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Hamilton v. Accutek: Potential Collective Liability Of The Handgun Industry For Negligent Marketing

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HAMILTON v. ACCUTEK: POTENTIAL COLLECTIVE LIABILITY OF THE HANDGUN INDUSTRY FOR NEGLIGENT MARKETING

INTRODUCTION

Should handgun manufacturers have the duty, as an industry, to market their products in such a way as to prevent injuries caused by foreseeable criminal misuse of their products? Over the last twenty years there have been numerous unsuccessful attempts to utilize products liability theories to hold handgun manufacturers liable for injuries caused by accidental or criminal misuse of handguns.[1] Currently, a theory of collective liability for negligent marketing is being put forth by a group of plaintiffs in the United

1. *See, e.g.*, Forni v. Ferguson, No. 1332994/94, slip op. (Sup. Ct. New York County Aug. 2, 1995) (unpublished); DeRosa v. Remington Arms Co., Inc., 509 F. Supp. 762 (E.D.N.Y. 1981); *see generally*, Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912 (1984). Courts have generally been unwilling to find that handguns are defective products that subject their manufacturers to strict liability where the handguns perform precisely as intended and cause injury only because they were intentionally misused. *Id.* Theories other than strict liability have been asserted, unsuccessfully, to hold handgun manufacturers liable for injuries sustained by independent criminal use. These theories include negligent marketing, *see, e.g.*, McCarthy v. Sturm, Ruger and Co., Inc., 916 F. Supp. 366 (S.D.N.Y. 1996) (holding that advertisements emphasizing the destructive capabilities and expanding design of hollow point bullets could not serve as basis for negligent marketing claim), and the abnormally dangerous activity doctrine, *see, e.g.*, Delahanty v. Hinckley, 564 A.2d 758 (D.C.App. 1989) (rejecting the abnormally dangerous activity doctrine in the context of handgun marketing).

States District Court for the Eastern District of New York in the case of *Hamilton v. Accutek*.[2] Judge Weinstein, in denying the defendant handgun manufacturers' motion for summary judgment on the claim of negligent marketing,[3] is considering the possibility of either adapting an existing collective liability theory to the negligent marketing context or expanding a current collective liability theory so that it is applicable to the instant case.[4] For the purpose of this comment, the potential collective liability theory will be referred to as "industry-wide marketing liability."

The concept behind the negligent marketing claim is that, as an industry, handgun manufacturers have engaged in negligent methods of handgun marketing that have resulted in the development and maintenance of a well-supplied black market for handguns.[5] The plaintiffs contend that since many of the handguns used by criminals to cause injuries to innocent bystanders are illegally acquired though this black market, it is fair to hold the handgun manufacturers liable for the foreseeable criminal misuse of these handguns.[6] Critics of this type of collective liability expansion insist that most products can be

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2. 1996 WL 465148 (E.D.N.Y. Aug. 12, 1996).

3. *Id.* at *1. Summary judgment was granted in favor of the defendants with respect to plaintiffs' products liability and fraud claims. *Id* at *2. Explaining the plaintiffs' negligent marketing claim, the *Hamilton* court stated:

> The heart of the plaintiffs' theory, apparently, is the claim that defendant's negligence in methods of marketing handguns and flooding the handgun market has fostered the development of an extensive underground economy in handguns. Through this underground market, it is suggested, youths may readily illegally obtain handguns which they then use, resulting in deaths of individuals such as the decedents represented by the plaintiffs in this court.

Id. at *22.

4. *Id.* at *23.

5. *Id.* at *21.

6. *Id.*

criminally used and that manufacturers have neither the authority nor the responsibility to control criminal conduct.[7]

New York has been a leader in recognizing products liability theories and currently acknowledges four separate theories of collective liability.[8] Part I of this comment will briefly describe the general principles of products liability and examine the origins of each of the four collective liability theories and their application under New York law. Part II will discuss the policy considerations regarding a new theory of collective liability and evaluate its potential for inclusion in New York State's existing theories in connection with a negligent marketing claim.

I. PRODUCTS LIABILITY

A. General Principles

Strict products liability, a relatively new tort theory, is founded on the premise that persons who manufacture or market products that cause injuries to others as a result of defective qualities or characteristics of the product, which make the product unreasonably dangerous, should be held liable for resulting damages.[9] Until approximately eighty years ago, a party injured by a product could only recover under a contract theory.[10] Modern products liability theory originated with Judge Cardozo's

7. *See* Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912, 1915 (1984) (noting that many products can be put to illegal use, including automobiles used in drug smuggling operations or as getaway cars in bank robberies).

8. *Hamilton*, 1996 WL 465148 at *18; *see* discussion *infra* text accompanying notes 9-54.

9. Todd Iveson, Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common-Law Approach*, 51 FORDHAM L. REV. 771, 779 (1983).

10. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

1916 opinion in *MacPherson v. Buick Motor Company*.[11] In that case, the New York Court of Appeals rejected the notion that a duty existed between a manufacturer and a consumer only when there was privity of contract.[12] The court held that "when the consequences of negligence may be foreseen[,] . . ." the manufacturer of an "inherently or imminently dangerous" product owed a duty to the user of that product.[13] In the years following that decision, products liability has been greatly expanded.[14] Today, there are three theories under the products liability umbrella under which an injured party may seek recovery: 1) negligence; 2) warranty; and 3) strict liability.[15] To recover under a negligence theory, a plaintiff must show that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach of duty was the cause of the plaintiff's injuries.[16] Generally, to recover under a warranty theory, the defendant must have made some expressed or implied claim about a product that proved to be false or misleading and consequently has caused injury to the plaintiff.[17] To recover under a theory of strict products liability, one must show that the

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11. *Id.*; *see generally* David W. Leebron, *An Introduction to Products Liability: Origins, Issues and Trends*, 1990 ANN. SURV. AM. L. 395, 396 (1991).

12. *MacPherson*, 217 N.Y. at 389, 111 N.E. at 1053 (dismissing the "notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else").

13. *Id.* at 394, 111 N.E. at 1055.

14. *See, e.g.*, Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 493 U.S. 944 (1989); Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

15. *See generally*, Leebron, *supra* note 11, at 397.

16. *See* RESTATEMENT (SECOND) OF TORTS § 395 (1965).

17. *See id.* § 402B ("One . . . [who] makes to the public a misrepresentation of a material fact concerning the character of quality of a chattel sold by him is subject to liability. . . ."); *see also* U.C.C. § 2-318 (1995) ("A seller's warranty whether express or implied extends to any natural person who may be reasonably expected to use, consume or be affected by the goods who is injured in person by breach of the warranty.").

product which caused the plaintiff's injury was in a "defective condition unreasonably dangerous . . . to the consumer."[18]

B. Collective Liability Theories

In a products liability action, as in most tort actions, the plaintiff usually bears the burden of proving that the conduct of the defendant caused damage to the plaintiff.[19] However, over the last fifty years, courts have developed several theories of collective liability that allow the plaintiff to circumvent some of the traditional causation requirements.[20] These theories have been applied in cases where the defendant is in a better position than the plaintiffs to know whose negligent actions actually caused the plaintiff's injury.[21] They have also been applied in cases where more than one defendant has acted negligently and it would be impossible for the plaintiff to establish which particular defendant was the cause of the injury.[22] Courts have reasoned that, in the interests of justice, all of the potentially responsible defendants should be held liable because the innocent plaintiffs would not otherwise be able to obtain relief.[23] New York courts have recognized four types of collective liability: 1) alternative liability;[24] 2) enterprise liability;[25] 3) concerted action liability;[26] and 4) market share liability.[27]

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18. Restatement (Second) of Torts § 402A (1965) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property. . . .").

19. *See* Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 518, 539 N.E.2d 1069, 1082, 541 N.Y.S.2d 941, 954, *cert. denied*, 493 U.S. 944 (1989).

20. *See, e.g.*, Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 580, 436 N.E.2d 182, 186, 450 N.Y.S.2d 776, 780 (1982).

21. Summers v. Tice, 199 P.2d 1, 4 (1948).

22. *See generally,* Andrew B. Nace, Note, *Market Share Liability: A Current Assessment of a Decade-Old Doctrine*, 44 VAND. L. REV. 395, 402 (1991).

23. *See, e.g., Summers*, 199 P.2d at 4.

24. *See, e.g., Bichler*, 55 N.Y.2d at 589, 436 N.E.2d at 186, 450 N.Y.S.2d at 780.

1. Alternative Liability Theory

Alternative liability was the first collective liability theory to be widely accepted in American common law.[28] This theory provides that the burden of proof on the causation issue shifts from the plaintiff to the defendants. Alternative liability theory is applicable where there is more than one defendant, each of whom acted independently in negligently causing injury to the plaintiff, and it is impossible to determine which defendant actually caused the injury.[29]

In *Summers v. Tice*, a landmark California case in which the alternative liability theory was first recognized, two hunters simultaneously fired identical shotguns, using identical ammunition, in the direction of the plaintiff.[30] The California Supreme Court held that both defendants were negligent, reasoning that if it was to require the plaintiff to prove which of the hunters caused the injury, both defendants would be absolved of liability and the plaintiff would be denied a remedy.[31] The court noted that defendants in this situation should have the burden of showing that their actions did not cause the damage because it was the defendants who "brought about a situation where the negligence of one of them injured the plaintiff. . . ."[32] Defendants are thus held jointly and severally liable under an alternative liability theory.[33] In recognizing this theory, the New

25. *See, e.g.*, Hall v. DuPont DeNemours & Co., Inc., 345 F. Supp. 353 (E.D.N.Y. 1972).

26. *See, e.g., Bichler*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

27. *See, e.g.*, Hymowitz v. Eli Lilly & Co., 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

28. *See generally*, Richard J. Heafey and Don M. Kennedy, PRODUCT LIABILITY: WINNING STRATEGIES AND TECHNIQUES § 5.07 (1995).

29. *Summers*, 199 P.2d at 3 (quoting WIGMORE, SELECT CASES ON THE LAW OF TORTS § 1 (1912)).

30. *Id.* at 2.

31. *Id.* at 4.

32. *Id.*

33. *Id.* at 5; *see* Hawks v. Goll, 281 N.Y. 808 (1939) (holding that drivers of two separate automobiles who independently and negligently struck and killed a pedestrian could be held jointly and severally liable).

York Court of Appeals has held that plaintiffs are required to join all parties who may have potentially caused the plaintiff's injury.[34]

2. Enterprise Liability Theory

Enterprise liability theory is applicable in cases where the plaintiff can show that her injuries are the result of a group-created risk.[35] The application of enterprise liability theory in New York originated with *Hall v. Du Pont De Nemours & Co., Inc.*,[36] where the court held that if the plaintiff could show that members of the explosives industry had a "joint awareness of the risks" associated with the production of blasting caps, and that these members had a "joint capacity to reduce or affect those risks," then the defendants would accordingly be held jointly liable on enterprise liability grounds.[37] Industry members, as a group, may demonstrate a joint awareness of risk to the general public, as well as an ability on their part to reduce this risk, by their participation in trade organizations that provide safety information and set industry standards.[38] Nonetheless, despite the existence of myriad trade organizations, enterprise liability theory has rarely been applied outside of the blasting cap industry.[39]

34. Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 579, 436 N.E.2d 182, 185, 450 N.Y.S.2d 776, 779 (1982).

35. Hall v. E.I. DuPont De Nemours & Co., Inc., 345 F. Supp. 353, 378 (E.D.N.Y. 1972).

36. *Id.*

37. *Id.*

38. *Id.*

39. Heafey and Kennedy, *supra* note 28, at § 5.07 (citing *Hall*, 345 F. Supp. 353).

3. Concerted Action Liability

In *Bichler v. Eli Lilly & Co.*, [40] the New York Court of Appeals held that concerted action liability arises where the evidence shows that the defendants had an express or tacit agreement to commit a tortious act upon the plaintiff. In this circumstance, only one of the defendants will have directly caused the injury. Nevertheless, all are held jointly and severally liable for the injury because all have breached a duty and have acted in concert with one another.[41]

In *Bichler*, for example, a pharmaceutical manufacturer was held liable for an injury sustained by a plaintiff whose mother ingested the drug DES.[42] Although Eli Lilly was a major manufacturer of DES in the United States, the plaintiff was unable to establish during trial that Eli Lilly manufactured the DES ingested by her mother.[43] Nevertheless, the jury found that the defendant had breached a duty in that it "and other DES manufacturers wrongfully marketed the drug for use in preventing miscarriage without first performing laboratory tests upon pregnant mice."[44] Concerted action liability was appropriate in this context because it would have been inordinately difficult for the individual harmed by DES to determine which particular company manufactured the pills ingested by his mother,[45] and yet the injury was the result of the

40. 55 N.Y.2d 571, 581, 436 N.E.2d 182, 186, 450 N.Y.S.2d 776, 780 (1982).

41. Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 505, 539 N.E.2d 1069, 1073, 541 N.Y.S.2d 941, 945 (1989).

42. 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

43. *Id.* at 578, 436 N.E.2d at 184; 450 N.Y.S.2d at 778.

44. *Id.* at 578, 436 N.E.2d at 185, 450 N.Y.S.2d at 779. The jury found that if the defendant had adequately tested the drug, "the pharmaceutical companies would have learned that DES was capable of causing cancer to develop in female offspring and would not have marketed the drug for problems of pregnancy." *Id.*

45. *Id.* at 579, 436 N.E.2d at 185, 450 N.Y.S.2d at 779.

defendant's engagement in "a common plan or design to commit a tortious act."[46]

Concerted action liability is best understood by examining cases involving drag racing.[47] The New York Court of Appeals has held that when a group of defendants participate in a drag race on a public highway they are acting in concert.[48] In the drag racing cases, all defendants have been held jointly and severally liable for the harm caused to a third party where the conduct of the individual defendant who actually caused the harm was "induced and encouraged" by the conduct of the other defendants.[49] In the past, New York has recognized concerted action liability with regard to drug companies that have participated in "consciously parallel" activity or have engaged in conduct that "substantially aided or encouraged other" drug companies to act negligently.[50] However, the Court of Appeals later modified its view by holding that "[p]arallel activity, without more, is insufficient to establish the agreement element necessary to maintain a concerted action claim."[51]

4. Market Share Liability

Market share liability is similar to enterprise liability. Under both theories, a seemingly identical product is manufactured by

46. *Id.* at 580, 436 N.E.2d at 186, 450 N.Y.S.2d at 780 (quoting PROSSER, TORTS § 46 (5th ed. 1984).

47. *See* Heafey and Kennedy, *supra* note 28, at § 5.07.

48. *Id.*

49. Bierczynski v. Rogers, 239 A.2d 218, 221 (Del. Sup. Ct. 1968). The court noted that "[t]he authorities reflect generally accepted rules of causation that all parties engaged in a motor vehicle race on the highway are wrongdoers acting in concert, and that each participant is liable for harm to a third person arising from the tortious conduct of the other, because he has induced and encouraged the tort." *Id.*

50. Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 584, 436 N.E.2d 182, 188, 450 N.Y.S.2d 776, 782 (1982).

51. Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 506, 539 N.E.2d 1069, 1074, 541 N.Y.S.2d 941, 946-47 (1989).

numerous independent companies.[52] The product causes injury to a plaintiff who is unable to identify which defendant actually manufactured the product.[53] The major difference between enterprise and market share liability lies in the extent to which each defendant is held liable. Under the enterprise liability theory, each member of the industry may be held jointly and severally liable.[54] Under the market share theory, each defendant is liable only for a percentage of the plaintiff's damages.[55] The percentage for which a company is liable is equal to the percent of the market controlled by that company for the period during which the plaintiff used the product.[56] Defendants cannot exculpate themselves by showing that their respective products were not, or could not have been, the actual cause of the plaintiff's injuries.[57] The New York Court of Appeals has held that "liability . . . is based on the over-all risk produced, and not causation in a single case. . . ."[58] However, the court did allow

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52. Nace, *supra* note 22, at 399-401.

53. Symposium, *The Problem of the Indeterminate Defendant: Market Share and Non-Market Share Liability Theory*, 55 BROOK. L. REV. 863 (1989).

54. Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. 353, 375 (E.D.N.Y. 1972) ("Joint liability has been traditionally imposed on multiple defendants who exercise actual collective control over a particular risk-creating product or activity.").

55. Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989).

56. *The Problem of the Indeterminate Defendant: Market Share and Non-Market Share Liability Theory*, *supra* note 53, at 863. The author notes that:

> The [*Hymowitz*] court adopted the principle of market share liability, which compels each DES manufacturer to pay a pro rata share of every DES plaintiff's damages equal to the specific manufacturer's proportion of the total national sales of DES. Thus, a DES manufacturer that produced ten percent of all obstetric DES sold in America will be responsible for ten percent of each DES plaintiff's damages, irrespective of whether the particular manufacturer produced the specific DES which actually caused the plaintiff's injury.

Id. In New York, apportionment of liability is based upon a national market. *Id.*

57. Heafey and Kennedy, *supra* note 28.

an individual defendant company to exculpate itself if it could show that it had never marketed its product for use in the manner in which the plaintiff's injury was actually caused.[59]

II. POTENTIAL COLLECTIVE LIABILITY UNDER A NEW THEORY OF INDUSTRY-WIDE LIABILITY

A. Negligent Marketing and the Handgun Industry

New York may again lead the country in expanding collective liability theory. In *Hamilton v. Accu-tek*,[60] Judge Weinstein expressed a belief that even if the present collective liability theories recognized in New York State are not applicable, the plaintiffs may be able to develop the negligent marketing claim in such a way as to require the court to adopt a variation of the present collective liability theories.[61] The court hypothesized that the New York Court of Appeals might recognize a variation of the collective liability theories if the plaintiff was able to show that the collective efforts of handgun manufacturers to flood the market with handguns has sparked an underground economy

58. Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 512, 539 N.E.2d 1069, 1078, 541 N.Y.S.2d 941, 950 (1989).

59. *Id.* ("If a DES producer satisfies its burden of proof of showing that it was not a member of the market of DES sold for pregnancy use, disallowing exculpation would be unfair and unjust.").

60. 1996 WL 465148 at *1 (E.D.N.Y. Aug. 12, 1996).

61. *Id.* at *23. The court stated that:

> If the underlying cause of the injuries is the unchecked growth of the underground handgun market, and not an individual negligent sale of a particular gun by a particular defendant to a particular licensed dealer, then the New York Court of Appeals might find a market share theory or some variant to be viable even if the manufacturer of the gun used to commit the killing were known.

Id.

where those with a desire to commit crimes are able to acquire handguns.[62] Even in a situation where the plaintiff can identify the individual manufacturer of the handgun that caused the injury, a claim could still be made for industry-wide liability if there is a showing "that a particular manufacturer's negligence alone would have been insufficient to foster the growth of the underground gun market to the extent that the individual shooter could obtain the manufacturer's gun."[63]

Among the plaintiffs in *Hamilton* are Freddie Hamilton and Katina Johnstone.[64] Freddie Hamilton lost her son, Njuzi, to handgun violence on July 27, 1993.[65] The handgun used to kill Njuzi Hamilton has never been recovered, but police investigators have determined that the gun "was probably either a Beretta or a Taurus 9 millimeter handgun."[66] Katina Johnstone's husband was killed by a legally purchased Smith & Wesson revolver.[67] The revolver was stolen from the legitimate purchaser two weeks before the shooting of Johnstone.[68] The lawsuit names as defendants forty-nine handgun manufacturers who sell and/or distribute handguns in the United States.[69]

In arriving at its decision to the deny the defendants' motion for summary judgment, the court recognized its responsibility as

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62. *Id.* The court noted that the plaintiffs have been able to gather extensive material during discovery "that focuses primarily on coordinated industry activities in opposing government efforts to impose more stringent controls on firearm sales and distribution." *Id.* at *4. These activities include: 1) membership in trade organizations; 2) lobbying efforts; and 3) marketing and distribution. *Id.* at *4-5.

63. *Hamilton*, 1996 WL 465148 at *23.

64. *Id.* at *2. Ms. Johnstone, the administrator of her husband's estate, together with Ms. Hamilton, the administrator or her son's estate, filed suit in January 1995 both as representatives of the estates and as individuals injured by the defendants. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* The circumstances surrounding how the handguns came into the possession of the shooters vary significantly among the plaintiffs.

68. *Id.* Mr. Johnstone's killer has been arrested, tried, and convicted. *Id.*

69. *Id.* at *3. The plaintiffs chose not to join the actual shooters or any owners or dealers who may have had control of the handguns prior to the shootings. *Id.*

a federal district court to rule as it believes the state's highest court would rule on the novel questions of law.[70] Judge Weinstein examined in detail each of the collective liability theories currently recognized in New York,[71] and noted that the New York Court of Appeals has and continues to be in the forefront of recognizing new and innovative theories concerning products liability, tort law, and collective liability.[72]

The court found three factors present in all existing collective liability theories.[73] First, plaintiffs must show that it would be impossible or extremely difficult to determine the actual manufacturer responsible for causing injury to the plaintiff.[74] Second, all the handgun manufacturers named as defendants must be shown to have engaged in some sort of tortious behavior. Third, the plaintiffs would need to show that "the problems of proof are related to the conduct" of the defendants.[75] The court concluded that it was not likely that the New York Court of Appeals would adopt enterprise or concerted action liability in the instant case.[76] Looking to the facts developed by the plaintiffs at the time of the decision, Judge Weinstein held that if the Court of Appeals were to adopt any theory of collective liability, it was likely to be a variant of market share or alternative liability.[77]

Additionally, the court noted that the Court of Appeals "has looked to other states for collective liability theories that best fit particular cases where no theory previously adopted in New York was deemed suitable."[78] Accordingly, the court's analysis included an examination of the New Jersey Supreme Court's

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70. *Id.* at *16 (citing DeWeeth v. Balding, 38 F.3d 1266, 1275 (1994)). Additionally, the court noted that federal district courts are not bound by the holdings in lower state courts which the district court finds likely to be reversed on appeal. *Id.* (citing Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465 (1967)).

71. *Id.* at *18-20; *see supra* notes 9-59 and accompanying text.

72. *Hamilton*, 1996 WL 465148 at *18-20.

73. *Id.* at *26.

74. *Id.*

75. *Id.*

76. *Id.* at *24.

77. *Id.*

78. *Id.* at *20.

1989 decision in *Shackil v. Lederle Laboratories*,[79] and concluded that New Jersey was open to the possibility of adopting variants of market share liability.[80] In *Shackil*, a lower New Jersey court, using a risk-modified market share theory, found for the plaintiffs in a case involving the vaccine for diphtheria, pertussis, and tetanus.[81] The New Jersey Supreme Court reversed the lower court for public policy reasons concerning the future availability of vaccines, but stated that the case could "come to represent the exception rather than the rule" regarding its reaction to market share liability variants.[82] Judge Weinstein also took note of a California decision in which the court rejected market share liability, finding it unfair to hold all manufacturers liable when in reality only one actually caused the injury to the plaintiff.[83]

The court's decision not to grant summary judgment to the defendants was in keeping with its contention that it was not clear at this point whether or not the New York Court of Appeals would expand collective liability theory based on the facts in this case.[84] The court found that many of the elements on which New York Court of Appeals had based its decision in *Hymowitz v. Eli Lilly & Co.*[85] were analogous to elements of the instant case.

B. Possible Effects of Recognizing an Industry-Wide Liability Theory

Current collective liability theories do not provide a remedy to an injured party unless there is a strong connection between the plaintiff's injury and the actions of the defendant. Industry-wide

79. 530 A.2d 1287 (N.J. App. Div. 1987).
80. *Id.*
81. *Id.*
82. *Id.*
83. *See Sheffield v. Eli Lilly & Co.*, 144 Cal. App. 3d 583 (1983).
84. *Hamilton*, 1996 WL 465148 at *24.
85. 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 493 U.S. 944 (1989).

liability would allow recovery where there is a less direct but still substantial connection between the plaintiff's injury and the defendant's action.[86] The direct link requirement in the causation element of typical negligence claims is somewhat analogous to the privity of contract requirement of the early 1900's.[87] It was once held that because there was no contractual link between the injured consumer and the manufacturer of the defective product there could be no recovery.[88] This privity requirement resulted in the immunity of manufacturers from liability, no matter how foreseeable the injury or how unreasonably dangerous the product was to the ultimate consumer.[89] This doctrine has since been abandoned because the result did not serve the interests of justice.[90] The situation with handgun manufacturers is similar. Although it is foreseeable that criminals will acquire handguns and inflict injury on innocent third parties, the law currently provides no remedy by which handgun manufacturers can be held liable where the weapon is not defective.[91] The handgun industry has been allowed to shield itself from liability, insisting it can not be held responsible for the criminal conduct of others no matter how unreasonable the industry's business practices may be.[92]

One of the policy reasons for recognizing a collective liability theory against the handgun industry in a negligent marketing claim is that manufacturers are in a better position than victims to absorb or spread the cost.[93] Moreover, handgun manufacturers

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86. *Id.*

87. See Leebron, supra note 11, at 395.

88. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

89. Leebron, *supra* note 11, at 396.

90. *Id.* at 397.

91. Paul R. Bonny, Note, *Manufacturers' Strict Liability for Handgun Injuries: An Economic Analysis*, 73 GEO. L.J. 1437 (1985) ("No court or jury has yet allowed recovery against a manufacturer for injuries caused by a properly functioning handgun. . . .").

92. Michael J. Folio, *The Politics of Strict Liability: Holding Manufacturers of Nondefective Saturday Night Special Handguns Strictly Liable After Kelley v. R.G. Industries*, 16 HAMLINE L. REV. 147, 160 (1992).

93. Bonny, *supra* note 91, at 1438.

should be liable for the costs associated with their products. Current policies allow an industry making huge profits from the production and sale of handguns to be immune from liability to those innocent parties who are foreseeably injured by handguns.[94] By adopting a theory of industry-wide liability, the courts can correct this situation and hold those who benefit the most from the sale of handguns liable to those injured the most by the use of handguns.

Another benefit gained by adopting an industry-wide liability theory with regard to manufacturers of handguns is that it will prompt research into ways to keep handguns out of the hands of criminals.[95] Once the handgun industry is responsible for the true cost of the handguns that reach the hands of criminals, the handgun industry will likely increase efforts to find ways to safeguard handguns from criminal misuse.[96] Safety devices or procedures which are not economically attractive in a climate of immunity from liability may become viable when handgun producers are responsible for compensation of innocent third parties for injuries due to handgun violence.[97] Intensified efforts by the handgun industry, combined with efforts of the government and law enforcement to keep handguns away from criminals, might drastically reduce handgun violence.[98] Under current policies, handgun manufacturers have the same exposure

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> Intuitively, it seems fairer to require handgun manufacturers to bear these exorbitant costs rather than force individual victims to suffer without compensation. Handgun users, who inflict the injuries, are logically the most appropriate people to bear the costs, but they are often judgment proof. Thus, manufacturers may be the most suitable group to bear the cost of handgun injury.

Id.

94. Folio, *supra* note 92.

95. Note, *Absolute Liability for Ammunition Manufacturers,* 108 HARV. L. REV. 1679, 1691 (1995).

96. *Id.* at 1691-92.

97. *Id.*

98. *Id.* at 1691 ("If liability reduced the prevalence of legally owned firearms[,] . . . research suggests that gun prevalence among criminals would also decrease. . . .").

to liability if a handgun is legitimately purchased by a policeman or if purchased on the black-market by a serial killer. Adoption of a theory of industry-wide liability could end this aberration.[99]

On the other hand, recognition of industry-wide liability would likely reduce the number of handgun manufacturers doing business in the United States.[100] The exposure of the handgun manufacturing industry to increased liability would likely lead manufacturers to purchase additional insurance at higher prices. Theoretically, the higher costs would be passed on to the consumer.[101] Higher prices could reduce the number of handguns purchased legally.[102] Handgun industry marketing and distribution reforms, which are sure to follow new liability exposure, could drive down the number of guns produced that are eventually supplied to the black market.[103] Combined, these factors could dramatically shrink the handgun industry, limit the variety of handguns available, and increase the price of handguns legitimately purchased by law-abiding American citizens.[104] Drastic reductions in handgun purchases could result in plant closings. Hundreds, perhaps thousands, of jobs could potentially be eliminated.[105]

The imposition on the handgun industry of collective liability would have the same effect when applied to other industries. It is plausible that tobacco companies could be held liable for the costs of cigarettes which are purchased illegally by children. In a claim similar to the instant claim, future plaintiffs could assert that the tobacco industry "flooded" the market to the point where it was possible for children to obtain cigarettes through an underground economy. The spouse of a cancer victim who had been addicted

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99. Folio, *supra* note 92.

100. Bonny, *supra* note 91, at 1459.

101. Absolute Liability for Ammunition Manufacturers, supra note 95, at 1690 ("In competitive markets, the cost of a liability rule is passed on to the consumer in the form of higher prices.").

102. Bonny, *supra* note 91, at 1456.

103. *Absolute Liability for Ammunition Manufacturers*, *supra* note 95, at 1691.

104. Bonny, *supra* note 91, at 1459.

105. *Id.*

to cigarettes as a child could claim to have been harmed by the negligent marketing of the tobacco industry. If courts entertained such liability, the costs to American manufacturing and the loss of manufacturing jobs would be astronomical.

Moreover, the adoption of a collective liability theory for the handgun manufacturing industry may be inconsistent with existing public policy. As foreseeable as illegal handgun violence may be, it still is accomplished by the criminal actions of someone not under the control of the group being held liable.[106] It would be unwise to adopt a policy that allows the independent acts of criminals to potentially force the makers of legal products out of business.[107] Moreover, the unilateral adoption by American courts of collective liability for the handgun industry could hamper the ability of American products to compete globally due to increased costs of production. Finally, federal and state legislatures have been entrusted with the power to enact laws which could be designed to secure many of the social benefits envisioned by the court's possible adoption of a collective liability theory for handgun manufacturers. Holding handgun manufacturers collectively liable under a negligent marketing theory can be viewed as a means for the courts to "legislate from the bench," thereby circumventing the legislative process.[108]

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106. Folio, *supra* note 92, at 160.

107. *See* Bonny, *supra* note 91, at 1459-60 ("If after imposing strict liability[,] people purchase fewer handguns and some companies go out of business, efficiency has been improved and, because handgun victims are assured compensation, everyone is better off.").

108. *See* McCarthy v. Sturm, Ruger and Co., Inc., 916 F. Supp. 366 (S.D.N.Y. 1996). Judge Baer, in dismissing plaintiffs' negligent marketing claim against an ammunition manufacturer for failure to state a claim, noted that the plaintiffs' "claims seek legislative reforms that are not properly addressed to the judiciary." *Id.* at 372. He continued, "I was a member of the New York legislature. As judges, though, we [] are constrained to leave legislating to that branch of government." *Id.*

CONCLUSION

A new theory of collective liability for the handgun manufacturing industry should not be adopted in New York. The effect of holding handgun manufacturers liable for independent criminal acts would be devastating. Once the handgun industry is held collectively liable for negligent marketing, the theory of collective liability could be expanded to reach manufacturers of other products that could be foreseeably misused by criminals to injure innocent third parties. Liability would have no bounds and courts would be crushed by the volume of new claims filed under a negligent marketing theory. Individual manufacturers would not only be responsible for their own negligence, but for that of every member of the industry and for the criminal conduct of those not under their authority or control. It is poor social policy to hold manufacturers liable for independent criminal activity and poor economic policy to dramatically increase costs to American manufacturers.

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