sup> requires a defect in the product in order to be able to hold manufacturers liable for the harm caused to third parties by the defective product, there have been proposals in the literature of switching from negligence to a strict products liability regime in which the existence and proof of a defect would not be the crucial liability parameter.

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<sup>30</sup> For an opposite opinion see Rachana Bhowmik, *Aiming For Accountability: How City Lawsuits Can Help Reform An Irresponsible Gun Industry*, 11 J.L. & Pol'y 67, 114 (2002) (considering that there are other design changes that, if implemented, would prevent unauthorized gun use, decrease the number of accidental deaths and injuries and minimize illegal trafficking of guns). See also Cynthia Leonardatos, Paul H. Blackman & David B. Kopel, *Smart Guns/ Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 Conn. L. Rev. 157 (2001) (discussing the effectiveness of various types of gun locks and personalization devices).

<sup>31</sup> See *Merrill v. Navegar, Inc.* 26 Cal. 4th 465 (Cal. 2001), *White v. Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000); *Carrel v. Allied Prods. Corp.*, 677 N.E.2d 795 (Ohio 1997).

<sup>32</sup> See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j., 31. If the risk was obvious, the existence of a warning could be even counter-productive because it may be ignored by users and consumers and may diminish the attention required for warnings concerning non-obvious and not generally known risks.

<sup>33</sup> *White v. Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000).

<sup>34</sup> See Kairys, *supra* note 19 at 15; *Carrel v. Allied Prods. Corp.*, 677 N.E.2d 795, (Ohio 1997); *LaPuma v. Collinwood Concrete*, 661 N.E. 2d 714 (Ohio 1996); *Milbrand v. Smith & Wesson Corp.*, 1998 U.S. Dist. LEXIS 19409 (W.D.N.Y. 1998).

<sup>35</sup> See RESTATEMENT (THIRD) §2.

For example, Professor Hay and Professor Spier<sup>36</sup> consider that the existence of a defect in the product is not relevant when determining whether the gun manufacturer should be held liable and that the relevant parameter should be the purchasers' solvency and their distribution (either homogeneous or heterogeneous).

These two professors propose that in the case that gun purchasers were solvent and homogeneous, consumer-only liability would be the desirable and socially optimal rule<sup>37</sup>. According to their model manufacturers' liability would be undesirable when consumers have adequate financial resources and therefore could be held personally liable for the harm caused to third parties.<sup>38</sup> Such a system would be a negligence regime under which consumers would fully internalize the social harm caused by their product use and consequently would take optimal precautions to reduce the probability of accidents while gun manufacturers would be held liable for the harm caused by the product only in the case that the product was defective.

However, in the case that consumers were insolvent and homogeneously distributed the most efficient legal system would be to impose consumer-only liability with residual-manufacturer liability. When consumers lack the financial resources to fully compensate their victims they will demand cheap unsafe products and use them dangerously<sup>39</sup> because they would know that they can not afford paying the full compensation for the victim. Therefore, Professors Hay and Spier consider that in such case manufacturers should be residually responsible for the shortfall in non-consumer damages not covered by the financially constrained consumer.

As a result, if the consumer product market for guns was composed by insolvent and homogeneous consumers, a consumer-only liability rule would be optimal and there would be no need to demonstrate that a gun was defective. Consequently, the law of products liability for guns would evolve from a design defect negligence-based rule to a strict liability system. However, when consumers are heterogeneous –solvent and insolvent-, residual manufacturer liability would not be desirable because it would create an inefficient subsidization from gun manufacturers to consumers and an overprovision of safety features included in the product.

In the firearms context, Professors Hay and Spier understand that applying strict liability to gun manufacturers would be undesirable because it would function as a tax for the average social harm caused by guns. As a consequence, the market price would be inefficiently high and the market quantity inefficiently low.

However, it does not seem desirable that gun manufacturers would be held liable not because their product is defective but because the consumer of their product is insolvent

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<sup>36</sup> Bruce Hay and Kathryin E. Spier, *Manufacturer Liability fo Harms Caused by Consumers to Others*, (forthcoming 2003).

<sup>37</sup> *Id.* at 1.

<sup>38</sup> *Id.* at 3.

<sup>39</sup> *Id.* at 3.

and therefore the victim would not be compensated. Such legal regulation would create lot of uncertainty in the industry because gun manufacturers' liability would be regulated in an indirect way.

When allocating liability, legal rules should regulate conducts and send signals to the participants of a certain market in order to help them adopt decisions by internalizing the consequences of them. Therefore, when deciding to hold gun manufacturers liable, a criterion such as defect should not be abandoned.

## 2.2. Negligence

As explained earlier, when bringing a claim against gun manufacturers under product liability theories the major problem presented is the need to prove defect. Guns are not defective products, just dangerous, and this results in product claims against gun manufacturers being dismissed. Plaintiffs have therefore sought alternative theories in order to hold gun manufacturers liable, including negligence. Concretely, plaintiffs have focused on the conduct of defendants and alleged gun manufacturers' negligent marketing.<sup>40</sup>

In order for a plaintiff to sustain a claim against a gun manufacturer under negligence, he must prove the *prima facie* elements of negligent conduct:<sup>41</sup>

1. The plaintiff must establish that the gun manufacturer had a legal duty of care;
2. The plaintiff must prove that the gun manufacturer breached this duty;
3. The plaintiff must prove that he was damaged as a result of this breach; and,
4. Finally, the plaintiff must prove that the manufacturer's breach of the duty was the proximate cause of the plaintiff's harm.

Generally, plaintiffs' suits against gun manufacturers under the negligent marketing theory have not prevailed.<sup>42</sup> Causation has been a major problem for plaintiffs because the probability that the defendant's negligent marketing was the cause of the plaintiffs' injuries is generally very low.<sup>43</sup> However, the main difficulty that plaintiffs have faced when trying to establish gun manufacturers' negligence has been the duty element.<sup>44</sup>

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<sup>40</sup> See Richard J. Fiato, *Note: Gun Manufacturers And Gun Violence: Should Gun Manufacturers Be Liable? In Some Cases Perhaps They Should Be Or On The Other Hand, Maybe Not*, 78 U. Det. Mercy L. Rev. 675, 678 (2001). It has been suggested that gun manufacturers could be held liable under Negligent Entrustment because gun manufacturers market their products in a way that made possible and foreseeable that the product would reach an illegal market like the criminals market. This theory holds manufacturers liable if victims can establish that they knew or had reason to know that the dealers to which it sold had a history of have a history of sales to ineligible buyers. However, this theory did not succeed because it is generally considered applicable only to the entrustment of products to children.

<sup>41</sup> *Id.* at 676.

<sup>42</sup> See *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002); *Philadelphia v. Beretta U.S.A. Corp.*, 277 F. 3d 415 (3d Cir. 2002); *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001); *Carrel v. Allied Prods. Corp.*, 677 N.E.2d 795 (Ohio 1997).

<sup>43</sup> For an analysis of the causation problems presented in handgun cases see Aaron Twerski, Anthony J. Sebok, *Liability Without Cause? Further Ruminations On Cause-In-Fact As Applied To Handgun Liability*, 32 Conn. L. Rev. 1379, 1387 (2000). See also *Philadelphia v. Beretta U.S.A. Corp.*, 277 F. 3d 415 (3d Cir. 2002).

To satisfy this element, the plaintiff must establish that gun manufacturers owe a duty to third parties—like the general population of a certain city. The determination of the existence of this duty is one of the most problematic issues presented by negligence in this context. An important parameter to determine whether the defendants owe a duty to the potential plaintiffs is given by the foreseeability of the harm to the plaintiff, the degree of the certainty that the plaintiff suffered the injury, and the closeness of the connection between the defendant's conduct and the injury suffered.<sup>45</sup>

However, one of the major problems for introducing this duty is that, once established, its expansion<sup>46</sup> is very difficult to limit. Therefore, it is generally understood that gun manufacturers have no duty to insure against third parties for the criminal use of their non-defective products.<sup>47</sup>

The major case in which this duty was found was *Hamilton v. Accu-Tek*.<sup>48</sup> However, this opinion was vacated by *Hamilton v. Beretta U.S.A. Corp.*,<sup>49</sup> where the Second Circuit Court of Appeals, applying New York law, held that manufacturers did not owe such a duty and could not be held liable for the subsequent criminal acts that resulted in the injuries to the plaintiffs. In this case, the court considered that the parameter to determine whether a defendant owed a duty to the plaintiff was the existence of a special relationship between them.<sup>50</sup> Without such a special relationship, there was no duty owed.

However, regardless of the existence of a special relationship between the plaintiff and the defendant, concluding that gun manufacturers owed a duty to third parties and therefore holding them liable under a negligence theory would imply the creation of a legal duty that would infinitely expand their liability and would be unfair because manufacturers would be held liable for the acts of others.<sup>51</sup> Moreover, it is not possible for the courts to distinguish between the proper distribution of a gun to a legal purchaser from the improper distribution of a gun to a future criminal.<sup>52</sup>

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Plaintiff alleged that the gun industry's methods for distributing guns were negligent and a public nuisance. The court granted defendant's a motion to dismiss, because the plaintiffs did not establish the necessary causal nexus between the defendants' conduct and their alleged injuries and therefore could not recover under any legal theory asserted.

<sup>44</sup> See *Trujillo v. City of Albuquerque*, 603 P.2d 303 (Ct. App. N.M. 1979), *Boston v. Smith & Wesson*, 2000 Mass. Super. LEXIS 352 (Mass. 2000). In these cases the plaintiffs' negligence claim was dismissed because did not establish defendant's duty.

<sup>45</sup> Emily Kromke, *California's legislative response to Merrill v. Navegar: An Analysis*, 24 Whittier L. Review 833, 842 (2003).

<sup>46</sup> For an opposite opinion see Amy Edwards, *Mail-Order GunKits and Fingerprint-Resistant Pistols: Why Washington Courts Should Impose a Duty on Gun Manufacturers to Market Firearms Responsibility*, 75 Wash. L. Rev. 941 (2000) (arguing that not holding gun manufacturers strictly liable for injuries caused by criminal use allows them to continue to market products that are used for criminal purposes).

<sup>47</sup> See *Fiato*, *supra* note 40 at 677.

<sup>48</sup> *Hamilton et al. v. Accu-Tek et al.*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

<sup>49</sup> *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001).

<sup>50</sup> See Kromke, *supra* note 45 at 833.

<sup>51</sup> See *id.* at 843.

<sup>52</sup> See *id.* at 849.

However, as mentioned before, negligence claims were based on the negligent marketing done by the defendants when distributing and selling the firearms they produced or sold. The basis of these claims was that gun manufacturers were negligent because they marketed their products in a way that made possible and foreseeable that the product would reach an illegal market of criminals. Therefore, plaintiffs argued that gun manufacturers owed a duty to third parties of preventing their product from reaching this criminal market. *Merrill v. Navegar, Inc.*<sup>53</sup> represented the first time that a Court—in this case, a California court—allowed a suit against a gun manufacturer under a negligent marketing claim.<sup>54</sup> However, the California Supreme Court<sup>55</sup> overturned the decision because it understood that negligence was inapplicable in light of the California Civil Code Section 1714.4(a).<sup>56</sup>

In sum, suits brought under the negligent marketing theory presented the problem of establishing a duty problem because, once introduced, it is very difficult to limit.<sup>57</sup> Where this duty to third parties is not owed, it cannot be breached and, as a result, there cannot be negligence on the gun manufacturer's side.

### 2.3. Public Nuisance

As explained above, plaintiffs' claims against gun manufacturers based on products liability and negligence theories were generally dismissed. Even though tort categories have been widely defined by courts and by different scholars, the suits against gun manufacturers did not fit into the traditional categories. As a result, lawyers sought other theories that would allow this type of claim to pass the pleadings stage.

Plaintiffs' lawyers thought that nuisance was an open and broadly defined tort whose flexible crime-fighting content might allow them to state causes of action against gun manufacturers.<sup>58</sup> In the Restatement (Second) of Torts, nuisance is used to refer to the harm to another or to the invasion of an interest. However, if according to tort law the conduct<sup>59</sup> of the defendant is not of a kind that subjects him to liability, the nuisance would exist, but

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<sup>53</sup> *Marilyn Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001).

<sup>54</sup> *See Fiato, supra* note 40 at 687. Even though the Court of Appeals considered that "Navegar had a legal duty not to manufacture, market and distribute in a manner that increases the risk of harm inherent in the presence of handguns in society" and therefore should be held liable under negligence, the court held that the manufacturer had a duty to use. However, the California Supreme court overturned the decision in light of the Section 1714.4(a) of the California Civil Code.

<sup>55</sup> Recent Cases: *Firearms litigation – Supreme court of California holds that state PL statute bars negligence action against firearms manufacturer. Merrill v. Navegar, Inc. 28 P. 3d 116 (Cal 2001)*, 115 Harv. L. Rev. 717, 723 (2001). The Supreme Court reading of section 1714.4's did not consider the balancing risk-utility test and creates a broad immunity for gun manufacturers. However, see Kromke, *supra* note 45 at 833. California (2002) repealed a statute 1714.4 and amended 1714 in order to make possible for firearm and ammunition manufacturers to be sued under numerous negligence causes of actions as well as under the benefit-risk test.

<sup>56</sup> *See* Recent Cases, *supra* note 55 at 718.

<sup>57</sup> *See* Kromke, *supra* note 45 at 851.

<sup>58</sup> *See* Developments in the Law – *The Paths of Civil Litigation II: The use of the Public Nuisance Tort Against the Handgun Industry*, 113 Harv. L. Rev. 1759, 1760 (2000).

<sup>59</sup> *See* RESTATEMENT (SECOND) OF TORTS § 822 (1965).

there is no liability for it. In other words, as it is used in the Restatement, "nuisance" does not signify any particular kind of conduct on the part of the defendant. Instead, the concept of nuisance refers to two particular kinds of harm – the invasion of two kinds of interests – by conduct that is tortious only if it falls into the usual categories of tort liability.<sup>60</sup>

As used in the Restatement, nuisance embraces two different legal concepts: private nuisance and public nuisance. Private nuisances are described in Section 821 D Restatement.<sup>61</sup> Private nuisance claims are enjoined in actions brought by individuals whose private interests with the land are affected by them. In contrast, public nuisance has its origins in the criminal interferences with the right of the Crown<sup>62</sup> and is defined in Section 821 B of the Restatement in a very broad manner.<sup>63</sup> For instance, a public nuisance does not necessarily have to involve interferences with interests in land.<sup>64</sup> The public nuisance tort focuses on the rights of the general public rather than the rights of particular people harmed.<sup>65</sup> This is the reason why public nuisances claims are traditionally enjoined in legal proceedings brought by public officials in the name of the state seeking to protect the general public.

However, sometimes private actions for damages based upon public nuisances are available to individual plaintiffs.<sup>66</sup> In order to maintain a private action for public nuisance, the individual plaintiff must suffer harm that is different in kind from that suffered by the public at large.<sup>67</sup> In the gun context, the public generally experiences danger, fear,

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<sup>60</sup> See *id.* § 824:

Type of Conduct Essential to Liability (1965):

The conduct necessary to make the actor liable for either a public or a private nuisance may consist of

(a) an act; or

(b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest or the invasion of the private interest.

<sup>61</sup> *Id.* § 821 D Private Nuisance (1965); ("A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land".)

<sup>62</sup> See JAMES A. HENDERSON JR., RICHARD N. PEARSON & JOHN A. SILICIANO, *THE TORTS PROCESS* 444 (5th ed. 1999).

<sup>63</sup> RESTATEMENT (SECOND) OF TORTS, § 821 B:

(1) A public nuisance is an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) Whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) Whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

<sup>64</sup> This stands in contrast to the definition of private nuisance included in the RESTATEMENT (SECOND) OF TORTS § 821D (1965).

<sup>65</sup> See Kairys, *supra* note 4 at 1173.

<sup>66</sup> See *Bubalo and Dofflyn v. Navegar*, 1998 U.S. Dist. LEXIS 3598 (N.D. Ill. 1998), a private plaintiff brought a public nuisance claim against a handgun manufacturer.

<sup>67</sup> See HENDERSON, *supra* note 62, at 446. See also David Kairys, *Public Nuisance Claims of Victims of Handgun Violence*, 43 *Ariz. L. Rev.* 339, 341 (2001).

inconvenience and interference with the use and enjoyment of public places that affect the quality of everyday life. However, this harm is not different in kind because it is suffered by the society as a whole. The real and different harm in kind is the one suffered by individuals who have been shot to death or suffered serious physical or emotional injuries.<sup>68</sup> Therefore, legal claims brought by individuals against gun sellers have not been considered as tort claims and therefore have been remitted to other legal theories such as public nuisance claims.<sup>69</sup>

When stating a nuisance cause of action, an important difference<sup>70</sup> between public and private nuisance is the role of negligence. Given that municipalities owe a “duty” to their citizens to avoid dangers to citizens, there is no need to prove negligence because the duty element is already part of their required conduct. In contrast, under private nuisance it is necessary to prove negligence because otherwise imposing liability for harm regardless the care taken would be like imposing strict liability for the harm caused.

The public nuisance doctrine has been used in the environmental, the asbestos and the tobacco litigation context.<sup>71</sup> However, the new litigation focus is the gun cases. Recent judicial decisions have rejected nuisance as a basis for liability in these cases because courts have considered that if defective products are not a nuisance as a matter of law, it would not make any sense to consider a non-defective, lawful product as a nuisance.<sup>72</sup>

In the few cases brought by individuals<sup>73</sup> against gun manufacturers based on public nuisance, the defendants’ motions to dismiss were granted. In contrast, a public nuisance suit filed by a state actor in its governmental capacity is not considered a tort suit but is instead considered a legitimate exercise of state police power in protecting the health and safety of the population.<sup>74</sup> The power to abate a public nuisance can be described as an incident of the state’s police power.<sup>75</sup> Therefore, in order to exercise their governmental power, municipalities claimed that the harm caused by firearms to the citizens who lived in these municipalities constituted a public nuisance.

Municipalities believed that manufacturers of guns facilitated, sustained and sometimes even encouraged the demand for their products for their use in criminal acts. By doing that municipalities believed that gun manufacturers promoted guns to everybody else as necessary for their protection against guns used by criminals<sup>76</sup>. Municipalities considered

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<sup>68</sup> See *Id.* at 343.

<sup>69</sup> See John G. Culhane, Jean Macchiaroli Eggen, *Defining A Proper Role For Public Nuisance Law In Municipal Suits Against Gun Sellers: Beyond Rethoric And Expedience*, 52 S. C. L. Review 287, 290 (2001).

<sup>70</sup> See *Id.* at 314.

<sup>71</sup> See Lauren E. Handler & Charles E. Erway, *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 Def. Couns. J. 484, 487 (2002).

<sup>72</sup> See *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001).

<sup>73</sup> See *NAACP v. A.A.Arms, Inc.*, 2003 U.S. Dist. LEXIS 8238 ( E.D.N.Y. 2003), *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); *Bubalo and Dofflyn v. Navegar*, 1998 U.S. Dist. LEXIS 3598 ( N.D. Ill. 1998).

<sup>74</sup> See Culhane & Eggen, *supra* note 69 at 290.

<sup>75</sup> See *Id.* at 298.

<sup>76</sup> See Kairys, *supra* note 19 at 12.

that such conduct constituted a public nuisance<sup>77</sup>. However, the main focus of those claims was not the pain and suffering or the lost earnings of gun victims but the direct, foreseeable and known harm done to the cities by marketing, distributing and promoting policies and practices of gun manufacturers<sup>78</sup>. Therefore, manufacturers created and contributed to a public nuisance by knowingly making guns easily available for purposes of crime<sup>79</sup>.

There is an important difference between a municipal suit against gun sellers in which the city acts as a private plaintiff in a tort action in which the city would seek to recover for its own harm<sup>80</sup>, and a municipal suit against gun sellers on public nuisance grounds in which the city would stand defending the population. In the latter case, the city's actions would be aimed at eliminating the risk at its source. However, in any of those cases, either as defending the population against risks posed by firearms or as a direct plaintiff who suffers losses, whether the actions of the gun industry constitute a public nuisance is crucial to the outcome of these suits. If successful, this novel use of public nuisance would expand the tools that government has for crime control.

Firearms are a problem in the U.S. There is a high crime rate that should concern any decision maker. However, it is important to determine whether public nuisance claims are a way of solving the firearm problem in the U.S. and in the case that they were, whether this is the best way to solve it.

### 3. *Cincinnati v. Beretta U.S.A*

In the beginning of the 90's, the per capita violent crime rate in the city of Cincinnati was double that of the whole United States.<sup>81</sup> In the year 1998, the violent crime rate in the U.S. was 566.4 (per 100.000 population); in the City of Cincinnati it was significantly higher: 873.8. The firearms offenses (that include any offense or crime in which a firearm was involved) were the 64.09% of the total crimes in the City of Cincinnati<sup>82</sup> and more than 89 percent of the guns confiscated in the Cincinnati changed hands at least once before reaching the person who used them in a crime.

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<sup>77</sup> Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001). The plaintiff in this case, Camden County, considered that the gun manufacturers' marketing and distribution of handguns created and contributed to the widespread criminal use of handguns in the county and that this was a public nuisance for the county because this conduct endangered public safety, health, and peace, and imposed inordinate financial burdens on the county. However, the Court of Appeals affirmed the District Court judgment and dismissed the claim. See also Philadelphia v. Beretta U.S.A. Corp., 126 F. Supp. 2d 882 (Dis. Ct. E.D. Pa. 2000).

<sup>78</sup> Kairys, *supra* note 19 at 13.

<sup>79</sup> Kairys, *supra* note 4 at 1173.

<sup>80</sup> Culhane & Eggen, *supra* note 69 at 328.

<sup>81</sup> Crime in the America's Top-Rated Cities, A Statistical Profile 1979-1998, Grey House Publishing, 3<sup>rd</sup> Ed. 2000.

<sup>82</sup> The Youth Crime Interdiction Initiative, Crime Gun Trace Analysis Report: The Illegal Youth Firearms Market in Cincinnati, February 1999, Department of the Treasury, Bureau of Alcohol, Firearms and Tobacco (A.T.F.). A.T.F. Crime gun trace analysis report. The report compiles and summarizes A.T.F.'s crime gun trace information between August 1<sup>st</sup> 1997 and July 31<sup>st</sup>, 1998. The information was obtained with the help of police departments in 32 participating cities with populations of 250,000 or more.

The Cincinnati town hall was concerned about the violent context of the city and in order to solve it developed what was called the Community Problem Oriented Policing<sup>83</sup> (C.P.O.P.) and brought an action against Beretta U.S.A. Corp.<sup>84</sup>, 15 other gun manufacturers and 3 gun trade associations seeking to recover damages for the harm caused by the firearms the defendants manufactured, sold, and distributed.

The most remarkable issue in the *Cincinnati v. Beretta U.S.A. Corp.*<sup>85</sup> case is that the Ohio Supreme Court permitted a suit brought by a municipality, the City of Cincinnati, to pass the pleadings stage for claims against gun manufacturers, trade associations, and distributors to proceed under alleged nuisance, negligence, and products liability claims.

However, even though the higher Ohio Supreme Court did not grant defendant's a motion to dismiss the plaintiff's claim and remanded the case back to the Trial Court, it acknowledged that the Court's opinion in this case did not mean that the underlying liability claim against the firearm industry would prevail.

### 3.1. The Facts

On April 28<sup>th</sup>, 1999, the City of Cincinnati (the plaintiff-appellant) filed a complaint against fifteen gun manufacturers, three trade associations, and one gun distributor, seeking to hold them responsible under nuisance, negligence and products liability theories for the harm caused by the firearms they manufactured, sold or distributed.

The City alleged that, as a result of the defendants' conduct in manufacturing or distributing guns, the City suffered problems ranging from costs of responding to shootings, to decreased property values and tax revenues and to Cincinnati's general fears resulting from criminal activity and injuries caused by firearms. The City sought injunctive relief, compensatory and punitive damages, restitution and disgorgement of profits.

The essential element of the complaint was that appellees manufactured, marketed, and distributed their firearms in ways that made them accessible to prohibited users, including children and criminals.

The complaint<sup>86</sup> filed by the city of Cincinnati asserted that due to their intentional and negligent conduct and their failure to make guns safer, appellees fostered the criminal

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<sup>83</sup> The C.P.O.P was an attempt to establish a responsive, community-oriented government to the major "troublesome circumstances" of the City and to tackle community problems through a partnership between residents and employees of the City of Cincinnati. For further information about C.P.O.P. see <http://www.rcc.org/cnas/cpop.htm>.

<sup>84</sup> <http://www.berettausa.com/>

<sup>85</sup> *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002).

<sup>86</sup> The lawsuit originally alleged other theories of liability including fraud, negligent misrepresentation, unfair and deceptive advertising and unjust enrichment. However, these counts were not contested by

misuse of firearms, helped sustain the illegal firearms market in Cincinnati and created a public nuisance. In this complaint, the city of Cincinnati sought both injunctive relief and monetary damages including reimbursement for expenses such as increased police, emergency, health and corrections costs.

Fifteen of the defendants (“the appellees”) moved to dismiss the complaint for failing to state a claim on which relief could be granted. The trial court granted the motions to dismiss and the Court of Appeals affirmed. However, the Ohio Supreme Court reversed the judgment of the Court of Appeals and remanded the cause to the trial court.

### **3.2. The Theories of Recovery and the Court's Analyses and Holdings - including the dissents**

Following the structure of the appellants’ different claims, the judgment of the Supreme Court was organized in three basic parts: the court analyzed the appellants’ grounds of the public nuisance cause of action under Ohio law. Secondly, the Supreme Court considered the remoteness of the complaint and, finally, the Court analyzed the City of Cincinnati’s claim for recovering the cost of governmental services. In the fourth part of the opinion, the Court briefly analyzed the Constitutional arguments alleged by the appellees concerning the consequences of such decision for the Commerce Clause and the Due Process Clause of the United States Constitution. Even though this is not the basic topic of this paper, there will be a short description of the Court’s constitutional analysis.

The main arguments that the Supreme Court of Ohio used when adopting the decision of the case were:

#### a) Cause of action under Ohio Law.

According to the trial court and the Court of Appeals, the plaintiff’s complaint failed to state a cause of action under Ohio law. In contrast, the Supreme Court of Ohio held that there were grounds to state a cause of action.

When reaching this conclusion, the highest court of Ohio followed its reasoning stated in the *O’Brien v. Univ. Community Tenants Union, Inc.* (1975), 327 N.E.2d 753 case. In that case the court concluded that in order to dismiss a complaint for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff could prove no set of facts entitling him to relief. Furthermore, in construing a complaint upon a motion to dismiss for failure to state a claim, it is necessary to presume that all factual allegations of the complaint were true and to make all reasonable inferences in favor of the non-moving party.<sup>87</sup> The court further noted that as long as there was a set of facts consistent with the

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the appellant and therefore were not addressed by the Ohio Supreme Court and will not be analyzed in this paper either.

<sup>87</sup> *Mitchell v. Lawshon Milk Co.*, 532 N.E. 2d 753 (Ohio 1988).

plaintiff's complaint which would allow the plaintiff to recover, the court would not grant a defendant's motion to dismiss.<sup>88</sup> According to the Ohio Supreme Court the cause of action was properly stated.

From this procedural standpoint, the Supreme Court of Ohio addressed separately the different grounds – public nuisance, negligence and products liability – of the complaint:

a) Public Nuisance

Appellant – the city of Cincinnati – alleged that appellees created and maintained a public nuisance by manufacturing, marketing, distributing and selling firearms in ways that unreasonably interfered with the public health, welfare and safety in the city of Cincinnati. At the same time, appellant considered that appellees knew, or reasonably should have known that their conduct would cause guns to be used and possessed illegally and that such conduct produced an ongoing nuisance that had a detrimental effect upon the public health, safety and welfare of the residents of Cincinnati who had a common right to be free from such conduct.

Appellees – the defendants of the case – answered appellants' complaint by presenting several reasons why the complaint did not state a cause of action for public nuisance. However, the Supreme Court disagreed with them.

1. Defendants claimed they could not be held liable for the harm alleged because they did not have control over the instrument that potentially produced the nuisance at the time of injury.

However, in his answer appellant differentiated between the use of the product that caused the public nuisance and the creation of the environment that would allow the causation of the alleged public nuisance. In other words, appellant alleged that the public nuisance claim was stated because appellees controlled the creation and the supply of the illegal secondary market for firearms that caused the public nuisance, even though they were not in control of the actual use of the firearms that caused injuries.

The court agreed with the above mentioned Cincinnati's position and considered that it was not fatal to its public nuisance claim that gun manufacturers did not control the actual firearms at the moment that harm occurred.

2. Appellees also contended that appellant's nuisance claim could not go forward because the distribution of firearms was highly regulated and covered a "legislatively authorized conduct". Implicitly appellees wanted the compliance with regulation to control when deciding whether they should be liable. However, the court considered that even though there was a comprehensive regulatory scheme involving the manufacturing, sales, and distribution of firearms, the law did not regulate the distribution practices in the complaint.

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<sup>88</sup> York v. Ohio State Hwy. Partol, 573 N.E.2d 1063 (Ohio 1991).

3. Finally, appellees argued that the public nuisance claim failed because appellant did not plead an underlying tort to support either an absolute public nuisance claim based on intentional or ultra-hazardous activity or a negligence-based claim of a qualified public nuisance. However, this argument of the court was not strong enough because the complaint alleged both intentional and negligence misconduct on appellees' part.

Therefore, the court understood that under Ohio law the public nuisance claim could be maintained for injuries caused by a product if the facts established that the design, manufacturing, marketing or sale of the product unreasonably interfered with a right common to the general public.

#### b) Negligence

Appellant's negligence claim was based on the appellees' failure to exercise reasonable care in the very different activities of designing, manufacturing, marketing, advertising, promoting, distributing, supplying and selling their firearms without ensuring their safety for their intended and foreseeable use by consumers. In addition, the complaint alleged failure to warn based on the appellees' failure to exercise reasonable care by not providing a full warning to consumers of the risks associated with firearms.

As discussed above, in order to maintain a negligence action, the plaintiff must show:

1. The existence of a duty.
2. The breach of that duty.
3. That the breach of that duty was the proximate cause of the plaintiff's injury.

As explained earlier, the major problem of the negligence claim was to establish the existence of a manufacturers' duty to control towards the general public. In order to establish the existence of the manufacturers' duty, the Court of Appeals construed the nature of appellant's negligence claims relying on the "special relationship" rule<sup>89</sup>. But the Supreme Court of Ohio did not agree that the "special relationship" rule was the crucial issue to determine the existence of a duty. The highest court of Ohio rejected the defendants' arguments that the harm was too attenuated and that they did not have a duty to control third parties. The court explained that the negligence issue was not whether appellees owed appellant a duty to control the conduct of third parties. Instead, the issue in this case was whether appellees were themselves negligent by manufacturing, marketing, and distributing firearms in a way that created an illegal firearms market that resulted in

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<sup>89</sup> The distinction between duty and "special relationship" concluded by the Supreme Court of Ohio was established by the *Boston v. Smith & Wesson*, 2000 Mass. Super. LEXIS 352 (Mass. 2000).

"given that the Plaintiffs were foreseeable plaintiffs from Defendants' perspective, the court need not to decide whether Defendants owed a duty greater than the basic duty".

foreseeable injury. Consequently, the 'special relationship' rule was not determinative. Therefore, the allegations of the complaint were to be addressed without resort to that rule.

The Ohio Supreme Court applied straightforward general negligence principles<sup>90</sup> and concluded that manufacturers should have anticipated an injury to the plaintiffs as a probable result of manufacturing, marketing and distributing a product with an alleged negligent design. Therefore, a negligence cause of action was sustained.

### c) Products Liability

There were two product liability theories alleged by the city of Cincinnati:

1. Defective design: Appellants argued that guns manufactured or supplied by appellees were defective because they did not incorporate feasible safety devices that would have prevented unauthorized use and foreseeable injuries.
2. Failure to warn and to instruct: Appellants alleged that appellees manufactured or supplied guns without an adequate warning of their dangerousness or instruction as to their use.

The Court of Appeals upheld the dismissal of these claims. With respect to the Defective Design claim, the Court of Appeals found that first; the complaint was deficient because it did not allege with specificity “a single defective condition in a particular model of gun at a time it left its particular manufacturer”. Second, that the City could not bring its claims under the Product Liability Act, R. C. 2307.71 et seq. because it could prove no harm to itself and nor could recover economic loss alone under R.C. 2307.71 (B) and (G), 2307.79 of the Act<sup>91</sup>. Therefore, appellant was precluded from bringing its product liability claim under the Product Liability Act because a claimant can not recover economic damages alone and must allege damages other than just economic ones<sup>92</sup>.

Nevertheless, the Ohio Supreme Court did not dismiss the claim and based its opinion on two grounds. First, the court relied on the Ohio Rules of Civil Procedure, Civ. R. 8(A)(1) according to which “as long as there is a set of facts consistent with the plaintiff’s complaint which would allow the plaintiff to recover, the court may not grant a defendant’s motion to dismiss”. Second, the Supreme Court understood that these set of facts that would allow the plaintiff to recover was the possibility to bring a common-law products liability claim<sup>93</sup>. Under this claim alleging only the existence of economic damages was not a problem. Additionally, the Supreme Court understood that under the common law a product could be considered defective applying either the Consumers Expectation test or the Risk Utility

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<sup>90</sup> White v. Smith & Wesson, 97 F. Supp. 2d 816 (N.D. Ohio 2000).

<sup>91</sup> LaPuma v. Collinwood Concrete, 661 N.E. 2d 714 (Ohio 1996). Judge Painter said that claims were not barred by remoteness and the product liability claims remained viable causes of action under common law.

<sup>92</sup> *Id.*

<sup>93</sup> Carrel v. Allied Prods. Corp., 677 N.E.2d 795 (Ohio 1997).

test. Thus, a product would be defective if it would be more dangerous than what the reasonable consumer would expect or if the products' risks would outweigh its benefits.

With respect to the Failure to Warn claim, the Court of Appeals reasoned that the failure to warn claim could not go forward because the defendants owed no duty to warn when risks concerning firearms were open and obvious. However, as Judge Painter's stated in his concurrent opinion, some of the allegations involved risks that were not open and obvious<sup>94</sup>. As with the defective design claim, the Ohio Supreme Court considered that appellant could bring a common-law claim for failure to warn. Applying common law failure to warn grounds, the plaintiff had to prove that the manufacturer knew or should have known, in the exercise of reasonable care, of the risk of hazard about which it failed to warn and that the manufacturer failed to take precautions that a reasonable person would take in presenting the product to the public<sup>95</sup>. The highest Court of Ohio considered that the appellant properly alleged a failure to warn claim that withstood a motion to dismiss.

- 1) The claims were barred by the doctrine of remoteness

Remoteness<sup>96</sup> is not generally considered an independent legal doctrine. It is generally related either to the issues of proximate causation or considered wholly derivative of the harm suffered by a third party (this is what is called standing).

Courts have taken different positions regarding remoteness: some courts have found that remoteness bars recovery and others have understood the opposite. However, in order to determine whether the appellants claim was remotely caused by appellees conduct, the Ohio Supreme Court analyzed the factors established in *Holmes*<sup>97</sup>.

In the *Holmes* case, the court offered three arguments in favor of considering that the directness of a relationship was a requirement for establishing causation:

1. Indirectness adds to the difficulty of proof when determining which of the plaintiff's damages can be attributed to the defendant's misconduct.
2. Recognizing the claims of the indirectly injured would complicate the apportionment of damages among plaintiffs when trying to avoid multiple and double recoveries.
3. These complications are unnecessary given that other parties who are directly injured and who can remedy the harm without these associated problems are available.

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<sup>94</sup> For the determination that guns did not involve "open and obvious risks", see *White v. Smith & Wesson*, 97 F. Supp. 2d. (N.D. Ohio 2000).

<sup>95</sup> *Crislio v. T.C.H. Liquidating Co.*, 556 N.E.2d 1177 (Ohio 1990).

<sup>96</sup> For a discussion about the remoteness idea see *Holmes v. Securities Investor Protection Corp.*, 117 L. Ed. 2d 532 (U.S. 1992).

<sup>97</sup> *Id.*

Appellees maintained that even if appellant could establish any of the elements of the individual torts it alleged, the injuries to the city were still too remote to create liability on the part of the gun manufacturers and trade associations. Appellees argued that remoteness barred recovery because the causal connection between the alleged wrongdoing and the alleged harm was too remote and because the claims asserted were indirect and derivative of the claims of others.

The Court of Appeals followed the appellees' arguments concerning the remoteness and concluded that appellants' claims were too remote for recovery. However, the Ohio Supreme Court applied the *Holmes* test and understood that the appellant's claim withstood it because although appellant was indirectly attempting to protect its citizens from the alleged misconduct by the gun manufacturers and trade associations, appellant was seeking recovery for its own harm.

2) Appellant could not recoup expenditures for public services.

The city of Cincinnati - the appellant in this case - argued that the appellees' misconduct caused damages to it because it incurred in expenses that could have had other uses in benefit of the citizens of Cincinnati. On the other side, appellees contended that the costs of the public expenses for police, emergency, health, corrections, prosecution and other services were not recoverable because the city had the duty to provide these services<sup>98</sup>.

Generally, a municipality cannot reasonably expect to recover the costs of city services whenever a tortfeasor causes harm to the public. However, the Supreme Court of Ohio considered that in a case like this, recovery should be allowed because the continuing nature of the misconduct justified the recoupment of such governmental costs. Therefore, in case that appellant could prove all the elements of the alleged torts, recovery should be awarded.

3) Constitutional Arguments

Appellees further argued that claims of the City of Cincinnati would have Constitutional consequences because they believed that Cincinnati was attempting to regulate a national firearms industry and, therefore, as this would have Constitutional implications, its claims were barred under the Commerce Clause and the Due Process Clause of the U.S. Constitution. Despite the fact that no statute or regulation was involved in this case, appellees maintained that this litigation violated the Commerce Clause alleging that appellant was seeking extraterritorial jurisdiction over a conduct occurring outside Cincinnati's city limits<sup>99</sup>. However, the Ohio Supreme Court considered that the injunctive relief sought by appellants, although it would also affect out-of-state conduct, would not violate the Commerce Clause and that it was hence not possible to require the dismissal of the lawsuit on this ground.

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<sup>98</sup> *Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983).

<sup>99</sup> *B.M.W. of N. Am. Inc. v. Gore*, 116 S. Ct. 1589 (U.S. 1996).

#### 4) Conclusion

The Supreme Court of Ohio reversed the judgment of the Court of Appeals and remanded the cause to the trial court for further proceedings. The highest Court of Ohio understood that the appellant alleged the facts necessary to withstand a motion to dismiss under the Civ. R. 12 (B)(6) and therefore would have the opportunity to pursue its claims in further proceedings.

Nevertheless, the reversal of the Court of Appeals judgment did not mean that the appellant would prevail upon remand. The Supreme Court of Ohio did not predict the outcome of the case and acknowledged the importance of allowing this type of litigation to pass the pleadings state.

As foreseeable, in this controversial case three judges concurred and three dissented and wrote two different dissenting opinions. The first one was written by Judge Moyer and Judge Cook wrote another separate opinion. Judge Lundberg Stratton concurred with both dissenting opinions.

##### 1. Judge Moyer 's dissenting opinion

According to Judge Moyer, the issue was not whether the court agreed with appellant that in Cincinnati violence existed due to guns illegally obtained. The real issue was to determine whether the City had standing to assert its claims. Judge Moyer considered that, as a matter of law, the City's alleged injuries were too remote from the conduct of appellees and too derivative of the harms suffered by victims of gun violence. His dissenting opinion was mainly based on three arguments: the proximate causation issue, the complicated apportioning damages rules that would require the recognition of the city's claim, and the unnecessary inclusion of indirect plaintiffs in this type of suits.

- a) Regarding the proximate causation issue, its limitation rested on the nature and degree of the connection between the defendant's acts and the events of which the plaintiff complaint. The dissent considered that generally, the application of the *Holmes* test to determine whether the plaintiff's claims were too remote or derivative was correct though he believed that the use of this test in that case was inadequate.

The dissent differentiated between quantitative and qualitative factors. Concerning the quantitative parameters, it was too difficult for the City of Cincinnati to prove which expenses were consequences of the manufacturers' conduct and which expenses were not derived from it.

From a qualitative perspective, the question was not whether the city could prove damages but whether the city could prove that those damages were attributable to

the wrongdoing of the gun manufacturers as opposed to other independent factors<sup>100</sup>.

Thus, the dissent disagreed with the majority concerning the difficulty of determining that the expenses borne by the city were easily capable of proof and affirmed that there was a too high level of difficulty in determining the amount of the city's damages attributable to the conduct of the gun manufacturers.

- b) Recognizing the city's claim would require a court to adopt complicated rules apportioning damages.

The dissent understood that the city's complaint was a derivative action because the city's damages were connected to death and injuries by individual citizens allegedly resulting from illegal guns or the use of legal guns by unauthorized users. Therefore, for almost every harm the city suffered there was at least one injured victim standing between the city and the gun manufacturers. Thus, the injured persons may also have claim against gun manufacturers. Under these circumstances, the fact that the city sought damages in part only for its own harm did not satisfy the *Holmes* test and even if the *Holmes* test was met, courts would be forced to adopt too complicated apportioning damages rules<sup>101</sup>.

- c) Directly injured persons could remedy the harm alleged by the city.

Given that there were numerous directly injured victims of gun violence in Cincinnati, what *Holmes* required from courts was not to analyze whether these direct damages were possible to prove but to consider whether the difficulties inherent in applying complicated rules apportioning damages among multiple plaintiffs were justified. The difficult application of the *Holmes* test required affirming the judgment of the court of appeals.

## 2. Judge Cook's dissenting opinion.

Judge Cook's dissenting opinion was based on the argument that the Cincinnati's negligence-based claims should be barred by remoteness principles. Judge Cook structured his opinion in three different parts: the proximate causation issue, the failure to state a claim under Ohio Products Liability Act and, finally, an analysis of the public nuisance cause of action.

- a) Judge Cook considered that it was necessary to distinguish between including a proximate-cause component within the conventional standing analysis and the requirement of proof of proximate cause as a substantive element. Given that

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<sup>100</sup> *Holmes*, *supra* at note 96.

<sup>101</sup> Second Circuit reasoning in *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d. Cir. 1999).

proximate cause was a substantive element that needed to be proved, it should not be included in the standing analysis. Therefore, the remoteness of the alleged harm should preclude the city from establishing proximate cause as a matter of law<sup>102</sup>.

- b) The city's claims failed to plead a compensable injury and to state a valid claim under the Ohio Products Liability Act because it was an action for purely economic harm.

Judge Cook disagreed with the majority's holding that the city could maintain its common-law products liability claims alleging defective design and failure to warn because even assuming that the Act would not preempt these claims, the city did not plead valid common-law causes of action and the majority did not manage to cite a precedent case in which the court allowed a products liability claim to be a viable theory of recovery for a plaintiff in a similar situation to the one of the city of Cincinnati. Allowing such a claim could mean to extend products-liability law to new categories of potential plaintiffs without reasoning on how this could be so.

- c) Concerning the public nuisance cause of action, the dissent agreed with the majority in accepting that remoteness did not necessarily prevent the city from stating a valid claim but considered that this cause of action should fail as well because public nuisance law did not go as far as the city would have liked to extend it.

Despite the broad content of the concept of public nuisance, the dissent presented several conceptual limitations that would preclude the city of Cincinnati to state a valid public nuisance claim:

- a) First, the defendants' marketing and distribution practices cause harm only through intervening actions of persons not within the defendants' control.
- b) Second, allowing the city's action would make possible to consider any given activity to be a public nuisance and given that defendants were subject to extensive federal regulation concerning their activities, the majority's decision to allow a nuisance claim would promote a legislative judgment by the court.

## ***4. Critique of Public Nuisance Suits Against Firearm Manufacturers***

### **4.1. The Strict Liability v. Negligence Debate**

The underlying decision about the legal doctrine that should be applied on gun manufacturers when determining their liability for the harm caused by the guns they produce to third parties is the decision of imposing negligence or strict liability on them.

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<sup>102</sup> Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3d Cir. 2002).

The Restatement (Third) § 1 establishes that product manufacturers are strictly liable with respect to persons and property for harm caused by the product defect.

“Liability of Commercial Seller or Distributor for Harm Caused by Defective Products:  
One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.”

Therefore, in order to be able to hold liable any of the members of the distributive chain it is necessary first to qualify the product as defective. Thus, the analysis is divided in two phases: a first negligence-based step in which it is considered whether a product is defective or not; and a second phase in which the manufacturer is hold liable for the harm caused by the product in the case that previously the product has been qualified as defective.

Thus, when the product is defective, strict liability regime holds all members of the commercial chain strictly liable for the harm caused by the defect. Whether the defect was discoverable by the seller turns to be totally irrelevant.<sup>103</sup> Nevertheless, in order to avoid being held liable, to the only defense that each member of the distributive chain has is to argue that there was no defect when the product left their hands and therefore it appeared afterwards.

Conversely, in the case that the product was not defective, the plaintiff-victim would need to prove that the purchaser of the product was negligent when managing it and that this negligence was the cause of its harm. Therefore, under these circumstances the harmed non-purchaser victim would not have a strict liability claim against the members of the distributive chain but instead would have a negligence action against the purchaser of the product.

As mentioned before, under products liability, the major problem presented by the gun suits for holding gun manufacturers liable for the harm caused by the guns they commercialize is the lack of defect. Therefore, if the gun purchaser is not negligent, under the general regime established in the Restatement the third-party victim is not compensated.

In contrast, if it was considered that the applicable liability regime to gun manufacturers was strict liability; they would take appropriate care and incorporate potentially adequate safety features in the guns and would sell the product at the price reflecting the cost of the products and the future expected liability<sup>104</sup>. However, if strict liability was imposed on gun manufacturers and they would raise the price in order to internalize the expected liability; this “tax” would make the market price to be inefficiently high and the market quantity to be inefficiently low. Therefore, an efficient equilibrium would not be reached.

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<sup>103</sup> JAMES A. HENDERSON JR., AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS*, (4th ed. 2000).

<sup>104</sup> Steve Shavell, *Strict Liability versus Negligence*, 1 *Journal of Legal Studies*, (1980).

On the other side, imposing strict liability on gun manufacturers for paying to the harmed victim the shortfalls that insolvent consumers could not pay would not be a good normative criterion and would create and undesired uncertainty in the market.

Concluding, strict liability on gun manufacturers would not lead to an efficient equilibrium because only high risk consumers (potential criminals, for example) would be willing to pay a high price for the product. Law abiders, instead, would not be generally willing to pay for a price that would reflect the expected liability of gun manufacturers and therefore would not buy the product. As a result, there would be an adverse selection effect according to which purchasers that were law abiders would not buy the product at this high price and high risk consumers such as criminals would still be willing to buy it.

Therefore, the negligence-based products liability system according to which a manufacturer is held liable for the harm caused by the product in the case that the product was defective is a good approach that incentives both parties to take care and to behave efficiently.

#### 4.2. Is the Public Nuisance Doctrine Correctly Applied?

As explained earlier, the public nuisance doctrine is a unique tort that focuses on the rights of the general public rather than the ones of a particular person harmed<sup>105</sup>. However, this is a broadly defined tort with more flexible limits than the ones presented by the traditional tort categories. Thus, the determination of whether a defendant's conduct created or contributed to a public nuisance is very fact-specific because there is no type of conduct required and there is no limit to a particular instrumentality or means of interference with public rights. This flexibility made possible these type of claims against the firearms industry. Additionally, some commentators misunderstood it and considered this tort as open-ended or without limits.<sup>106</sup>

However, through these suits against the gun industry courts have defined the limits<sup>107</sup> of this tort and have determined its elements in order to assess whether damages would be appropriate or not. In doing so, two basic elements have been considered when defining public nuisance:

1. The defendant's conduct created or contributed to a substantial, unreasonable interference with common public rights and,
2. The defendant failed to take reasonable measures that would have eliminated or ameliorated the harm.

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<sup>105</sup> David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 Conn. L. Rev. 1175, 1175 (2000).

<sup>106</sup> *Id.* at 1176.

<sup>107</sup> *Id.* at 1177.

Even though the elements that describe public nuisance are still broad, the main problem presented in gun cases is the determination of the first element presented above. It is not obvious that the conduct of the different participants in the gun industry constitutes an unreasonable interference with a common public right given that gun manufacturing and distribution are lawful activities that are “heavily regulated” by federal, state and local authorities<sup>108</sup>. This was the basic argument used by the court in the *City of Cincinnati v. Beretta, U.S.A. Corp.*, when it judiciously declined to expand the common law public nuisance doctrine to gun manufacturing cases.

On the other side, in order to prevail in a nuisance claim, the Ohio Supreme Court considered that the plaintiff should have shown the defendant’s negligent conduct by establishing as a matter of law the existence of a duty owed by gun manufacturers. However, concluding that the conduct of gun manufacturers constituted a public nuisance raises different issues.

First, it is very difficult and undesirable to conclude that gun manufacturers owe a duty to third parties. If this duty was owed it would be very difficult to limit the extension of duties owed to unknown third parties in any kind of context. It is necessary to determine when duties are owed before the harm takes place instead of creating duties *ex post*, when parts of the society do not like the consequences of a certain social situation. However, it might be possible to argue that gun manufacturers should owe a duty to third parties. It would even be desirable that the gun industry would pay for the cost of the harm caused by the criminal use of the firearms they market. Public nuisance, however, is not the instrument to create this duty given that guns are legal market products. It would be necessary and important to regulate this duty and the burdens that the gun industry would bear in order to send a clear signal to the gun industry about the potential liabilities they might be exposed to.

Second, public nuisance claims against gun manufacturers present a causation problem<sup>109</sup> because the cause of the injuries to the victims is not directly related to the act of assembling and building guns. Instead, injuries are usually caused by the unauthorized use of a final, non-defective product like a manufactured gun by a third party. Plaintiffs generally allege that there should be liability for the harm caused by the use of guns purchased through “straw purchases”.<sup>110</sup> Straw purchases are gun sales in which a non-qualified buyer (B<sub>2</sub>) is using a qualified buyer (B<sub>1</sub>) to do the purchase from the manufacturer or gun seller in order to afterwards acquire the gun from that qualified buyer (B<sub>1</sub>). However, the causal link between the actual conduct of gun manufacturers and the harm caused by the product they manufacture is not a direct one, since there is always an intermediate non-controllable agent – a qualified or non-qualified buyer- between the product and the actual victim.

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<sup>108</sup> Joseph W. Cleary, *Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just Do Not Work*, 31 U. Balt. L. Rev. 273, 285 (2002).

<sup>109</sup> *Id.* at 300.

<sup>110</sup> Kairys, *supra* note 105 at 1184, also see

<http://www.bradycampaign.com/press/release.asp?Record=487>

Related to the causation issue, there is a remoteness problem discussed earlier. Even though some scholars<sup>111</sup> consider that the public nuisance doctrine should be an exception to the remoteness rule, courts' jurisprudence has not supported this idea. However, the application of the public nuisance doctrine in these cases would violate the products liability rule against recovery of "remote damages"<sup>112</sup>.

In the undesired case that courts understood that the public nuisance doctrine was applicable in gun cases, an additional problem would arise: the determination of its appropriate remedy. In the public nuisance context, remedies<sup>113</sup> are generally directed at the abatement of the nuisance and typically include an injunctive relief and damages. However, these traditional remedies are not possible to implement in the gun context. A court can not grant an injunctive relief against a certain defendant for the damages caused by a firearm because this is a non-defective product legally marketed.

Therefore, in the *Cincinnati* case<sup>114</sup> the Ohio Supreme Court excessively stretched the public nuisance doctrine<sup>115</sup> when justifying the non-dismissal of the claim because the essential content of the elements that constitute the public nuisance tort are not present in gun cases.

#### **4.3. Even if Literally Applicable, Is the Doctrine Appropriately Applied?**

Even if the public nuisance doctrine was valid in the gun context, it would not be appropriately applied even when it is argued that in economic terms cities are subsidizing the gun industry by absorbing a relevant portion of the damage done by their products<sup>116</sup>. The use of the public nuisance doctrine presents several problems from a conceptual and from a practical standpoint.

Conceptually, the expenses that municipalities incur as a consequence of the harm caused by firearms does not seem to fit into the category and the concept of public nuisance. It is true that had the harm caused by firearms not existed, municipalities could have used the money for police, health care, firefighters, and for providing other public services to the citizens. However, these public expenses do not derive from a public nuisance and therefore should not be recoverable. They are consequence of the use – sometimes the illegal use – of a legally marketed non-defective product. Therefore, the costs derived from the use that citizens do of a certain legal and non-defective product like automobiles, tobacco, knives, guns, etc., should be considered a municipal burden to bear by municipalities instead of qualifying these expenses as costs of a public nuisance.

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<sup>111</sup> Handler & Erway, *supra* note 71 at 491.

<sup>112</sup> *Id.* at 490.

<sup>113</sup> Kairys, *supra* note 105 at 1177.

<sup>114</sup> *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002).

<sup>115</sup> And all the tort theories included in the cause of action.

Thus, in case that society as a whole would conclude that these are costs that should not be assumed by the municipalities' public budget, the legislature – and not the courts - should decide that these products should be deemed as public nuisances.

On the other side, the underlying claim that plaintiffs bring before the court is a products liability claim: plaintiffs are seeking damages caused by the use of a legally commercialized product. Moreover, when public nuisance is alleged, instead of pleading a products liability cause of action – claims based on products liability theories do not pass the pleadings' stage -, implicitly plaintiffs are asking courts to ignore products liability rules<sup>117</sup>. This is the legal theory that should apply in cases in which plaintiffs seek damages caused by a product. Therefore, even though a very broad interpretation of the public nuisance doctrine would allow this type of claims, products liability should be the legal theory applied. Thus, public nuisance is pleaded not because it is the applicable doctrine in these cases but because gun cases are not embraced by the traditional products liability categories.

Finally, public nuisance historically arose for protecting and restricting the encroachment to royal property or public highways because it was considered an infringement upon the rights of the crown or the general public. When the term evolved it included any act not warranted by law or an omission to discharge a legal duty, which inconvenienced the public in the exercise of rights common to all. It was not until the sixteenth century that the crime of public nuisance, for the first time, also became the tort of public nuisance.

As mentioned earlier, public nuisance can also give rise to a private tort claim if the plaintiff can show that, as a result of the public nuisance, he sustained injuries different in kind from those suffered by the public in general. This qualification has persisted, and it is held that a private individual has no action for the invasion of the purely public right unless his damage is in some way to be distinguished from that sustained by other members of the general public. It is not enough that he suffers the same inconvenience or is exposed to the same threatened injury as everyone else<sup>118</sup>. Nowadays, though, public nuisance can be an activity that causes air pollution, water pollution, noise disturbances or a dangerous condition<sup>119</sup>.

However, even though the public nuisance concept has expanded its content, the real issue that society – and not courts - should decide is which activities are going to be considered legal and socially necessary activities and therefore the costs derived from them are going to be borne by the society as a whole; and which ones are going to be deemed public nuisances and therefore the costs derived from them should be borne by the different agents participating in that industry, instead of holding liable the participants of a certain

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<sup>116</sup> Kairys, *supra* note 19 at 5.

<sup>117</sup> Handler & Erway, *supra* note 71 at 491.

<sup>118</sup> L. Mark Walker and Dale E. Cottingham, *An Abridged Primer On The Law Of Public Nuisance*, 30 Tulsa L.J. 355, 356 (1994).

<sup>119</sup> Cleary, *supra* note 1098 at 302.

legal and heavily regulated industry of the costs derived from their legally marketed product.

#### 4.4. Is Public Nuisance Just a Way to Avoid the Pitfalls of Products Liability and Negligence Law?

The gun cases like the one analyzed in this paper are not nuisance cases<sup>120</sup> because they do not present the *prima facie* elements of public nuisance. Public nuisance is not based on fault or a strict liability based tort because the defendant's conduct need not to be unlawful or tortious, it just needs to violate a public right<sup>121</sup>. However, the problem is to determine what is the public right that might be violated by firearms in a society where the possession of firearms is legal.

It would not be appropriate to understand that the costs and consequences derived from an industry legally participating in the market are public nuisances because these lawsuits implicitly would regulate and alter the behavior of entire legal industries<sup>122</sup> and a court is not the place to take such decisions.

The majority of the plaintiffs in the gun cases want to seek damages from gun manufacturers, distributors and sellers for the harm caused by their products. But these claims should be brought under products liability theories. It is important to notice that once public nuisance got popular, every plaintiff who had already filed a products or negligence case, *added* a public nuisance claim to the complaint not because it was an additional adequate legal theory supporting their cause of action but because it was an alternative in case that the negligence or the products claims would fail.

Given the weak legal framework<sup>123</sup> in which these gun claims are based, it is important that courts would understand that the public nuisance doctrine does not embrace these cases because this would create a socially and economically undesired uncertainty in the firearm and in other industries –like automobiles, fast-food, etc. - that would feel threatened by the liability that could potentially be imposed on them under such a public nuisance doctrine. These industries legally market their products. However, cars and fast food are products that cause harms to people such as car accidents, personal injuries, deaths, contamination, etc. or health problems such as cholesterol, high blood pressure, etc. If firearms would be considered products that cause a public nuisance, the gun industry would have to internalize those costs and spread them through the price of their products. However, it would be very difficult – if not impossible - to limit this theory of recovery to the plaintiffs in the gun cases and not to allow this type of suits to expand to other industries whose products eventually cause harm to people and might cause municipalities to incur in expenditures. Therefore, the uncertainty created by the potential exposure to liability to the

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<sup>120</sup> Handler & Erway, *supra* note 71 at 491.

<sup>121</sup> Kairys, *supra* note 105 at 1178.

<sup>122</sup> Handler & Erway, *supra* note 71 at 490.

<sup>123</sup> Products liability and negligence theories do not cover gun cases and the public nuisance doctrine should not be available.

industries whose legally market products might cause harm to individuals and that would provoke expenditures to municipalities is not desirable for the economy and for the society as a whole.

This, however, does not mean that the firearm industry should be as free from liability as it until now needs to be. The use of firearms is a problem in the U.S.A. that should be a public concern not only for the economic costs it has for the society but for the amount of injuries and deaths that they cause to people.

However, the public discussion in the U.S. concerning the crime rate should separate two different issues: first, the decision whether to hold gun manufacturers liable for the harm caused by their products when reaching the criminal market; and second, the determination of the legal framework under which the firearm industry should be held liable<sup>124</sup>. So far, in the gun litigation context both questions seem to be mixed; one decision is to consider that the gun industry should be liable; another issue is to determine under what legal theories it should be held liable. From a legal perspective, it is not be wise to stretch and use the inappropriate existing tort categories in order to hold gun manufacturers liable when their conduct does not fit in any tortious conduct subject to liability<sup>125</sup> because in doing so, this represents an inadequate and discretionary application of the existing legal instruments.

## 5. Conclusion

A public nuisance claim is the vehicle provided by civil law for executive branch officials to seek immediate relief to stop and remedy conduct that is endangering the public<sup>126</sup>.

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<sup>124</sup> The discussion about the type of regulation that should be implemented in order to decrease the criminal rate in the U.S. is beyond the scope of this paper. However, it is nevertheless interesting to consider the effect on the criminality of a greater or lower regulation of guns. It is generally considered that a greater regulation of guns would reduce the incidence of gun violence because individuals would face more difficulties when trying to buy a gun. However, there have been proposals in the literature in the opposite direction. Some authors like Professors Lott and Landes (See John R. Lott and William M. Landes, *Multiple victim public shootings, bombings, and right-to -carry concealed handgun laws: contrasting private and public law enforcement*, John M. Olin Law & Economics Working Paper no. 73, 1999) proposed allowing concealed handgun laws to reduce for example, the incidence of public shootings. The idea behind this proposal is that when a criminal is considering whether to shoot in a public place, if he knows that possibility of encountering the potential victim who is armed may deter him from the attack. This conclusion derives from the economic model of crime that predicts that in the case that concealed handguns were allowed, the potential perpetrator's cost of acting would raise and the expected benefit would be reduced. Even though not all potential offenders would alter their behavior, some individuals would be deterred from carrying out a shooting spree because the changes in the costs and benefits derived from the action would be sufficiently large to make their net gain from acting negative. The magnitude of this deterrent effect will depend on how many individuals are in the margin so that allowing carrying concealed handguns changes the net benefit of their actions from positive to negative. Thus, according to this economic model allowing carrying concealed handguns would reduce the number of mass shootings and the amount of harm per shooting. However, the prediction of the the magnitude of the regulatory effect on the crime rate is beyond the scope of this paper.

<sup>125</sup> For an opposite opinion and a defense of the use of strict liability for handgun manufacturers see Paul R. Bonney, *Strict Liability for Handgun Manufacturers*, 1985, in *ECONOMIC ANALYSIS OF TORT AND PRODUCTS LIABILITY LAW*, 221-247 (Jenny B. Wahl ed. Garland Publishing, Inc., 1998).

<sup>126</sup> Kairys, *supra* note 105 at 1176.

However, municipalities have the temptation to seek and to achieve regulatory and tax outcomes through litigation instead of achieving them through the legislative channels<sup>127</sup>.

The U.S. Constitution establishes a separation of powers divided by the legislative, who are the ones to decide that certain activities create too much danger to the public, and the executive, that is the power that should decide that somebody's conduct in their jurisdiction is creating or contributing to a public nuisance and, the judicial. Even though some plaintiffs want to compel the firearms industry to change its behavior through these suits<sup>128</sup>, it is not the role of the courts but the legislature to determine what kind of products should be marketed, what kind of conducts constitute negligence or public nuisance, to manage and control the public budget<sup>129</sup> and to decide where the money collected through taxation should be spent.

Judges and courts are not designed and qualified for doing this kind of analysis and even if they were, their role is not to determine whether a product is inherently dangerous and therefore should be kept out of the market or whether should be legally marketed but by participants of the industry internalizing the costs of the harm caused. It is the responsibility of the legislature to determine the policy regarding commerce and therefore to set gun laws<sup>130</sup>, and the job of the judiciary to interpret that policy and ensure that the constitutional integrity is maintained<sup>131</sup>.

This does not mean that a public entity may never resort to the tort of public nuisance<sup>132</sup>. The firearms industry makes the American society to spend a significant part of public resources that could be spend in socially necessary services like health care or education. However, from a legal perspective it is not valid to use legal theories to certain contexts in which they should not be applied. The fact that the conduct of the firearm industry in the U.S. does not constitute a public nuisance and therefore the costs derived from the illegal use of firearms should not be recouped by municipalities does not mean that the crime rate, the use of firearms by children and the possibility of making the market and guns safer, should not be a concern in the U.S. What is important is to have a public debate about these issues and to establish the legal support under which these claims should be brought.

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<sup>127</sup> Handler & Erway, *supra* note 71 at 490.

<sup>128</sup> *Developments in the Law - The Paths of Civil Litigation II. The Use of the Public Nuisance Tort Against the Handgun Industry*, 113 Harv. L. Rev. 1759, 1769 (2000).

<sup>129</sup> *Id.* at 490.

<sup>130</sup> Kromke, *supra* note 45 at 853.

<sup>131</sup> *Id.* at 851. Even though this idea is beyond the scope of this paper, it is worth mentioning that besides this horizontal distribution of powers problem between courts, legislatures and the executive branch, another tension arises with the vertical distribution of powers between municipal, state and federal decision making. The distribution of the social costs caused by the gun industry is asymmetric because rural areas are less affected by firearms violence than urban areas. Cities disproportionately bear the costs of illegal use of guns and senators from rural states routinely block gun control legislation because they do not face the horror that urban mayors do. This could be a reason why mayors from cities where firearms violence is a problem turn to the courts as a democratic safety valve.

<sup>132</sup> Handler & Erway, *supra* note 71 at 491.

In sum, these new legal proceedings lead to a shift from private law to public law, and a dangerous lessening of concern for legal theories and an increase of concern with a public melodrama<sup>133</sup>.

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<sup>133</sup> Schwartz, *supra* note 18 at 756.