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Ammunition For Victims Of Saturday Night Specials: Manufacturer Liability Under Kelley V. R.G. Industries, Inc

NOTES

AMMUNITION FOR VICTIMS OF SATURDAY NIGHT SPECIALS: MANUFACTURER LIABILITY UNDER *KELLEY V. R.G. INDUSTRIES, INC.*

Criminals in the United States use handguns more frequently than any other weapon in the perpetration of homicides and robberies.[1] In recent years, in nearly half of all homicides the murder weapon was a handgun.[2] Despite the widespread criminal use of handguns, over two and one-half million new handguns enter American markets each year,[3] and Congress has refused to pass legislation to implement tighter handgun control.[4] Survivors of handgun shootings and families of victims currently are appealing to the courts to begin clearing the streets of handguns.[5] Typically, the victims or their representatives sue the manufacturer and distributor of the handgun used

1. *See* U.S. DEP'T OF JUSTICE, 1985 F.B.I. UNIFORM CRIME REPORTS 10 (handguns used in 43% of all murders in 1984) [hereinafter cited as 1985 UNIFORM CRIME REPORTS]; Turley & Harrison, *Strict Tort Liability of Handgun Suppliers*, 6 HAMLINE L. REV. 285, 306 (1983) (handguns used in 23% of all aggravated assaults and 40% of all robberies in 1979).

2. *See* 1985 UNIFORM CRIME REPORTS, *supra* note 1, at 10 (handguns used in 43% of all murders in 1984); U.S. DEP'T OF JUSTICE, 1981 F.B.I. UNIFORM CRIME REPORTS 10 (handguns used in 50% of all murders in 1981). Criminals used handguns to murder 10,728 persons in the United States in 1979, but only 8 persons in Great Britain, 48 persons in Japan, 21 persons in Sweden and 42 persons in West Germany during the same year. P. SHIELDS, GUNS DON'T DIE—PEOPLE DO 63-69 (1981).

3. *See* U.S. DEP'T OF TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS STATISTICS (1980), *reprinted in Federal Regulations of Firearms*, REPORT TO THE SENATE JUDICIARY COMM. 6 (1982) (2,500,000 nonmilitary handguns produced for sale in 1980). In 1981 Americans owned between 40 and 60 million handguns. *See* P. SHIELDS, *supra* note 2, at 37 (1981). Although handguns comprise less than 20% of all firearms in the United States, in 1981 handguns were involved in 90% of all firearm deaths and injuries. Peer, McGuire & Clausen, *Taking Aim at Handguns*, NEWSWEEK, Aug. 2, 1982 at 42.

4. *See* Santarelli & Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471, 474 (1983) (recognizing that intent of litigation instituted against gun manufacturers is to effect handgun control through courts because legislative appeals have failed); Speiser, *Disarming the Handgun Problem by Directly Suing Arms Makers*, Nat'l L.J., June 8, 1981, at 29, col. 1 (claiming that paralysis of legislative, administrative and police remedies to reduce handgun crime requires extending tort law to control handgun violence).

5. *See* Halbrook, *Tort Liability for the Manufacture, Sale, and Ownership of Handguns?*, 6 HAMLINE L. REV. 351, 351 (1983) (suits against manufacturers of handguns used in crime is new strategy to ban handgun ownership by citizens); Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common-Law Approach*, 51 FORDHAM L. REV. 771, 771 (1983) (growing number of suits initiated attempting to impose liability on manufacturers of handguns used in crime [hereinafter cited as Note, *Common-Law Approach]*; Note, *Legal Limits of a Handgun Manufacturer's Liability for the Criminal Acts of Third Persons*, 49 Mo. L. REV. 830, 834 (1984) (onslaught of litigation against handgun manufacturers currently taking place) [hereinafter cited as Note, *Legal Limits]*; *Suits Target Handgun Makers, Newsweek*, Aug. 2, 1982, at 42 (predicted that litigants would file over 200 lawsuits against manufacturers of handguns used in crime by end of 1984).

against the victim and seek imposition of strict liability on the manufacturer and distributor through an abnormally dangerous activity[6] or unreasonably dangerous product theory.[7] The victims often assert that the manufacture and distribution of handguns constitutes an abnormally dangerous activity and that liability for injuries from handguns should follow, despite the level of care exercised by the manufacturers and distributors.[8] Alternatively, the victims claim that a handgun is an unreasonably dangerous product and that courts should hold the manufacturer and distributor of a handgun strictly liable for injuries resulting from the use or misuse of the product.[9] The handgun manufacturers and distributors generally win on summary judgment or on a motion to dismiss for failure to state a claim upon which relief can be granted.[10] The recent decision of Maryland's highest court in *Kelley v. R.G. Industries, Inc.*,[11] however, may reverse the trend of decisions in favor of manufacturers and distributors, at least in suits by victims of "Saturday Night Specials."[12] Although rejecting the application of strict liability under

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6. *See* Santarelli & Calio, *supra* note 4, at 498 (some members of plaintiffs' bar seek to impose liability upon gun manufacturers through abnormally dangerous activity theory of strict liability); *see also infra* notes 16-52 and accompanying text (discussion of handgun manufacturer liability under abnormally dangerous activity theory of strict liability).

7. *See* Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912, 1912 (1984) (noting that shooting victims or their survivors have sued handgun manufacturers under theory of unreasonably dangerous products); *see also infra* notes 53-99 and accompanying text (discussing applicability of unreasonably dangerous products theory in suits against manufacturers and distributors of handguns used in crime).

8. *See, e.g.*, Perkins v. F.I.E. Corp., 762 F.2d 1250, 1252 (5th Cir. 1985) (plaintiffs argued that production and distribution of handguns is abnormally dangerous activity warranting strict liability recovery by victims of handgun crime); Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1203 (7th Cir. 1984) (same); Burkett v. Freedom Arms, Inc., 299 Or. 551, ____, 704 P.2d 118, 120 (1985); *see also infra* notes 16-52 and accompanying text (discussion of handgun manufacturer liability under abnormally dangerous activity theory).

9. *See, e.g.*, Perkins v. F.I.E. Corp., 762 F.2d 1250, 1252 (5th Cir. 1985) (plaintiffs argued that handguns were unreasonably dangerous products warranting strict liability recovery by victims of handgun crime); Patterson v. Gesellschaft, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985) (same); Riordan v. International Armament Corp., 132 Ill. App.3d 642,____, 477 N.E.2d 1293, 1297 (1985) (same); *see also infra* notes 53-99 and accompanying text (discussion of applicability of unreasonably dangerous products theory in suits against manufacturers and distributors of handguns used in crime).

10. *See, e.g.*, Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1205-06 (7th Cir. 1984) (granting handgun manufacturer's motion for summary judgment); Bennet v. Cincinnati Checker Cab. Co., 353 F. Supp. 1206, 1210 (E.D. Ky. 1973) (same); Riordan v. International Armament Corp., 132 Ill. App.3d 643,____, 477 N.E.2d 1293, 1299 (1985) (granting handgun manufacturer's motion to dismiss for failure to state claim upon which relief can be granted). *But see* Richman v. Charter Arms Corp., 571 F. Supp. 192, 200-04 (E.D. La. 1983) (denying handgun manufacturer's summary judgment motion), *rev'd sub nom.* Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985).

11. 304 Md. 124, 497 A.2d 1143 (1985).

12. *See id.* at 144-61, 497 A.2d at 1153-61 (recognizing cause of action against Saturday Night Special manufacturers and distributors); *infra* notes 100-205 and accompanying text (discussing *Kelley* court's recognition of shooting victims' cause of action against Saturday Night Special manufacturers and distributors). The term "Saturday Night Special" supposedly originated in Detroit when lawmen began noticing that weekend shootings in the city often involved small,

an abnormally dangerous activity[13] or unreasonably dangerous product theory,[14] the Maryland Court of Appeals in *Kelley* found that a victim of the criminal misuse of a handgun could maintain an action against the manufacturer and distributor of the handgun if the handgun fits into a distinct class of small, inexpensive, and poorly crafted handguns commonly known as Saturday Night Specials.[15]

Victims of handgun crime or their representatives often sue the manufacturer and distributor of the handgun used against the victim under the theory that the manufacture and distribution of handguns is an abnormally dangerous activity.[16] In asserting that the manufacture and distribution of handguns is an abnormally dangerous activity, the plaintiffs' claims have paralleled sections 519 and 520 of the *Restatement (Second) of Torts.*[17] Section 519 recommends the imposition of liability for any harm caused by carrying on an abnormally dangerous activity, regardless of the care exercised to prevent the harm.[18] To determine whether an activity is abnormally dangerous, section 520 recommends an examination of the societal value of the activity, the seriousness of the harm threatened by the activity, the extent to which the activity is not a matter of common usage, and a determination of whether the activity is natural and appropriate for the locality in which the activity occurs.[19] Section 520 recommends balancing the considerations to determine whether an activity is abnormally dangerous and further in-

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cheap handguns. *See* 118 CONG. REC. 21,27029 (1972). Although Detroit had enacted strict laws concerning handgun sales, one hour away in Toledo, purchasers easily could buy inexpensive handguns and return to Detroit to use the weapon in weekend criminal activity. R. SHERRILL, SATURDAY NIGHT SPECIAL 98 (1973).

13. *See* 304 Md. at 132-34, 497 A.2d at 1147 (denying strict liability recovery under abnormally dangerous activity theory because court found that manufacture and distribution of handguns was not land-related activity); *see also infra* notes 16-52 and accompanying text (discussing inapplicability of abnormally dangerous activity theory in suits against manufacturers and distributors of handguns subsequently used in crime).

14. *See* 304 Md. at 132-39, 497 A.2d at 1147-50 (denying strict liability recovery under unreasonably dangerous product theory because court found no defect in handgun that criminal used to shoot plaintiff); *see also infra* notes 53-99 and accompanying text (discussing unreasonably dangerous product theory in suits against handgun manufacturers and distributors).

15. *See* 304 Md. at 144-61, 497 A.2d at 1153-61 (recognizing cause of action against Saturday Night Special manufacturers and distributors); *infra* notes 100-205 and accompanying text (discussing *Kelley* court's recognition of shooting victims' cause of action against Saturday Night Special manufacturers and distributors).

16. *See supra* note 8 (cases in which victims of handgun crime have sued manufacturer or distributor of handgun under abnormally dangerous activity theory).

17. *See* RESTATEMENT (SECOND) OF TORTS §§ 519-20 (1976) (recommending imposition of strict liability for injuries caused by abnormally dangerous activities); *see, e.g.*, Perkins v. F.I.E. Corp., 762 F.2d 1250, 1265 n.43 (5th Cir. 1985) (plaintiff alleged that handgun manufacture and distribution was abnormally dangerous activity under §§ 519-20 of *Restatement (Second) of Torts);* Martin v. Harrington and Richardson, 743 F.2d 1200, 1203 (7th Cir. 1984) (same); Kelley v. R.G. Industr., Inc., 304 Md. 124, 132-33, 497 A.2d 1143, 1146-47 (same); Burkett v. Freedom Arms, Inc., 299 Or. 551,____, 704 P.2d 118, 119 (1985) (same).

18. RESTATEMENT (SECOND) OF TORTS § 519 (1976).

19. *Id.* § 520.

structs that no single consideration is dispositive.[20] Despite the balancing approach of the *Second Restatement,* the comments to section 520 emphasize the importance of the locality of the activity in ascertaining whether an activity is abnormally dangerous.[21] The doctrine of abnormally dangerous or ultrahazardous activity originated in the English case of *Rylands v. Fletcher,*[22] and English courts and Parliament have limited application of the doctrine to activity that is unduly dangerous and inappropriate because of the nature of the place in which a party carries on the activity.[23] Similarly, American courts have applied the abnormally dangerous activity doctrine only when the activity carried on is not appropriate to the place in which the activity occurs.[24] Although courts have permitted recovery under an abnormally

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20. *See id.* § 520 comment f (in determining whether activity is abnormally dangerous, any one consideration in § 520 is not necessarily dispositive).

21. *See* RESTATEMENT (SECOND) OF TORTS § 520 comments c, e, f, g, h, j, k (1976) (emphasizing locality considerations in determining existence of abnormally dangerous activity); *see also* Note, *Legal Limits, supra* note 5, at 843-44 (comments to *Restatement (Second) of Torts* consistently stress importance of locality where activity maintained). The *First Restatement of Torts* did not support the subsequent findings of courts that an activity is only ultrahazardous in relation to the place in which the activity occurs. *See* RESTATEMENT OF TORTS §§ 519-20 (1938) (recommending strict liability recovery for persons injured by ultrahazardous activities). The *First Restatement* recommended that one who carries on an ultrahazardous activity should be liable to anyone harmed by the unpreventable miscarriage of the activity despite the care exercised to prevent the harm. *Id.* § 519. Under § 519 of the *First Restatement,* liability results, without considering any negligence on the part of the person carrying on the activity, because the activity carries with it some element of unpreventable danger. *Id.* § 519 comment b. Section 520 of the *First Restatement* defined an ultrahazardous activity as an activity that necessarily involves a risk of serious harm to others which the party carrying on the activity cannot eliminate and an activity that is not a matter of common usage. *Id.* § 520. Neither the provisions of the *First Restatement* nor the comments to sections 519 and 520 suggested examining the activity in relation to its surroundings. *See* W. PROSSER, LAW OF TORTS § 77, at 527 (3d ed. 1964) (discussing *Rylands v. Fletcher* doctrine in *Restatement of Torts).* Arguably, the *First Restatement* fell short of the abnormally dangerous activity rule as it evolved in England by failing to emphasize the importance of locality in identifying an abnormally dangerous activity. *Id.*

22. Fletcher v. Rylands, 159 Eng. Rep. 737 (1865), *rev'd,* 1 L.R. Ex. 265 (1966), *aff'd,* 3 L.R.—H.L. 330 (1868). In *Rylands v. Fletcher,* a property owner sued the owners of a mill when water from a reservoir that they had constructed on their land broke through into a shaft of an abandoned coal mine and flooded the adjacent coal mines belonging to the plaintiff. 3 L.R.—H.L. at 331. The House of Lords found that the mill owners were liable because the reservoir constituted an unnatural use of the land. 3 L.R.—H.L. at 338.

23. *See* W. PROSSER, *supra* note 21, at 522 (explaining emergence of rule from *Rylands v. Fletcher* that one who damages another by activity unduly dangerous and inappropriate to place carried on, in light of character of place and surroundings, is liable to one harmed).

24. *Id.* at 527; *see, e.g.,* New Brantner Extension Ditch Co. v. Ferguson, 134 Colo. 502,. ____, 307 P.2d 479, 482 (1957) (company operating dam to divert irrigation water from river into ditch not liable to owners of flooded property absent showing of proximate cause because dam was in natural bed of river); Greene v. Spinning, 48 S.W.2d 51, 61 (Mo. App. 1932) (filling station owner and operator not liable for leakage of gasoline from tanks into neighboring landowner's well, absent negligence, because storage of gasoline is not unnatural use of land); Hudson v. Peavy Oil Co., 279 Or. 3,____, 566 P.2d 175, 178 (1977) (property owner denied recovery against service station for seepage of gasoline from underground storage tanks because underground storage of gasoline was not extraordinary, exceptional, or unusual in that location).

dangerous activity theory of strict liability in cases involving property damage caused by pile driving[25] and oil drilling,[26] courts have denied recovery under an abnormally dangerous activity theory in cases involving damage resulting from ordinary building construction[27] and from a dam in the natural bed of a river.[28] Courts and commentators distinguish the latter cases by characterizing the activity involved as a "natural" use of the land.[29] Although "appropriate" may be a more accurate word than "natural" for distinguishing the latter cases,[30] courts consistently have limited application of the abnormally dangerous activity doctrine to activities that are unduly dangerous in relation to the specific area in which the activities occur.[31]

American courts have refused to find that the manufacture or distribution of handguns are activities that do not suit the locality in which they occur.[32]

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25. *See* Caporale v. C.W. Blakeslee & Sons, Inc., 149 Conn. 79,____, 175 A.2d 561, 564 (1961) (pile driving is inherently dangerous activity permitting strict liability recovery against defendants); Sachs v. Chiat, 281 Minn. 540,____, 162 N.W.2d 243, 245-47 (1968) (pile driving is ultrahazardous activity, and persons injured by activity can recover even though defendants carefully conducted pile driving activity).

26. *See* Green v. General Petroleum Corp., 205 Cal. 328,____, 270 P. 952, 955 (1928) (adjoining property owner entitled to recover damages for oil and mud thrown on premises in eruption of oil well caused by oil drilling regardless of absence of negligence in conducting oil drilling activity).

27. *See* Gallin v. Poulou, 140 Cal. App.2d 638,____, 295 P.2d 958, 962 (1956) (builder held not liable for injuries to tenant of apartment building when plaster fell upon tenant due to vibrations from construction because construction was not extrahazardous activity and builder was not negligent).

28. *See* New Brantner Extension Ditch Co. v. Ferguson, 134 Colo. 502,____, 307 P.2d 479, 482 (1957) (company operating dam to divert irrigation water from river into ditch not liable to owners of flooded property absent showing of proximate cause because dam was in natural bed of river).

29. W. PROSSER, *supra* note 21, at 526 (American courts refuse to apply *Rylands v. Fletcher* principle to damages caused by natural use of land); *see supra* note 24 (decisions refusing strict liability recovery under abnormally dangerous activity theory because activity not unnatural in particular location in which it occurs).

30. *See* W. PROSSER, *supra* note 21, at 526. American courts refuse to apply the abnormally dangerous activity doctrine to activities that courts label "natural" uses of the land. *Id.* An activity is not "natural" for purposes of the abnormally dangerous activity doctrine if the activity is "out of place" and inappropriate in view of the activity's surroundings. *Id.; see* Greene v. Spinning, 48 S.W.2d 51, 61 (Mo. App. 1932) (filling station owner and operator not liable for leakage of gasoline from tanks into neighboring landowner's well, absent negligence, because storage of gasoline is not "unnatural" use of land). Accordingly, although blasting and storing hazardous liquids may qualify as abnormally dangerous activities if conducted in a densely populated area, if a party conducted these activities in a desert, a court likely would not label the activities abnormally dangerous. W. PROSSER, *supra* note 21, at 530.

31. *See supra* note 24 (abnormally dangerous activity doctrine limited to activities that are inappropriate in light of location of activity).

32. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1265 n.43, 1267 (5th Cir. 1985) (marketing of handguns is not activity properly classified as abnormally dangerous because marketing of handguns is not activity relating to land or other immovables); Kelley v. R.G. Industr., Inc., 304 Md. 124, 133-34, 497 A.2d 1143, 1147 (1985) (manufacture and distribution of handguns is not abnormally dangerous activity because not dangerous in relation to place in which activity occurs); Burkett v. Freedom Arms, Inc., 299 Or. 551,____, 704 P.2d 118, 121 (1985) (refusing

For example, one handgun victim recently claimed in an action against a handgun manufacturer that the activity of producing and marketing handguns satisfied the locality requirement of section 520 of the *Restatement (Second) of Torts* because no location existed in the United States in which manufacturers safely can market handguns for sale to the general public.[33] Although a trial court found that the locality question created a factual issue,[34] an appeals court rejected the argument and found that, as a matter of law, the manufacture or distribution of handguns was not related to land or other immovables.[35] The appellate court further explained that the manufacture or sale of a consumer product is not a land related activity and that manufacturers of consumer products, therefore, cannot be liable under an abnormally dangerous activity theory.[36]

Aside from the arguments that recovery under the abnormally dangerous activity doctrine is limited to land related activities and that sections 519 and

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strict liability recovery against handgun manufacturer under abnormally dangerous activity doctrine because marketing of handguns does not carry risk of harm to persons or property in vicinity).

33. *See* Richman v. Charter Arms Corp., 571 F. Supp. 192, 202 (E.D. La. 1983), *rev'd sub nom.* Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); RESTATEMENT (SECOND) OF TORTS § 520 (1976) (defining abnormally dangerous activity). In *Richman v. Charter Arms Corp.*, the family of a murder victim sued the manufacturer and distributor of the handgun used in the homicide seeking strict liability recovery under an abnormally dangerous activity theory. 571 F. Supp. at 202. Attempting to satisfy the locality consideration of § 520 of the *Restatement (Second) of Torts,* counsel for the victim's family asserted that distributors safely could not market handguns to the general public anywhere in the United States. *Id.* The district court found that the plaintiff's locality argument created a question of material fact suitable for the jury. *Id.* at 201-02.

The district court certified all questions of law to the United States Court of Appeals for the Fifth Circuit. Perkins v. F.I.E. Corp., 762 F.2d 1250, 1253-54 (5th Cir. 1985). In reversing *Richman* and granting summary judgment for the handgun manufacturer, the Fifth Circuit in *Perkins* concluded that an abnormally dangerous activity must be an activity relating to land or other immovables, that the activity conducted must be the direct cause of the injury, that the defendant directly must have been engaged in the injury producing activity, and that the activity must not require intervening substandard conduct of a third party to cause injury. 762 F.2d at 1267-68. The Fifth Circuit determined that courts would not characterize the marketing of handguns as a land related activity and rejected the district court's finding that material issues of fact existed concerning the applicability of the abnormally dangerous activity doctrine. *Id.* at 1269. Because the appellate court found that the marketing of handguns is not an activity that is abnormally dangerous in itself, the *Restatement (Second) of Torts* provisions could not provide relief to the plaintiff. *Id.* at 1265 n.43. In any event, the *Perkins* court found that Louisiana state courts would not apply the provisions of the *Restatement (Second) of Torts* concerning abnormally dangerous activities because Louisiana courts never have invoked the *Second Restatement* provisions for determining the existence of an abnormally dangerous activity. *Id.* at 1265.

34. Richman v. Charter Arms Corp., 571 F. Supp. 192, 202 (E.D. La. 1983); *see supra* note 33 (discussion of *Richman).*

35. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1267 (5th Cir. 1985) (reversing trial court and finding that marketing of handguns was not ultrahazardous activity because marketing of handguns is not land related activity).

36. *Id.; see supra* note 33 (discussion of *Perkins v. F.I.E. Corp.).*

520 of *Restatement (Second) of Torts* are wholly inapplicable to a suit against the manufacturer of a handgun used in crime, the assertion that the manufacture or distribution of handguns falls within any of the considerations outlined in sections 519 and 520 misses a crucial distinction between the manufacture or distribution of a product and the use of that product.[37] According to a comment to section 519 of the *Second Restatement,* liability arises from the abnormal danger of the activity itself.[38] Courts have explained that the manufacture and distribution of handguns is not an activity that is dangerous in itself and that classifying the sale of a product as an activity merely blurs the distinction between strict liability for unreasonably dangerous products and strict liability for an abnormally dangerous activity.[39] Courts commonly object to labeling the manufacture or distribution of handguns as an abnormally dangerous activity because such a holding would make all manufacturers and distributors insurers against harm caused by the use of their products.[40] Courts maintain that imposing strict liability on manufacturers of handguns subsequently used in crime could require that manufacturers of knives, drugs, alcohol, tobacco, and other potentially

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37. *See* Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984) (rejecting manufacturer's liability and finding that complaint alleging that manufacture and sale of handguns is abnormally dangerous activity confuses products liability with abnormally dangerous activity theory); Santarelli & Calio, *supra* note 4, at 501 (proponents of abnormally dangerous activity theory of recovery against handgun manufacturers miss crucial distinction between use of item and production and sales of item); Note, *supra* note 7, at 1923 (under abnormally dangerous activity doctrine, user of product, rather than product's manufacturer, generally is party that is liable). In *Martin v. Harrington and Richardson, Inc.,* the family of a murder victim sued the manufacturer and distributor of the handgun used in the homicide. *Id.* at 1204. The complaint alleged that the distribution of handguns constituted an abnormally dangerous activity and that strict liability was appropriate. *Id.* The *Martin* court denied strict liability recovery because the court found that the sale of a product was not an activity and because the *Martin* court determined that courts properly would not impose strict liability for the sale of a nondefective product by a nonnegligent manufacturer. *Id.*

38. RESTATEMENT (SECOND) OF TORTS §§ 519 comment d (1976).

39. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1265 n.43 (5th Cir. 1985) (marketing of handguns is not activity that is dangerous in and of itself, and when injury occurs, injury is result of actions by third parties, not result of sale of handgun); Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984) (characterizing sale of handguns as activity blurs distinction between abnormally dangerous activity and unreasonably dangerous product theories of strict liability); Burkett v. Freedom Arms, Inc., 299 Or. 551,____, 704 P.2d 118, 121 (1985) (design, manufacture, and sale of handguns in not dangerous in itself and classifying activity as abnormally dangerous because of subsequent criminal use blurs distinction between use and marketing of products).

40. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1269 (5th Cir. 1985) (rejecting liability because finding that marketing of handguns is abnormally dangerous activity would make manufacturer insurer against both legitimate and illegitimate uses of product); Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984) (rejecting liability because only legislature properly can decide to make manufacturer insurer for nondefective products); Burkett v. Freedom Arms, Inc., 299 Or. 551,____, 704 P.2d 118, 122 (1985) (to hold one who designs, manufactures, and sells nondefective product strictly liable for misuse of product by third party amounts to enterprise liability, a concept that Oregon Supreme Court previously had rejected).

dangerous products act as insurers against all harm produced by their products.[41] Additionally, courts have recognized that the criminal use of a handgun, not manufacture and distribution of handguns, has injured the handgun victims in the litigation that has begun across the nation.[42] Although a court could find that the criminal use of a handgun is dangerous and could qualify as an abnormally dangerous activity in a suit against the user, a court likely will not find that the production and distribution of handguns is an unreasonably dangerous activity.[43]

Despite the limitation by courts of the abnormally dangerous activity doctrine to activities that are inappropriate to the locality and dangerous in and of themselves, some handgun victims have argued that a strict application of section 520 of the *Restatement (Second) of Torts* supports the conclusion that the manufacture and distribution of handguns is an abnormally dangerous activity.[44] Some complaints filed by handgun victims have focused on a recommendation in section 520 that courts balance the utility of an activity with the risk of harm to society created by the activity.[45] The plaintiffs in

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41. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1269 (5th Cir. 1985) (finding that Louisiana has policy against holding nonnegligent manufacturer liable for harm resulting from misuse of nondefective product); Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984) (refusing to make handgun manufacturer and distributor insurer against criminal use of product and finding that Illinois limits imposition of strict liability for sale of products to unreasonably dangerous products); Burkett v. Freedoms Arms, Inc., 299 Or. 551, ____, 704 P.2d 118, 122 (1985) (Oregon has rejected finding of liability upon manufacturers and distributors when product is not defective and when injuries result only from misuse of product).

42. *See, e.g.*, Perkins v. F.I.E. Corp., 762 F.2d 1250, 1252 (5th Cir. 1985) (victim suffered injury through criminal use of handgun and not through marketing or production of handgun); Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1205 (7th Cir. 1984) (same); Patterson v. Gesellschaft, 608 F. Supp. 1206, 1207-08 (N.D. Tex. 1985) (same); Kelley v. R.G. Industr., Inc., 304 Md. 124, 133-34, 497 A.2d 1143, 1147 (1985) (same).

43. *See* Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1203 (7th Cir. 1984) (if plaintiffs had brought action against assailant claiming that use of handgun was abnormally dangerous activity, plaintiff properly would state cause of action); Burkett v. Freedom Arms, Inc., 299 Or. 551,____, 704 P.2d 118, 121 (1985) (although court properly may find that use of handgun was abnormally dangerous activity, no common law jurisdiction would hold that manufacturing and marketing of handgun was abnormally dangerous activity).

44. *See* Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1203 (7th Cir. 1984) (plaintiff maintained that manufacture and distribution of handguns was abnormally dangerous activity under §§ 519-20 of *Restatement (Second) of Torts);* Richman v. Charter Arms Corp., 571 F. Supp. 192, 199 (E.D. La. 1983) (same), *rev'd sub nom.* Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); Burkett v. Freedom Arms, Inc., 299 Or. 551,____, 704 P.2d 118, 120 (1985) (same); *see also* RESTATEMENT (SECOND) OF TORTS § 520 (1976) (defining abnormally dangerous activity).

45. *See* Richman v. Charter Arms Corp., 571 F. Supp. 192, 202 (E.D. La. 1983) (plaintiff argued that handguns have no utility and that plaintiff satisfied § 520 of *Restatement (Second) of Torts* by demonstrating that danger inherent in handguns outweighs value), *rev'd sub nom.* Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); Burkett v. Freedom Arms, Inc., 299 Or. 551,____, 704 P.2d 118, 119 (1985) (plaintiffs alleged that manufacture and distribution of handguns was activity whose risks outweighed value to community); *see also* RESTATEMENT (SECOND) OF TORTS § 520 comment k (1976) (in determining existence of abnormally dangerous activity, courts should consider risks of activity compared to social utility).

actions against manufacturers and distributors of handguns subsequently used in crime argue that handguns have minimal social utility when compared with the risks of harm.[46] The proponents of strict liability against handgun manufacturers and distributors under the abnormally dangerous activity provisions of the *Restatement (Second) of Torts* often claim that the community in which the manufacturer or distributor initially sold the handgun largely is not devoted to the dangerous enterprise of handgun manufacturing and sale and that the community's prosperity would not falter due to the discontinuance of the activity of handgun manufacturing and marketing.[47] Some plaintiffs have argued that, balanced against the minimal value of the activity to the community, the deaths and injuries caused by handguns require that the parties carrying on the activity of manufacturing and marketing handguns pay for the damage that is a product of their activity.[48] Regardless of the merit of these arguments, most of the causes of action have failed to demonstrate the existence of a genuine issue of material fact concerning the disutility of handgun production and distribution because courts have found that state legislatures, by not banning handguns, have recognized some legitimate uses for handguns.[49] Commentators have added that the victims' claims that the manufacture and distribution of handguns is of no utility to society overlook the economic benefits of the gun manufacturing and distribution business in added jobs and taxable revenue.[50] Furthermore, the victims' assertions that handguns lack social utility may

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46. *See* Richman v. Charter Arms Corp., 571 F. Supp. 192, 202 (E.D. La. 1983) (plaintiff argued that handguns have no societal value and that risks far outweigh utility of handguns), *rev'd sub nom.* Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); *see also* Podgers, *Tort Lawyers Take Aim at Handguns,* THE BRIEF, Nov. 1981, at 4, 6 (plaintiffs in suits against manufacturers and distributors of handguns subsequently used in crime claim that handguns fail to meet any test of social value); Santarelli & Calio, *supra* note 4, at 499 (proponents of applicability of abnormally dangerous activity liability to handgun manufacturers rely primarily upon extent to which danger of handguns outweighs value).

47. *See* Richman v. Charter Arms Corp., 571 F. Supp. 192, 202 (E.D. La. 1983) (plaintiff argued that community largely is not devoted to marketing of handguns and that handguns have no utility), *rev'd sub nom.* Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985).

48. *See id.* at 194 (plaintiff claimed that by marketing handguns defendant assumed special responsibility to public and should bear costs of harm as cost of doing business); Burkett v. Freedom Arms, Inc., 299 Or. 551,____, 704 P.2d 118, 119 (1985) (plaintiff alleged that manufacturer could not undertake activity of manufacturing and marketing handguns without assuming consequences of activity).

49. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1265-66 n.43 (5th Cir. 1985) (Louisiana legislature, by not banning handgun sales, believes legitimate uses for handguns exist); Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984) (finding handgun manufacturers strictly liable under abnormally dangerous activities doctrine would thwart Illinois' policy supporting citizens' right to possess handguns by making possession of handgun unreasonably dangerous).

50. *See* Santarelli & Calio, *supra* note 4, at 499 (firearms industry employs thousands of individuals and contributes millions of tax dollars to local, state, and federal governments). *But cf.* Ram, Geldes & Bueno, *Health Care Costs of Gunshot Wounds,* 73 OHIO ST. MED. A.J. 437, 438 (1977) (estimated that $500 million spent annually in treating gunshot injuries); Turley & Harrison, *Strict Liability of Handgun Suppliers,* 6 HAMLINE L. REV. 285, 287 (1983) (same).

negate the victims' claims for recovery under an abnormally dangerous activity theory because courts developed the doctrine to provide relief to persons injured by a dangerous activity that was too beneficial to justify discontinuing the activity.[51] Arguing that the production and distribution of handguns lacks any societal value is contrary to the purpose of protecting beneficial but dangerous activity underlying the abnormally dangerous activity doctrine and the adoption by many courts of sections 519 and 520 of the *Restatement (Second) of Torts.*[52]

Apart from the abnormally dangerous activity doctrine, some handgun victims or their survivors have argued that manufacturers and distributors of handguns subsequently used in crime are strictly liable for the damage caused by the criminal use of their handguns because handguns are unreasonably dangerous products.[53] In support of the unreasonably dangerous product claims, the plaintiffs in suits against handgun manufacturers and distributors have cited section 402A of the *Restatement (Second) of Torts,* which makes the seller of a product liable to an injured user or consumer of an unreasonably dangerous product even though the seller has exercised all possible care in selling the product.[54] To state a claim properly under an unreasonably dangerous product theory of strict liability, the complaint must allege that the product sold by the defendant in the action was in a defective condition when the seller released possession or control of the product, that the product was unreasonably dangerous to the user or consumer, that the defect caused the alleged injuries, and that the product was expected to and

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51. *See* RESTATEMENT (SECOND) OF TORTS § 519 comment b (1976) (strict liability under abnormally dangerous activity doctrine arises from unpreventable risk of harm in activity whose social value does not justify its elimination); Note, *Legal Limits, supra* note 5, at 843 (by bringing action against handgun manufacturer and distributor under abnormally dangerous activity theory, victim of handgun crime seeks recovery under theory which by its nature negates characterization of handguns as useless to society).

52. *See supra* note 51 (abnormally dangerous activity doctrine allows continuation of dangerous activities that are valuable to society).

53. *See, e.g.,* Patterson v. Gesellschaft, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985) (mother of murder victim claimed that manufacturer designed handgun defectively); Richman v. Charter Arms Corp., 571 F. Supp. 192, 194 (E.D. La. 1983) (mother of murder victim sued murder weapon's manufacturer alleging that handgun was unreasonably dangerous product), *rev'd sub nom.* Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); Riordan v. International Armament Corp., 132 Ill. App.3d 642,____, 477 N.E.2d 1243, 1297-98 (1985) (family of murder victim claimed that manufacturer defectively designed handgun by making handgun small, inexpensive, and readily concealable); Kelley v. R.G. Industr., Inc., 304 Md. 124, 134, 497 A.2d 1143, 1147 (1985) (victim of armed robbery and shooting sued manufacturer and distributor of handgun claiming that manufacturer produced and sold unreasonably dangerous product).

54. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1964) (defining unreasonably dangerous products); *e.g.,* Patterson v. Gesellschaft, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985) (family of handgun victim sued manufacturer of handgun claiming that manufacturer produced and marketed unreasonably dangerous product under § 402A of *Restatement (Second) of Torts);* Riordan v. International Armament Corp., 132 Ill. App.3d 642,____, 477 N.E.2d 1293, 1297-98 (1985) (same); Kelley v. R.G. Industr., Inc., 304 Md. 124, 134, 497 A.2d 1143, 1147 (1985) (same).

did reach the consumer without substantial change in its condition.[55] In determining whether a product is defective under section 402A, American courts have applied a consumer expectation test.[56] Under the consumer expectation test, a seller of a product is not liable to a consumer unless the product is in a condition not contemplated by the ordinary consumer who purchases the product with the ordinary knowledge a consumer in that community would possess concerning the product's characteristics.[57]

Contrary to many plaintiffs' arguments, American courts have found that a handgun is not defective merely because it is capable of inflicting harm during criminal use.[58] A consumer would expect a handgun to be

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55. *See* Kelley v. R.G. Industr., Inc., 304 Md. 124, 135-36, 497 A.2d 1143, 1148 (1985) (discussing requirements for action under unreasonably dangerous products theory).

56. *See, e.g.,* Helene Curtis Industr., Inc. v. Pruitt, 385 F.2d 841, 855 (5th Cir. 1967) (applying consumer expectation test in suit against hair bleach manufacturer for injuries due to chemical burn); DeBattista v. Argonaut-Southwest Ins. Co., 403 So.2d 26, 30 (La. 1981) (applying consumer expectation test in suit against blood bank for injuries due to contraction of hepatitis); Phipps v. General Motors Corp., 278 Md. 337, 344, 363 A.2d 955, 958 (1976) (adopting consumer expectation test in determining existence of defect in automobile); *see also* W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 2, at 14 n.41 (1979) (approximately twenty-six states follow consumer expectation test of § 402A in determining whether product is unreasonably dangerous); Note, *Manufacturers' Strict Liability for Injuries from a Well-Made Handgun,* 24 WM. & MARY L. REV. 467, 481 (1983) (over half of states use consumer expectation test to determine existence of product defects); *infra* note 57 and accompanying text (defining consumer expectation test).

57. RESTATEMENT (SECOND) OF TORTS § 402A comments g, i (1964); *see* Greenman v. Yuba Power Prods., Inc., 59 Cal.2d 57,____, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) (product is defective if product is in dangerous condition beyond contemplation of ultimate consumer); Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis.2d 326, 332, 230 N.W.2d 794, 798 (1975) (same); W. KEETON, PROSSER AND KEETON ON TORTS 698 (5th ed. 1984) (same).

In *Greenman v. Yuba Power Prods., Inc.,* the plaintiff sued the manufacturer of a lathe for negligence and for breach of express and implied warranties when a piece of wood flew out of the lathe and injured the plaintiff. 59 Cal.2d at____, 377 P.2d at 898, 27 Cal. Rptr. at 698. On appeal from a verdict against the manufacturer, the Supreme Court of California affirmed the trial court decision and held that a manufacturer is strictly liable in tort if its product causes injury and if the manufacturer had reason to expect that the consumer would use the product without inspecting the product for defects. 59 Cal.2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

In *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.,* a child was injured when he fell into a pool built by the defendant company. 69 Wis.2d at 332, 230 N.W.2d at 798. The parents of the child sued the pool company under an unreasonably dangerous product theory, claiming that the absence of a self-latching gate on the fence surrounding the swimming pool constituted a design defect. 69 Wis.2d at 332, 230 N.W.2d at 798. The *Vincer* court found that the absence of a self-latching gate was obvious to any consumer and that, therefore, the pool company did not design defectively the pool and fence. 69 Wis.2d at 232, 230 N.W.2d at 798.

58. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1275 (5th Cir. 1985) (handgun that fired precisely as expected is not defective); Patterson v. Gesellschaft, 608 F. Supp. 1206, 1210-11 (N.D. Tex. 1985) (no defect in handgun used in crime because no malfunction occurred); Kelley v. R.G. Industr., Inc., 304 Md. 124, 136, 497 A.2d 1143, 1148 (1985) (possibility that criminal could use handgun to inflict harm does not make handgun defective).

dangerous because manufacturers design handguns to discharge bullets with deadly force.[59] Several courts have recognized that the characterization of a handgun as defective confuses a product's normal function that may be dangerous with a defect that renders a product unexpectedly dangerous.[60] For a court to find a handgun defective, some problem in the handgun's design or manufacture must cause the handgun to fire unexpectedly or in an unanticipated manner.[61] Absent any hidden danger that causes a handgun to misfire or otherwise to malfunction, a court properly cannot label a handgun an unreasonably dangerous product under the consumer expectation test because a handgun does not contain dangers that a consumer would not appreciate fully.[62]

Some commentators have argued that the consumer expectation test does not go far enough in promoting design safety and that courts should invoke a risk/utility test to determine whether a product is unreasonably dangerous.[63]

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59. *See* Patterson v. Gesellschaft, 608 F. Supp. 1206, 1212 (N.D. Tex. 1985) (consumers know that handgun is dangerous since, by its very nature, handguns fire bullets with force to kill); Mavilia v. Stoeger Industr., 574 F. Supp. 107, 110-11 (E.D. La. 1983) (dangers of handgun are obvious and widely known); Richman v. Charter Arms Corp., 571 F. Supp. 192, 197 (E.D. La. 1983) (every reasonable consumer knows that people can use handguns as murder weapons), *rev'd sub nom.* Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); Kelley v. R.G. Industr., Inc., 304 Md. 124, 136, 497 A.2d 1143, 1148 (1985) (consumers expect handguns to be dangerous and to have capacity to kill); *see also* Santarelli & Calio, *supra* note 4, at 484 n.58, 484-87 (no design defects exist in handguns simply because they are deadly).

60. *See* Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1202 (7th Cir. 1984) (no strict liability results from handgun that poses dangers fully recognizable by average consumer); Kelley v. R.G. Industr., Inc., 304 Md. 124, 136, 497 A.2d 1143, 1148 (1985) (although normal function of handgun may be dangerous, handgun is not defective because consumers expect that handgun is capable of inflicting harm).

61. *See* Kelley v. R.G. Industr., Inc., 304 Md. 124, 135-36, 497 A.2d 1143, 1148 (1985) (finding that handgun was not defective because handgun fired as expected). The Court of Appeals in *Kelley v. R.G. Industr., Inc.* explained by analogy that an automobile manufacturer is not liable when a reckless driver runs down a pedestrian because a purchaser buys an automobile with the expectation that the automobile has the ability to be propelled with great force and at high speeds. *Id.* On the other hand, if an automobile contains an unexpected defect, such as a gasoline tank placed in a position vulnerable to rear end collisions, a manufacturer could be liable under the unreasonably dangerous product doctrine. *Id.*

62. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1275 (5th Cir. 1985) (no liability under unreasonably dangerous products theory because handgun functioned precisely as anticipated and because dangers of handguns are open and obvious); Rhodes v. R.G. Industr., Inc., 173 Ga. App. 51, 52, 325 S.E.2d 465, 467 (1984) (handgun performed as expected because bullet fired when child pulled trigger); Riordan v. International Armament Corp., 132 Ill. App.3d 642, ____, 477 N.E.2d 1293, 1298 (1985) (victim of criminal use of handgun denied recovery against handgun manufacturer because plaintiff failed to show that handgun performed in manner not expected in light of handgun's nature and function); Kelley v. R.G. Industr., Inc., 304 Md. 124, 135-36, 497 A.2d 1143, 1148 (1985) (victim shot by armed robber denied recovery under unreasonably dangerous products theory because handgun performed in expected manner).

63. *See* Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence,* 33 VAND. L. REV. 593, 613-14 (1980) (consumer expectancy test insufficiently creates incentives for safer product design); Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles,* 45 MO. L. REV. 579, 589 (1980)

In light of the growing acceptance of some variation of a risk/utility test,[64] American courts have examined the applicability of risk/utility analysis in suits against manufacturers and distributors of handguns under an unreasonably dangerous product theory of strict liability.[65] Courts examining the applicability of a risk/utility test to determine the existence of defects in handguns have recognized that the California Supreme Court, in *Barker v. Lull Engineering Co.*,[66] first adopted risk/utility analysis to determine the existence of design defects in products.[67] In *Barker,* a machinery operator injured himself when he attempted to escape from a malfunctioning loader.[68] A jury instruction in the trial court conditioned strict liability on a finding by the jury that the machinery was unreasonably dangerous for the intended purpose.[69] On appeal from a jury verdict in favor of the manufacturer, the California Supreme Court found that the limiting instruction was insufficient and articulated a disjunctive two-prong test for design defects.[70] The *Barker* court explained that the trial court should have instructed the jury that, under a first prong, a product is defective in design, sufficient to impose strict liability on its manufacturer, if the product failed to perform as safely as an ordinary consumer would expect when used in an intended or foresee-

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(same); Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Products Liability Concepts,* 60 MARQ. L. REV. 297, 312 (1977) (same); Wade, *On the Nature of Strict Tort Liability for Products,* 44 MISS. L.J. 825, 829 (1973) (consumer's expectation alone cannot serve as test for design defects).

64. *See, e.g.,* Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 884-86 (Alaska 1979) (adopting risk/utility test to determine existence of defect in product); Hunt v. City Stores, Inc., 387 So.2d 585, 588 (La. 1980) (same); Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 174-76, 386 A.2d 816, 827-28 (1978) (same).

65. *See, e.g.,* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1272-75 (5th Cir. 1985) (examining applicability of risk/utility test for identifying defects in handgun used to murder plaintiff's decedent); Patterson v. Gesellschaft, 608 F. Supp. 1206, 1212-13 (N.D. Tex. 1985) (risk/utility test for design defects offered to prove that handgun used to injure plaintiff was unreasonably dangerous product); Kelley v. R.G. Industr., Inc., 304 Md. 124, 135-38, 497 A.2d 1143, 1148-50 (1985) (victim of criminal shooting argued that risk/utility test demonstrated design defect in handgun).

66. 20 Cal.3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

67. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1273 (5th Cir. 1985) (examining applicability of *Barker* type risk/utility test to determine existence of design defect in handguns); Riordan v. International Armament Corp., 132 Ill. App.3d 642, 477 N.E.2d 1293, 1298 (1985) (plaintiffs in suit against handgun manufacturer attempted to demonstrate design defect in handgun under *Barker* type risk/utility test); Kelley v. R.G. Industr., Inc., 304 Md. 124, 135-37, 497 A.2d 1143, 1148-49 (1985) (victim shot by armed robber argued that handgun was defectively designed under *Barker* type risk/utility test); *see also Barker,* 20 Cal.3d at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38 (adopting risk/utility analysis to determine existence of design defects in products).

68. *Barker,* 20 Cal.3d at 419, 573 P.2d at 447, 143 Cal. Rptr. at 229. In *Barker v. Lull Eng'g Co.,* an operator of a loader injured himself when he leaped from the machinery which bystanders told him was beginning to tip. *Id.* A piece of lumber fell on the operator as the operator attempted to flee the area, causing serious injury to the operator. *Id.*

69. *Id.* at 422, 573 P.2d at 449, 143 Cal. Rptr. at 231.

70. *Id.* at 432, 573 P.2d at 457-58, 143 Cal. Rptr. at 239-40; *see infra* notes 72-73 and accompanying text (discussing *Barker* court's two-prong test for design defects).

able manner.[71] Alternatively, under a second prong, a jury could find that a product is defective if the product's design was the proximate cause of the injuries sustained and if the defendant fails to prove that the benefits of the product's design outweigh the risk of danger inherent in the design.[72]

Despite a growing acceptance of the risk/utility approach in identifying design defects in products, most courts have determined that the facts surrounding the suits brought by victims of handgun crime do not suggest application of a *Barker* type risk/utility test for product design defects.[73] According to courts and commentators, a risk/utility test is appropriate only when a product malfunctions or otherwise causes unintended results, and the handguns used against the victims of handgun crime generally do not malfunction.[74] Although a court appropriately could apply a risk/utility test

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71. *Barker,* 20 Cal.3d at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38. In essence, the first prong of the *Barker v. Lull Eng'g* test, that a product is defective in design if the product fails to perform as safely as an ordinary consumer would expect when used in an intended and foreseeable manner, is the consumer expectation test. *See* Birnbaum, *supra* note 63, at 604 (first prong of *Barker* test is derived from consumer expectation test of § 402A of *Restatement (Second) of Torts); see also supra* notes 57-63 and accompanying text (discussion of consumer expectation test for design defects in handgun manufacturer litigation).

72. *Barker,* 20 Cal.3d at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238. To determine whether a manufacturer defectively designed a product under a risk/utility test, the jury should examine the seriousness of the harm threatened by the allegedly defective design, the likelihood of harm, and the mechanical, financial, and marketplace feasibility of a safer alternative design. *See id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237 (outlining risk/utility test for design defects). Under the second prong of the *Barker* test, once the plaintiff makes a prima facie showing that the design of the product proximately caused the injury incurred, the burden of proof shifts to the defendant to show that the benefits of the product's design outweigh the danger that the design creates. *Id.* at 431, 573 P.2d at 456, 143 Cal. Rptr. at 238.

73. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1274-75 (5th Cir. 1985) (risk/utility test for design defects was not applicable because plaintiffs did not allege that handgun had "something wrong" with it); Patterson v. Gesellschaft, 608 F. Supp. 1206, 1212-13 (N.D. Tex. 1985) (risk/utility test was not applicable because handgun did not malfunction or cause unintended results); Kelley v. R.G. Industr., Inc., 304 Md. 124, 138, 497 A.2d 1143, 1149 (1985) (risk/utility test is inappropriate defect test for products that did not malfunction).

74. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1274-75 (5th Cir. 1985) (risk/utility test for design defects was inapplicable because plaintiff failed to allege that handgun malfunctioned or caused unintended results); Barker v. Lull Eng'g. Co., 20 Cal.3d 413, 432, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978) (risk/utility analysis appropriate to examine manufacturer liability when product malfunctions); Kelley v. R.G. Industr., Inc., 304 Md. 124, 137-38, 497 A.2d 1143, 1149 (1985) (risk/utility test is not applicable in examining defects in handgun because handgun did not malfunction); *Podgers, supra* note 47, at 39 (products liability law focuses on whether product malfunctioned); Santarelli & Calio, *supra* note 4, at 484-85 (defect simply means product malfunctioned in manner causing injury); Note, *supra* note 7, at 1915-16 (risk/utility analysis only appropriate if product has malfunctioned). Some commentators argue that the criminal use of a handgun is not a handgun's intended use and that, therefore, courts should subject handguns to special scrutiny under a risk/utility test for design defects. *See* Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims,* 10 N. KY. L. REV. 41, 60-61 (1982) (risk/utility test appropriate to determine existence of design defects in handguns used in crime). At least one commentator, however, has argued that the applicability of the risk/utility test should not depend upon the legality of the particular use of the product. *See* Note, *supra* note 7, at 1917 (arguing that risk/utility test is inapplicable in suits against

to a loader that turned over unexpectedly,[75] a motor home that exploded,[76] or a power press that injured an operator's hands,[77] the risk/utility test is not applicable to a claim against a manufacturer of a handgun that did not malfunction.[78] Accordingly, most courts have found that no design defect existed in the handguns that would subject the manufacturer to strict liability under traditional products liability law.[79]

Even if courts invoke the risk/utility test described in *Barker,* the plaintiff in an action against a handgun manufacturer under a defective design theory likely will lose.[80] Under the risk/utility test described in *Barker,* the plaintiff must make a prima facie showing that the design of a product was the proximate cause of his injury before a court will balance the risks and utilities of the product.[81] The prima facie showing is a heavy burden when

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manufacturers of handguns used in crime). Because consumers can use numerous products in an illegal manner, one commentator suggests that the argument that risk/utility analysis should apply to the criminal use of a product has no logical limit. *See id.* (suggesting that application of risk/utility test to handguns logically would support application of risk/utility test to automobiles used as getaway cars and ships used to smuggle drugs).

75. *See Barker,* 20 Cal.3d at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38 (risk/utility anlaysis recommended to determine whether design defect existed in loader that overturned and injured operator); *see supra* notes 66-74 and accompanying text (discussion of *Barker*).

76. *See* Back v. Wickes Corp., 375 Mass. 633,____, 378 N.E.2d 964, 970 (1978) (in evaluating design of mobile home that exploded upon impact with fence post, jury could consider mechanical feasibility and consumer effects of alternative design).

77. *See* Duke v. Gulf & W. Mfg. Co., 660 S.W.2d 404, 411-13 (Mo. Ct. App. 1983) (jury could consider design alternatives in power press that caught and injured operator's hands).

78. *See supra* note 74 (risk/utility test for design defects is not applicable to products that do not malfunction).

79. *See, e.g.,* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1274-75 (5th Cir. 1985) (reversing trial court and rejecting claim that handgun criminally used to murder plaintiff's decedent was defectively designed); Patterson v. Gesellschaft, 608 F. Supp. 1206, 1212-14, 1216 (N.D. Tex. 1985) (granting handgun manufacturer's motion for summary judgment and finding no design defect in handgun armed robber used to injure plaintiff); Kelley v. R.G. Industr., Inc., 304 Md. 124, 138-39, 497 A.2d 1143, 1149-50 (1985) (refusing to recognize cause of action alleging that handgun criminally used to injure plaintiff was defectively designed).

80. *See infra* notes 82-85 and accompanying text (discussing inability of plaintiffs in actions against handgun manufacturers to demonstrate necessary causal link between handgun's design and plaintiff's injury).

81. *Barker,* 20 Cal.3d at 431, 573 P.2d at 456, 143 Cal. Rptr. at 238; *see* Birnbaum, *supra* note 63, at 605-06 (plaintiff first must make prima facie showing that product proximately caused injury before defendant must prove that product's utility exceeds risks). A plaintiff might establish that a product's design proximately caused the plaintiff's injuries by utilizing statistics to show the foreseeability of injuries due to the criminal use of handguns, by arguing that added safety features would have prevented the injuries, and by asserting that the foreseeability together with the lack of safety features proximately caused the injuries. Note, *supra* note 56, at 492. A court likely would find, however, that the criminal act of firing the handgun intervened to destroy the causal link between the handgun's design and the injury. *Id.* at 495. The risk/utility test for design defects reverses the order of proof in a design defect case by requiring the plaintiff first to prove causation and then to prove the existence of a defect. Perkins v. F.I.E. Corp., 762 F.2d 1250, 1273 (5th Cir. 1985). Under traditional products liability law, a plaintiff first would prove that a defect existed before a court would require proof of proximate cause. *Id.*

the handgun manufacturer has produced a flawless product and the distributor has marketed a product that performed as expected.[82] The complaints filed in actions against manufacturers of handguns subsequently used in crime generally have asserted that the concealability of the handgun proximately caused the injuries to the plaintiff.[83] The size of the handgun, however, did not proximately cause the injuries suffered by the plaintiff.[84] The person who pulled the trigger and the bullet that struck the victim were the proximate causes of the injuries to the plaintiffs.[85]

Even if the plaintiff in an action against a manufacturer of a handgun subsequently used in crime could demonstrate a link between the design of the handgun and the injury to the victim, the doctrine of superseding cause may preclude recovery.[86] A superseding cause is an act by a third person or force that, because of its intervention, relieves an antecedent tortfeasor from liability for negligently causing a dangerous condition that results in injury.[87] American courts have viewed intervening criminality as a superseding cause that precludes products liability recovery.[88] Although one court has held that a dealer who sold a handgun to an escaped convict in violation of a federal statute requiring purchaser identification may have foreseen the subsequent

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82. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1274 (5th Cir. 1985) (plaintiffs face major hurdle in demonstrating design of nonmalfunctioning handgun proximately caused injuries due to intervening criminal acts).

83. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1272-74 (5th Cir. 1985) (rejecting plaintiff's claim that concealability of handgun and marketing of handguns to general public proximately caused injuries to murder victim); Riordan v. International Armament Corp., 132 Ill. App.3d 642, ____, 477 N.E.2d 1293, 1298 (1985) (rejecting claim that size and concealability of handgun proximately caused murder victim's death).

84. *See* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1268 (5th Cir. 1985) (injuries to plaintiff resulted from criminal conduct of third party, not from any design defect in handgun); Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1205 (7th Cir. 1984) (same); Riordan v. International Armament Corp., 132 Ill. App.3d 642,____, 477 N.E.2d 1293, 1298 (1985) (same).

85. *See supra* note 84 (courts have found that criminal acts of third parties were proximate cause of injuries to victims of handgun crime, not concealability of handguns).

86. *See* RESTATEMENT (SECOND) OF TORTS § 440 (1964) (superseding cause intervenes to relieve negligent party from liability); Santarelli & Calio, *supra* note 4, at 487-91 (criminal use of handgun is superseding cause that precludes finding of liability in suits against handgun manufacturers); Note, *Common-Law Approach, supra* note 5, at 796 (party maintaining action against manufacturer of handgun used in crime must overcome obstacle of characterizing criminal act as superseding cause); Note, *supra* note 56, at 493-94 (criminal use of handgun is superseding cause precluding recovery to shooting victims); *infra* note 87 and accompanying text (defining superseding cause).

87. RESTATEMENT (SECOND) OF TORTS § 440 (1964).

88. *See* Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1205 (7th Cir. 1984) (criminal misuse of handgun is unforeseeable, intervening cause that breaks causal connection between manufacturer's actions and victim's injury); Bennet v. Cincinnati Checker Cab Co., 353 F. Supp. 1206, 1210 (E.D. Ky. 1973) (importer not liable for injuries resulting from criminal use of handgun because criminal use was superseding cause); Olson v. Ratzel, 89 Wis.2d 227, 254, 278 N.W.2d 238, 250-51 (1979) (criminal misuse of handgun may qualify as superseding cause relieving negligent seller of liability).

murder of two persons by the convict with the handgun,[89] the majority of American courts have found that the criminal use of a handgun destroys the necessary link between a handgun's design and the victim's injury.[90] Counsel for manufacturers and distributors of handguns used in crime appropriately can resort to the argument that "guns don't kill people, people kill people," in light of the trend of American decisions regarding criminality as a superseding cause precluding products liability recovery.[91]

Should a plaintiff somehow demonstrate a causative link between a handgun's design and the injury sustained through criminal use of the weapon, and withstand arguments of superseding cause, a court would balance the risks of harm to society caused by the handgun against the societal value of the handgun.[92] Relevant to the balancing process is the gravity of the danger posed by the product's current design, the likelihood of the occurrence of the hazard, the mechanical and financial feasibility of a safer design, and the adverse consequences to the product and the consumer that the alternative design would cause.[93] The manufacturer or distributor would have the burden of showing that the utility of the handgun outweighs the risk of harm to society.[94] The manufacturer or distributor may have difficulty in demonstrating that handguns are more useful than harmful because of a continuing split of opinion concerning the societal value of handguns.[95] In light of state legislative action nationwide, however, manu-

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89. *See* Franco v. Bunyard, 261 Ark. 144, 147, 547 S.W.2d 91, 93 (1977). In *Franco v. Bunyard,* the Arkansas Supreme Court ruled that a factual issue existed concerning whether a dealer was liable to the families of two murder victims and to one injured victim shot by an escaped convict to whom the dealer had sold a handgun. *Id.* at 147, 547 S.W.2d at 93. Because the *Franco* court found that the escaped convict may not have succeeded in purchasing the handgun from the dealer had the dealer properly requested identification from the purchaser as required under federal regulations, the court found that a jury question existed concerning the dealer's liability. *Id.; see* 27 C.F.R. § 178.124(c) (1985) (requiring that licensed dealer obtain certification from purchaser that federal law does not prohibit purchaser from buying firearm before completing transaction).

90. *See* Adkinson v. Rossi Arms Co., 659 P.2d 1236, 1239 (Alaska 1983) (criminal misuse of handgun is not foreseeable); Hulsman v. Hemmeter Dev. Corp., 65 Hawaii 58,____, 647 P.2d 713, 721 (1982) (same); Robinson v. Howard Bros. of Jackson, Inc., 372 So.2d 1074, 1076 (Miss. 1979) (same); *supra* note 88 (precedent establishes criminal use of handgun as superseding cause precluding manufacturer liability).

91. *See supra* notes 88-90 and accompanying text (courts view criminal acts as superseding causes that break causal link between product's design and injury to plaintiff).

92. *See* Note, *supra* note 56, at 485-86 (jury balances risks and utilities of handgun once plaintiff demonstrates causal link between handgun's design and injury to plaintiff).

93. *Barker,* 20 Cal.3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

94. *See Barker,* 20 Cal.3d at 431, 573 P.2d at 456, 143 Cal. Rptr. at 238 (once plaintiff has made prima facie showing of proximate cause, defendant has burden of proving that utilities of product outweigh risk of harm); Birnbaum, *supra* note 63, at 605-06 (same).

95. *Compare* P. SHIELDS, *supra* note 2, at 49-59 (arguing that handgun's useful purposes are minimal compared to societal cost of harm produced by handguns) *and* Brzeczek, *Law Enforcement Perspectives on Utility of Handguns,* 6 HAMLINE L. REV. 333, 334-40 (1983) (handguns are not sufficiently useful for home protection to justify risks of harm to community) *with* Santarelli & Calio, *supra* note 4, at 479-81 (social utility of handguns for self protection

facturers and distributors might meet the burden of proving that the utility of handguns outweighs any risk to society.[96] In enacting statutes to regulate the possession and sale of firearms, state legislatures have excluded from the statutes' operation uses of handguns for target shooting, hunting, business protection, and law enforcement purposes.[97] Manufacturers and distributors might argue successfully that enacted legislation that regulates the possession and sale of firearms and excludes certain uses from the statute's operation legitimizes the excluded uses.[98] The manufacturers and distributors may argue, therefore, that the legislature has determined that for the excluded uses, the utility of handguns outweigh the risk of harm to society.[99]

Despite the refusal by American courts to hold handgun manufacturers and distributors liable to victims of handgun crime under an abnormally dangerous activity or unreasonably dangerous product theory, a new theory of strict liability, based upon the classification of a handgun as a Saturday Night Special, may gain popularity due to the Maryland Court of Appeals' decision in *Kelley v. R.G. Industries, Inc.*[100] The facts in *Kelley* typify the circumstances surrounding handgun manufacturer litigation initiated across

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and sport outweigh any risks to society posed by handguns). *See generally* Hardy, *Legal Restriction of Firearm Ownership as an Answer to Violent Crime: What was the Question?* 6 HAMLINE L. REV. 391, 391-92 (1983) (as early as 1353, nations have addressed the issue of handgun control in light of concealability of handguns by criminals).

96. *See* Mavilia v. Stoeger Industr., 574 F. Supp. 107, 111 (D. Mass. 1983) (enactment of comprehensive handgun licensing provisions by state is indication that majority of legislators believe that handguns have legitimate uses that exceed any risk of harm to society); Rhodes v. R.G. Industr., Inc., 173 Ga. App. 51, 52, 325 S.E.2d 465, 467 (1984) (same); Note, *supra* note 7, at 1915 (despite movement to ban handguns, legislative agreement exists that handguns have legitimate uses); *see also* MD. ANN. CODE art. 27, §§ 36B-36G (1982) (regulations governing wearing, carrying and transporting of handguns in Maryland excludes target shooting, hunting, business and home protection uses from statute's operation); MASS. GEN. LAWS ANN. ch. 269, § 12 (West 1970) (Massachusetts provision that bans variety of weapons does not include handguns).

97. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 29-35 (West 1975) (statute prohibiting carrying or wearing of handguns includes exceptions for law enforcement personnel, target shooters, and other persons with legitimate reason); MD. ANN. CODE art. 27, § 36B(c) (1982) (regulation governing wearing, carrying, and transporting of handguns excludes target shooting, hunting, business protection, and home protection uses from statute's operation); N.H. REV. STAT. ANN. § 159:6 (1977) (permit required to carry pistol, and town official can issue permit to persons legitimately desiring to hunt, target shoot or collect pistols).

98. *See* Kelley v. R.G. Industr., Inc., 304 Md. 124, 141-44, 497 A.2d 1143, 1151-53 (1985) (Maryland regulations governing wearing, carrying, and transporting of handguns legitimizes target shooting, hunting, law enforcement and protection uses for handgun by excluding those uses from regulations); Santarelli & Calio, *supra* note 4, at 479-81 (handguns useful for recognized purposes of target shooting, hunting, collecting, and self-defense); *Note, supra* note 7, at 1915 (noting legislative agreement that legitimate uses for handguns exist).

99. *See supra* notes 96-98 and accompanying text (discussing recognition by state legislatures of legitimate uses for handguns).

100. *See* 304 Md. 124, 144-59, 497 A.2d 1143, 1153-61 (1985) (recognizing new cause of action by victims of handgun crime against Saturday Night Special manufacturers and distributors).

the nation.[101] An armed robber shot Olen J. Kelley in the chest during a holdup of the grocery store in which Kelley was an employee.[102] A Rohm Revolver Handgun Model RG-38S, designed and marketed by Rohm Gesellschaft, a West German corporation, and assembled and initially sold by R.G. Industries, Inc., a Miami based subsidiary of Rohm Gesellschaft, discharged the damaging bullet.[103] Kelley survived the gunshot wound and brought suit in Maryland against the West German corporation and its American subsidiary.[104] Kelley alleged that the gun manufacturers were strictly liable for his injuries and claimed that the manufacture and distribution of the handgun constituted an abnormally dangerous activity.[105] Alternatively, Kelley asserted that the handgun used against him was an unreasonably dangerous product.[106] Rohm Gesellschaft moved to dismiss Kelley's action for failure to state a claim upon which relief could be granted.[107] Finding no controlling precedent in Maryland on the strict liability issues of the case, the United States District Court for the District of Maryland certified several questions to the Court of Appeals of Maryland.[108] Specifically, the Court of Appeals found that

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101. *See id.* at 128-29, 497 A.2d at 1144-45 (victim shot during armed robbery sued manufacturer and distributor of handgun used in crime against victim); *see, e.g.*, Perkins v. F.I.E. Corp., 762 F.2d 1250, 1252 (5th Cir. 1985) (person shot in barroom sued manufacturer and distributor of handgun used against him); Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1201-02 (7th Cir. 1984) (family of murder victim and survivor of criminal shooting sued manufacturer of handgun used by criminal); Patterson v. Gesellschaft, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985) (family of store clerk killed in armed robbery sued manufacturer of robber's handgun).

102. 304 Md. at 128, 497 A.2d at 1144. Olen Kelley had worked as the produce manager of a Safeway for eleven years before an armed robber shot Kelley. *See* Siegel, *Liability of Manufacturers for the Negligent Design and Distribution of Handguns,* 6 HAMLINE L. REV. 321, 321 (1983) (discussion of facts surrounding *Kelley* case by plaintiff's attorney in case). During those eleven years, armed robbers held up Kelley in the grocery store five times, each time the perpetrator utilizing a concealed handgun to commit the crime. *Id.*

103. 304 Md. at 128-29, 497 A.2d at 1144-45.

104. *Id.* at 129, 497 A.2d at 1145. Kelley originally sued the West German manufacturer and its American subsidiary in Maryland state court. *Id.* On motion to the state court, the American subsidiary removed the case to the United States District Court for the District of Maryland under the district court's diversity jurisdiction. *Id.* Upon stipulation by the parties, the American subsidiary later was dismissed from the action. *Id.*

105. *Id.; see supra* notes 16-52 and accompanying text (discussion of handgun manufacturers' liability under abnormally dangerous activity doctrine).

106. 304 Md. at 129, 497 A.2d at 1145; *see supra* notes 53-99 and accompanying text (discussing manufacturer liability for criminal use of handguns under products liability theory).

107. 304 Md. at 129, 497 A.2d at 1145; *see* FED. R. CIV. P. 12(b)(6) (dismissal for failure to state claim upon which relief can be granted).

108. 304 Md. at 128-31, 497 A.2d at 1144-46. The district court certified questions to the Court of Appeals of Maryland pursuant to the Uniform Certification of Questions of Law Act. *Id.; see* MD. CTS. & JUD. PROC. CODE ANN. §§ 12-601 to 12-609 (1984) (provisions permitting certification of questions by federal courts to Court of Appeals of Maryland). The Court of Appeals, however, rephrased the questions certified by the district court pursuant to a provision in the certification order. 304 Md. at 131, 497 A.2d at 1146. Although the certification order did not restrict the Court of Appeals to the question as phrased by the district court, the Court of Appeals may have ventured from the scope of the certification order. Dorr & Burch, *Saturday*

the certification order from the district court presented the following three questions: whether the manufacturer or marketer of a handgun generally is liable to a victim of the criminal use of a handgun under any strict liability theory, whether the manufacturer or marketer of a small, cheap handgun that one could characterize as a Saturday Night Special is liable to persons injured through the handgun's criminal misuse, and whether the handgun that fired the bullet injuring Olen Kelley was a Saturday Night Special.[109]

The *Kelley* court found that a plaintiff could not maintain an action in Maryland against a manufacturer or distributor of a handgun subsequently used in crime under an abnormally dangerous activity, unreasonably dangerous product, or other accepted theory of recovery.[110] The Court of Appeals of Maryland in *Kelley* explained, however, that even though Maryland courts would not hold handgun manufacturers liable for gunshot injuries resulting from the criminal use of their products under traditional strict liability theories, the common law is dynamic and can change to permit new actions when courts conclude that circumstances justify the actions.[111] Maryland courts will change the common law, however, only when the changes are consistent with public policy.[112] Because the Maryland legislature had enacted a comprehensive regulatory scheme concerning the carrying and transporting of handguns, and had excluded from the statute's operation the use of handguns by target shooters, hunters, business owners, and persons deemed

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Night Fever, 15 THE BRIEF, Winter 1986, at 10, 13-14. The questions certified by the district court related only to the permissibility of a cause of action in Maryland under either an abnormally dangerous activity or an unreasonably dangerous product theory. 304 Md. at 129-31, 497 A.2d at 1145-46. The Court of Appeals rephrased the certified questions raising the questions concerning Saturday Night Specials sua sponte. 304 Md. at 131, 497 A.2d at 114; *see* Dorch & Burr, *supra,* at 14 (arguing that *Kelley* court answered questions beyond issues certified to court). The rephrasing of the questions to include the issue of strict liability against Saturday Night Special manufacturers and distributors occurred after oral argument in the Court of Appeals. Dorch & Burr, *supra,* at 14. The court heard no oral argument on the issue, received no briefs on the subject of Saturday Night Specials, and did not disclose that the court was considering a cause of action based upon the categorizing of a handgun as a Saturday Night Special until the court rendered the *Kelley* decision. *Id.*

109. 304 Md. at 131, 497 A.2d at 1146; *see id.* at 132-38, 497 A.2d at 1146-50 (discussing certified questions); *infra* notes 110-205 and accompanying text (Kelley court recognized cause of action in strict liability against Saturday Night Special manufacturers and distributors and suggested considerations for classifying handguns as Saturday Night Specials).

110. *See* 304 Md. at 133-34, 497 A.2d at 1147 (denying strict liability recovery under abnormally dangerous activity theory because court found that manufacture and distribution of handguns was not land-related activity); *id.* at at 134-38, 497 A.2d at 1147-50 (denying strict liability recovery under unreasonably dangerous product theory because court found no defect in handgun that criminal used to shoot plaintiff); *see also supra* notes 16-52 and accompanying text (discussing inapplicability of abnormally dangerous activity doctrine in suits against manufacturers and distributors of handguns subsequently used in crime); *supra* notes 53-99 and accompanying text (unreasonably dangerous product theory provides no relief to victim of handgun crime).

111. *See* 304 Md. at 140-41, 497 A.2d at 1150-51 (courts must adjust common law to reach fair and just solutions to pressing societal problems).

112. *Id.* at 141, 497 A.2d at 1151.

to have a substantial need to carry a handgun,[113] the *Kelley* court determined that not all handgun usage is contrary to Maryland's public policy against transporting and carrying handguns.[114] In accordance with this finding, the *Kelley* court found that the imposition of general strict liability upon manufacturers of handguns for injuries sustained by victims of crime is not consistent with Maryland public policy.[115]

Although public policy generally does not support traditional strict liability against handgun manufacturers, the Maryland high court in *Kelley* found that a special category of handguns was beyond the protection of Maryland public policy.[116] In the view of the *Kelley* court, Maryland's public policy permitting the carrying and transporting of firearms that are useful for sporting, law enforcement, and protection purposes does not sanction the type of handgun commonly known as a Saturday Night Special, characterized by short barrels, light weight, concealability, low cost, cheap metal, poor manufacture, inaccuracy, and unreliability.[117] The court in *Kelley* found that Saturday Night Specials are unfit for any use legitimized by the statutory exceptions to Maryland's legislation regulating the carrying and transporting of handguns.[118] According to the *Kelley* court, Saturday Night Specials have

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113. *See* MD. ANN. CODE art. 27, §§ 36B-36G (1982) (excluding hunting, target practice, home and business protection uses of handguns from statute regulating wearing, carrying, and transporting of handguns in Maryland). The Maryland General Assembly enacted a statute regulating the carrying, wearing, and transporting of handguns because of an alarming increase in the number of violent crimes perpetrated in Maryland. MD. ANN. CODE art. 27, § 36B(a)(i) (1982). The Maryland General Assembly found that a large percentage of the violent crimes in Maryland involved the use of handguns and that regulations for the wearing, carrying, and transporting of handguns were necessary to preserve the peace and to protect the rights and liberties of Maryland's citizens. *Id.* at § 36B(a)(i), (iv).

114. 304 Md. at 141-44, 497 A.2d at 1151-53.

115. *See id.* at 144, 497 A.2d at 1153 (rejecting recovery against handgun manufacturers for misuse of product under traditional strict liability theories because of state legislature's recognition of legitimate uses for handguns).

116. *See id.* (Maryland public policy permitting some limited carrying, wearing, and transporting of handguns does not protect Saturday Night Specials because people do not use Saturday Night Specials for legitimate purposes).

117. *Id.* at 144-46, 497 A.2d at 1153-54. Saturday Night Special is the term given to inexpensive handguns that predominate in crime in poor neighborhoods. Cook, *The "Saturday Night Special": An Assessment of Alternative Definitions from a Policy Perspective,* 72 J. CRIM. L. & CRIMINOLOGY 1735, 1736 (1981). Saturday Night Specials generally are handguns made of cheap metals and typically are small, low calibre pistols. *Id. See generally* Bruce-Briggs, *The Great American Gun War,* 45 PUB. INTEREST 37, 50 (1976) (discussing origin of term Saturday Night Special).

118. 304 Md. at 153-55, 497 A.2d at 1157-58; *see* MD. ANN. CODE art. 27, § 36B(c) (1982) (excluding hunting, target shooting, business and home protection uses of handguns from statute regulating carrying, wearing, and transporting handguns in Maryland); *see also Proposed Amendments to the Gun Control Act of 1968 to Prohibit the Sale of "Saturday Night Special" Handguns: Hearings on S. 2507 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary,* 92nd Cong., 1st Sess. 315 (1971) (testimony of Maxwell Rich, Executive Vice President of National Rifle Association) (Saturday Night Specials have no sporting purpose because these handguns frequently are poorly made) [hereinafter cited as

presented special problems for law enforcement officials and are virtually useless for the legitimate purposes of law enforcement, hunting, target practice, or the protection of homes or businesses.[119] Moreover, the Maryland court stated that Saturday Night Specials are most valuable to criminals, primarily because of the low cost and concealability of the weapon.[120] Because Maryland had a statute making it a separate crime to use a handgun in the perpetration of crime,[121] the *Kelley* court concluded that Saturday Night Specials have no legitimate purpose and that, therefore, public policy considerations present no bar to the imposition of strict liability against manufacturers and distributors of Saturday Night Specials.[122]

The *Kelley* court determined that congressional action was in accord with the court's finding that Maryland's public policy permitting the carrying, wearing, and transporting of firearms for legitimate uses does not cover Saturday Night Specials.[123] The *Kelley* court determined that congressional action in the Gun Control Act of 1968,[124] together with the continuing

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Saturday Night Special Hearings]; id. at 109-10 (testimony of Geoffrey Alprin, General Counsel of Metropolitan Police Department, Washington, D.C.) (Saturday Night Specials often misfire, fire accidentally, backfire and are inaccurate at short distances).

119. 304 Md. at 144-46, 497 A.2d at 1153-54; *see* H.R. REP. No. 1577, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 4410, 4415 (Congress designed import restrictions in Gun Control Act of 1968 to stop importation of small, cheap weapons that pose major law enforcement problems). Saturday Night Specials pose difficult law enforcement problems because the handguns generally are manufactured from soft, inexpensive metal. *Saturday Night Special Hearings, supra* note 118, at 109-10 (statement of Geoffrey Alprin, General Counsel of Metropolitan Police Department, Washington, D.C.). Because manufacturers often make Saturday Night Specials from soft metal, criminals easily can scratch off serial numbers making the tracing of these weapons impossible. *Id.* Also, the firing of a Saturday Night Special alters the soft metal of the handgun's bore, making ballistics examinations much more difficult. *Id.*

120. 304 Md. at 154, 497 A.2d at 1158; *see* Cook, *supra* note 117, at 1740-42 (price and size are two most important characteristics of handgun to criminals).

121. MD. ANN. CODE art. 27, § 36B (1982).

122. 304 Md. at 154-55, 497 A.2d at 1158.

123. *Id.* at 147-53, 497 A.2d at 1154-57; *see infra* notes 124-28 and accompanying text (discussing federal policy against importation of Saturday Night Specials).

124. 18 U.S.C. §§ 921-28 (1982). The Gun Control Act of 1968 and regulations issued by the federal government concerning firearms importation currently disallows the importation of handguns that are not "readily adaptable to sporting purposes." 18 U.S.C. § 925(d)(3) (1982). Although the language in the Gun Control Act of 1968 specifically does not refer to Saturday Night Specials, the effect of the statute is that distributors may not import Saturday Night Specials manufactured outside the United States because the Bureau of Alcohol, Tobacco, and Firearms has found that Saturday Night Specials have no sporting purpose. *Id.; see* H.R. REP. No. 1577, 90th Cong., 2d Sess. (main purpose of import restrictions in Gun Control Act of 1968 is to stop importation of cheap, small weapons that cause major law enforcement problems), *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 4410, 4415. The federal statute, however, does not prohibit the importation of parts for Saturday Night Specials that American companies easily can assemble and sell in American markets. *Saturday Night Special Hearings, supra* note 118, at 132 (testimony of Eugene Rossides, Assistant Secretary of the Treasury); *see* Note, *Common-Law Approach, supra* note 5, at 791 (loophole in Gun Control Act of 1968 permits importation of Saturday Night Special parts).

regulation of handguns by the Department of Treasury's Bureau of Alcohol, Tobacco and Firearms,[125] has identified a distinct category of handguns that, because of their characteristics, courts may treat differently.[126] The *Kelley* court found that Congress enacted the Gun Control Act of 1968 to ban importation of Saturday Night Specials because Congress found that these firearms lack legitimate value for any recognized use because of the poor quality of the handguns.[127] Accordingly, the *Kelley* court determined that Saturday Night Specials were beyond the protection of any federal public policy allowing the importation and purchase of firearms for legitimate uses.[128]

The Court of Appeals in *Kelley* maintained that manufacturers and distributors of Saturday Night Specials ought to know that their products have little or no legitimate purpose and that people will use the product primarily in criminal activity.[129] Although recognizing that no other jurisdiction had distinguished Saturday Night Specials from other handguns when considering a shooting victim's strict liability claims against a handgun manufacturer, the *Kelley* court determined that Maryland courts could find a manufacturer or distributor strictly liable to a victim of a Saturday Night Special because Saturday Night Special manufacturers and distributors ought to know that people use their products principally in the perpetration of crime.[130] The court, in fact, asserted that officials at R.G. Industries had recognized the market for the particular type of handguns they produced.[131]

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125. 27 C.F.R. § 178 (1985).

126. 304 Md. at 147-48, 497 A.2d at 1154-55.

127. *Id.* at 152, 497 A.2d at 1157; *see* S. REP. No. 1097, 90th Cong., 2d Sess. (Saturday Night Specials were target of Gun Control Act of 1968 because Saturday Night Specials are unsafe and lack legitimate uses), *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2164-67; H.R. REP. No. 1577, 90th Cong., 2d Sess. (main purpose of import restrictions in Gun Control Act of 1968 is to stop importation of cheap, small weapons that cause major law enforcement problems), *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 4410, 4415.

128. 304 Md. at 154-55, 497 A.2d at 1158.

129. *Id.* at 155, 497 A.2d at 1158-59; *see also infra* notes 130-35 and accompanying text (discussing *Kelley* court's finding that Saturday Night Special manufacturers ought to know that people use their products principally in criminal activity); *infra* notes 164-205 and accompanying text (questioning *Kelley* court's findings that Saturday Night Special manufacturers and marketers ought to know that people use their products principally in criminal activity).

130. 304 Md. at 156, 497 A.2d at 1159. Although no other court had distinguished Saturday Night Specials from other handguns when the *Kelley* court was considering the certification order, courts have hinted that a court might make a distinction between Saturday Night Specials and other handguns. *See* Patterson v. Gesellschaft, 608 F. Supp. 1206, 1210 (N.D. Tex. 1985) (court recognized handgun used to injure plaintiff as Saturday Night Special but found that plaintiff's arguments applied equally to other handguns and, therefore, denied recovery); Mavilia v. Stoeger Industr., 574 F. Supp. 107, 110 n.2 (D. Mass. 1983) (although denying strict liability recovery to family of innocent bystander killed by gunshot, court suggested that Saturday Night Specials have features that may bring product within doctrine of strict liability or breach of warranty).

131. 304 Md. at 155, 497 A.2d at 1158; *see* Brill, *The Traffic (Legal and Illegal) in Guns,* HARPER'S, Sept. 1977, at 40 (discussing comments of R.G. Industries official made after author deceived official by claiming to be dealer in handguns); *infra* notes 164-73 and accompanying text (discussing alleged statements of R.G. Industries official).

Citing a Michigan case that recognized a cause of action against a slingshot manufacturer because the court believed that the manufacturer had marketed the slingshots to children and possibly could foresee injuries resulting from misuse,[132] the *Kelley* court concluded that Saturday Night Special manufacturers can foresee that purchasers will use the handguns in the perpetration of crime.[133] Apparently to emphasize the foreseeability of the criminal use of Saturday Night Specials, the Maryland court added that, as between a shooting victim and a Saturday Night Special manufacturer, a manufacturer is more culpable for a gunshot wound resulting from criminal activity.[134] Accordingly, the *Kelley* court reasoned that the circumstances surrounding the criminal use of small, inexpensive, and poorly crafted handguns warranted the imposition of strict liability upon manufacturers and distributors of Saturday Night Specials.[135]

Upon finding that Maryland courts properly could impose strict liability upon a manufacturer or distributor of a Saturday Night Special, the Court of Appeals of Maryland in *Kelley* attempted to explain the criteria for determining whether a handgun was a Saturday Night Special.[136] Initially, the *Kelley* court noted that no precise definition of a Saturday Night Special existed.[137] The Court of Appeals, however, listed several considerations that are relevant in classifying handguns as Saturday Night Specials. According to the Maryland court, relevant considerations in determining whether a handgun is a Saturday Night Special include the barrel length of the handgun, concealability, cost, quality of materials and manufacture, accuracy, and reliability.[138] Also, in the view of the Maryland Court of Appeals, courts should consider whether the Bureau of Alcohol, Tobacco, and Firearms has banned the importation of the particular model of handgun as well as the industry standards and the perception of the particular handgun by law enforcement officials, legislators, and the public.[139]

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132. 304 Md. at 156, 497 A.2d at 1158; *see* Moning v. Alfano, 400 Mich. 425, 446-49, 254 N.W.2d 759, 769-70 (1977) (finding that jury question existed concerning toy slingshot manufacturer's liability to child injured through another child's misuse of slingshot); *infra* notes 177-85 and accompanying text (discussing *Moning*).

133. 304 Md. at 155-56, 497 A.2d at 1159.

134. *Id.*

135. *Id.* The *Kelley* court found that the increasing number of deaths and injuries due to handguns warranted the imposition of strict liability on manufacturers and distributors of Saturday Night Specials because manufacturers make these products for criminal activity. *Id.*

136. *Id.* at 157-59, 497 A.2d at 1159-60; *see infra* notes 137-43 and accompanying text (*Kelly* court's suggested considerations in determining whether handgun is Saturday Night Special).

137. 304 Md. at 155, 497 A.2d at 1159; *see* Hardy, *supra* note 95, at 401 (term "Saturday Night Special" is incapable of definition); *see also* Cook, *supra* note 117, at 1736-42 (attempting to define Saturday Night Specials and recognizing that most definitions are inadequate).

138. 304 Md. at 155-56, 497 A.2d at 1159-60; *see* Cook, *supra* note 117, at 1736 (congressional bills proposing ban of Saturday Night Specials have suggested that law base definition of Saturday Night Specials on price, size, calibre, quality, reliability and lack of sporting purpose).

139. 304 Md. at 155-56, 497 A.2d at 1159-60. The Department of Treasury, Bureau of

The *Kelley* court emphasized that classifying a handgun as a Saturday Night Special is a factual question for the jury and that courts rarely should label a handgun a Saturday Night Special as a matter of law.[140] The court explained that before sending the question of a handgun's classification to the jury, the plaintiff in an action against a handgun manufacturer or distributor first must make a prima facie showing to the court that the handgun that fired the injuring bullet possessed qualities characteristic of a Saturday Night Special.[141] For this purpose, the *Kelley* court explained that the size and barrel length of the firearm alone are not sufficient.[142] Should a plaintiff meet the preliminary showing that the handgun contains qualities characteristic of a Saturday Night Special, a jury must decide whether the handgun in question is a Saturday Night Special.[143] If a jury categorizes a particular handgun as a Saturday Night Special, the jury may impose liability upon a manufacturer for injuries sustained by the plaintiff, so long as the shooting was a criminal act in which the plaintiff did not participate.[144] The

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Alcohol, Tobacco and Firearms, has the power under the Gun Control Act of 1968 to ban the importation of particular handguns and to publish a list of handguns that does not meet the Bureau's guidelines set out in "Factoring Criteria for Weapons," BATF Form 4590. *See* 18 U.S.C. § 925(d) (1982) (providing that Commissioner of Department of Treasury has power to issue regulations concerning sale of firearms); 27 C.F.R. § 178 (1985) (regulations of Bureau of Alcohol, Tobacco and Firearms concerning sale of firearms and ammunition); BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, DEP'T OF TREASURY, PARTIAL LIST OF FOREIGN PRODUCTS NOT AUTHORIZED FOR IMPORTATION INTO THE UNITED STATES (1985) (listing of handguns that distributors may not import).

140. 304 Md. at 159, 497 A.2d at 1160. The *Kelley* court suggested several considerations that the trier of fact should address in the analysis of whether the handgun that fired the bullet that injured Olen Kelley was a Saturday Night Special. *Id.* at 159-61, 497 A.2d at 1160-61. For instance, the trier of fact should consider the reputation of R.G. Industries as the foremost manufacturer of Saturday Night Specials in America, the fact that the Bureau of Alcohol, Tobacco and Firearms has listed the company as marketing products that do not meet acceptable standards for handgun importation, and the statements of witnesses before congressional committees that have characterized Rohm handguns as "junk" and as weapons without any sporting purpose. *Id.* at 157-60, 497 A.2d at 1159-61. Other considerations include the short length of the barrel, the selling price of $35 to $55, the similarity of the weapon to handguns previously banned for importation, and studies on handguns used in crime that identify Rohm handguns as among the poorest quality handguns made. *Id.; see* Patterson v. Gesellschaft, 608 F. Supp. 1206, 1210 (N.D. Tex. 1985) (noting that Rohm .38 calibre handgun criminally used to injure plaintiff was Saturday Night Special).

141. 304 Md. at 158, 497 A.2d at 1160.

142. *Id.* The *Kelley* court noted that size and barrel length are not sufficient to establish a preliminary showing that a handgun possesses qualities characteristic of Saturday Night Specials because non-uniformed law enforcement officials and other persons with legitimate reasons sufficient to warrant a permit may carry small, short barrelled handguns. *Id.* According to the *Kelley* court, small, short barrelled handguns used for legitimate uses by authorized personnel are not Saturday Night Specials, and a court properly should not allow a jury to consider whether these handguns are Saturday Night Specials. *Id.*

143. *Id.*

144. *Id.* As the *Kelley* court explained, potential claimants might include intended victims of crime, innocent bystanders unintentionally shot by criminals, and law enforcement officials or others who intervene to aid a victim or to apprehend the criminal. *Id.* at 159 n.20, 497 A.2d at 1160 n.20.

Kelley court further held that handgun manufacturers could not fend off liability by asserting a defense of contributory negligence or assumption of the risk and that a jury could award any damages consistent with established tort law against a manufacturer, distributor, or other party in the marketing chain, including the retailer.[145]

The Court of Appeals of Maryland in *Kelley,* in answering the questions certified by the federal district court, established a new action in strict liability that Maryland victims of handgun crime can use against Saturday Night Special manufacturers.[146] Although the *Kelley* court did not classify the action as a particular type of strict liability theory, the new cause of action recognized by the *Kelley* court arguably is a cause of action arising under an unreasonably dangerous product theory, asserting a design defect in the product.[147] The design defect of a Saturday Night Special, in light of the *Kelley* court's reasoning in establishing the cause of action against Saturday Night Special manufacturers and distributors, is that the design permits and encourages the criminal use of the product.[148] Arguably, a plaintiff establishes that a defective design exists by demonstrating to the court that the handgun manufacturer and distributor ought to know that purchasers of their products would use the handguns primarily in the perpetration of crime.[149] Under the scheme set out in *Kelley,* all manufacturers and distributors of Saturday Night Specials ought to know that purchasers use their products principally in the perpetration of crime and, therefore, handgun victims or their families will win in a strict liability action upon establishing that the handgun used to injure the victim was a Saturday Night Special.[150]

Although several commentators support the imposition of strict liability upon manufacturers and distributors of handguns used in crime, few commentators expressly have recommended basing liability on categorizing handguns as Saturday Night Specials.[151] Commentators have questioned the

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145. *Id.* at 158-59, 497 A.2d at 1160.

146. *See id.* at 144-62, 497 A.2d at 1152-62 (establishing strict liability cause of action against manufacturers and distributors of Saturday Night Specials).

147. *See infra* notes 148-50 and accompanying text (describing new cause of action in Maryland against manufacturers and distributors of Saturday Night Specials).

148. *See id.* at 154-57, 497 A.2d at 1158-59 (finding that chief value of Saturday Night Special is for criminal activity and that Saturday Night Special manufacturers and distributors know or ought to know that people use their products principally in perpetration of crime).

149. *See id.* (finding that courts could hold Saturday Night Special manufacturers and distributors liable to victims of handgun crime because Saturday Night Special manufacturers and distributors know or ought to know that people will use their products principally for criminal activity).

150. *See id.* (Saturday Night Special manufacturers and distributors are liable to innocent persons who suffer gunshot injuries from criminal use of their products because manufacturers and distributors know or ought to know that their products have no legitimate uses and that people most likely will use their products in criminal activity).

151. *See* Turley & Harrison, *Strict Tort Liability of Handgun Suppliers,* 6 HAMLINE L. REV. 285, 308 (1983) (arguing that courts should hold handgun manufacturers and distributors

workability of the proposed definitions of Saturday Night Specials and have asserted that most of the definitions lack predictability, or are either over-reaching or under-reaching in defining a distinct class of substandard handguns.[152] Some even have questioned whether a distinct category of inexpensive, poorly crafted handguns actually exists.[153] The *Kelley* court recognized the problems inherent in a definition of a Saturday Night Special, yet the Maryland court was unwilling to permit manufacturers to flood American markets with handguns that have no legitimate uses, without the manufacturers paying for what the court found were foreseeable societal costs.[154] Accordingly, the Maryland Court of Appeals left to the jury the final determination of the categorization of a handgun as a Saturday Night Special, after the plaintiff makes a prima facie showing to the court that the handgun possesses qualities characteristic of Saturday Night Specials.[155] If the short barrel and small size of the handgun do not suffice to meet the threshold showing, as the opinion in *Kelley* instructs, the handgun's qualities that will suffice to establish a prima facie case that the handgun is a Saturday Night Special are not clear.[156] At least one commentator has suggested that con-

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liable to victims of handgun crime under unreasonably dangerous products theory); Note, *A Shot at Stricter Controls: Strict Liability for Gun Manufacturers,* 15 PAC. L.J. 171, 185-87 (1983) (same); *cf.* Patterson v. Gesellschaft, 608 F. Supp. 1206, 1210 (N.D. Tex. 1985) (although denying recovery to victim shot by criminal using Saturday Night Special, court suggested that arguments tailored only to Saturday Night Specials as distinct class of handguns might succeed); Mavilia v. Stoeger Industr., 574 F. Supp. 107, 110 n.2 (D. Mass. 1983) (although denying strict liability recovery to family of innocent bystander killed by gunshot, court suggested that Saturday Night Specials have features that may bring product within doctrine of strict liability or breach of warranty); Note, *Common-Law Approach, supra* note 5, at 799 (courts could find that Saturday Night Specials, as distinct class of handguns, contain design defects permitting strict liability recovery against manufacturers and distributors).

152. *See* Cook, *supra* note 117, at 1736-39 (arguing that traditional definitions of Saturday Night Specials are not workable because definitions fail to focus on characteristics most important to criminals); Hardy, *supra* note 95, at 401-02 (term "Saturday Night Special" is incapable of definition, and distributors easily could circumvent proposed definitions based on metal quality and price of handgun).

153. *See* Cook, *supra* note 117, at 1736 (defining Saturday Night Specials based upon whether handgun has legitimate purpose or is safe may yield empty category); Hardy, *supra* note 95, at 402 (distributors of handguns easily could circumvent label of Saturday Night Special under any of proposed definitions by raising their product's price or by using a higher grade of metal).

154. *See* 304 Md. at 157-61, 497 A.2d at 1159-61 (Saturday Night Special manufacturers and distributors may be strictly liable to persons injured by the handguns because the handguns lack any legitimate function).

155. *Id.* at 159, 497 A.2d at 1160. Arguably, a jury properly should not determine whether a handgun is a Saturday Night Special because allowing a jury to classify a handgun on an ad hoc basis does not allow manufacturers or distributors to anticipate the classification of their products. Dorr & Burch, *supra* note 108, at 14. If a legislature enacted the procedure allowing juries to classify handguns as Saturday Night Specials, the legislation might violate due process and equal protection by failing clearly to proscribe conduct sufficient to allow a person to regulate his conduct. *See id.* (arguing that *Kelley* court performed legislative functions yet acted inappropriately for legislative body by not providing safeguards for persons affected by action).

156. *See* 304 Md. at 158, 497 A.2d at 1160 (court should not allow jury to consider whether

cealability is one of two characteristics that most ably identify a Saturday Night Special because criminals desire concealability to gain the element of surprise and also to protect the handgun from police confiscation.[157] The other characteristic important to criminals, the low price of a handgun, is important in defining a Saturday Night Special because persons who could not afford a handgun otherwise commit a highly disproportionate share of crime.[158]

The Maryland Court of Appeals in *Kelly* found that certain handguns virtually are useless for legitimate purposes.[159] The *Kelley* court arguably erred, however, in finding that Maryland's public policy of permitting the carrying, wearing, and transporting of firearms for legitimate uses did not include Saturday Night Specials.[160] The Maryland General Assembly at least twice has rejected proposals to distinguish Saturday Night Specials from other handguns and ban their use.[161] By specifically refusing to ban Saturday Night Specials, arguably, the Maryland General Assembly recognized that Saturday Night Specials have at least some legitimate uses.[162] Any finding by a Maryland court to the contrary may constitute a usurpation of legislative functions.[163]

Although the *Kelley* court's finding that manufacturers and distributors of Saturday Night Specials ought to know that purchasers will use the firearms in the perpetration of crime has some merit, the authority cited by the Maryland court was weak.[164] First, in support of the finding that Saturday

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handgun was Saturday Night Special unless plaintiff makes prima facie showing that handgun has characteristics of Saturday Night Special beyond handgun's small size and short barrel); *see also infra* notes 157-59 and accompanying text (concealability of handgun is one of two characteristics that most ably may identify Saturday Night Specials).

157. *See* Cook, *supra* note 117, at 1740-42 (because concealability and availability are characteristics of handguns most important to criminals, court should base definition of Saturday Night Special on size and price); Note, *Common-Law Approach, supra* note 5 at 791 (Saturday Night Specials are attractive to criminals because of concealability and low price).

158. Cook, *supra* note 117, at 1740-41.

159. *See* 304 Md. at 154, 497 A.2d at 1158 (finding that Saturday Night Specials are unfit for legitimate uses); *supra* note 119 (Saturday Night Specials lack legitimate uses because these products are too unreliable and inaccurate).

160. *See* Dorr & Burch, *supra* note 108, at 12 (arguing that legislative action in Maryland indicates that Saturday Night Specials do not comprise distinct category of handguns that courts can treat differently).

161. *See* Md. H. 891, 1982 Sess. (proposing ban of Saturday Night Specials); Md. H. 122, 1976 Sess. (same); *see also* Dorr & Burch, *supra* note 108, at 12 (arguing that Maryland General Assembly's refusal to pass proposed bans on Saturday Night Specials indicates that Maryland legislators do not believe Saturday Night Specials comprise distinct category of handguns that courts can treat differently).

162. *See supra* note 161 (Maryland General Assembly has rejected proposed ban on Saturday Night Specials).

163. Dorr & Burch, *supra* note 108, at 14-15 (*Kelly* court overstepped bounds of judicial function and wrongly performed legislative function of policymaking in controversial social issue).

164. *See infra* notes 165-85 and accompanying text (arguing that authority cited by *Kelley* court in finding that Saturday Night Special manufacturers and distributors ought to know that

Night Special manufacturers and distributors ought to know that purchasers will use their products primarily in criminal activity, the *Kelley* court relied on a magazine article that contained alleged statements of an R.G. Industries official.[165] Allegedly, the R.G. Industries official admitted that the company's products sell well in ghetto areas, presumably high crime neighborhoods.[166] The statements of the R.G. Industries officials, even if true, only support a finding that R.G. Industries may have known that purchasers use R.G. Industries products principally in criminal activity or that persons living in ghetto neighborhoods often buy R.G. Industries products for protection.[167] The statements do not support a finding that all manufacturers and distributors of handguns that juries reasonably could label Saturday Night Specials ought to know that purchasers use their handguns primarily in criminal activity.[168] Moreover, the same article also included additional information about R.G. Industries products that does not support the *Kelley* court's conclusion.[169] The same R.G. Industries official that the *Kelley* court quoted estimated that R.G. Industries sold 350,000 handguns in 1975.[170] According to the article, criminals used R.G. Industries handguns in approximately 30,000 murders, robberies, and assaults in 1975.[171] Using the data provided by the article, purchasers used only eight and one-half percent of all R.G. Industries handguns sold in 1975 in the perpetration of crime.[172] The article relied on by the *Kelley* court, therefore, is not strong support for the conclusion that R.G. Industries or any other manufacturer and distributor ought to know that purchasers use their handguns principally in the perpetration of crime.[173]

In further support of the finding that Saturday Night Special manufacturers and distributors ought to know that purchasers use their products

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people use their products primarily for criminal activity was weak); *see also* Dorr & Burch, *supra* note 108, at 14 (*Kelly* court relied primarily on anecdotal materials and hearsay sources to support imposition of strict liability on Saturday Night Special manufacturers and distributors).

165. *See* 304 Md. at 155, 497 A.2d at 1158 (citing *Harper's* Magazine article as support for finding that R.G. Industries officials know that handguns they produce are cheap and sell well in high crime areas); Brill, *supra* note 131, at 40 (alleged statements of R.G. Industries official indicates knowledge of manufacturers that company's handguns are poorly made and attractive in ghetto neighborhoods).

166. Brill, *supra* note 131, at 40.

167. *See id.* (alleged statements of R.G. Industries officials refer only to handguns of R.G. Industries).

168. *Id.*

169. *See infra* notes 170-72 and accompanying text (magazine article cited by *Kelley* court supports view that people do not use R.G. Industries handguns principally in criminal activity).

170. *See* Brill, *supra* note 131, at 41 (R.G. Industries official admitted that company sold 350,000 handguns in American markets in 1975).

171. *Id.* at 42.

172. *See id.* at 41-42 (citing sales and criminal use statistics for R.G. Industries handguns).

173. *See supra* notes 170-72 and accompanying text (arguing that figures for R.G. Industries handguns sold and number of R.G. Industries handguns used in crime do not support *Kelley* court's findings).

primarily in the perpetration of crime, the *Kelley* court cited a student law review article, which concluded that most Saturday Night Specials are, in fact, used in crime.[174] The law review article cited by the *Kelley* court attributes the conclusion that people most often use a Saturday Night Special for criminal purposes to a statement by Senator Edward Kennedy supporting congressional legislation to ban the sale of Saturday Night Specials.[175] The congressional record, however, does not contain any statement of Senator Kennedy that directly supports the article's conclusion.[176]

The *Kelley* court also offered the Michigan Supreme Court's decision in *Moning v. Alfano*[177] as support for the *Kelley* court's finding that Saturday Night Special manufacturers and distributors ought to know that purchasers most often use their products in the perpetration of crime.[178] In *Moning,* the Michigan Supreme Court found that a jury question existed concerning the liability of a manufacturer of ten-cent slingshots to an injured bystander because the Michigan court concluded that a jury reasonably could find that misuse of the product by children was foreseeable.[179] Courts have questioned the extension of the *Moning* decision to products marketed to anyone but children.[180] One court also has questioned the extension of the *Moning* decision to other states because the Michigan Supreme Court decided the case by a three-two vote with two justices not participating.[181] Moreover, a California court considering a similar action by a child injured under substantially the same circumstances as in *Moning,* refused to impose strict liability upon the manufacturer or distributor.[182] According to the California

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174. 304 Md. at 154-56, 497 A.2d at 1158-59; *see* Note, *Common-Law Approach, supra* note 5, at 791-92 (arguing that Saturday Night Specials are useless except to criminals and that people most often use Saturday Night Specials for criminal purposes).

175. *See* Note, *supra* note 5, at 791 n.124 (citing remarks of Sen. Kennedy as support for conclusion that purchasers most often use Saturday Night Specials in criminal activity).

176. *See* 127 CONG. REC. § 7118, 7119 (1981) (statement of Sen. Kennedy) (record is void of any assertion by Sen. Kennedy that people most often use Saturday Night Specials in criminal activity). Senator Kennedy has stated that many criminals rely on Saturday Night Specials in perpetrating crime and that Saturday Night Specials are meant to maim or kill. *Id.*

177. 400 Mich. 425, 254 N.W.2d 759 (1977).

178. 304 Md. at 156, 497 A.2d at 1159.

179. 400 Mich. at 446-49, 254 N.W.2d at 769-70.

180. *See* Riordan v. International Armament Corp., 132 Ill. App.2d 642,____, 477 N.E.2d 1293, 1296 (1985) (*Moning* decision did not support plaintiff's claim that injury from marketing of handguns was foreseeable because court found *Moning* decision limited to products marketed directly to children); Linton v. Smith & Wesson, 127 Ill. App.3d 676,____, 469 N.E.2d 339, 340 (1984) (court found that *Moning* decision did not support plaintiff's claim that manufacturer had duty to control distribution of handguns because *Moning* decision limited to products marketed directly to children); *see also* Note, *supra* note 7, at 1920 (*Moning* decision not accepted universally and not easily extended).

181. *See* Linton v. Smith & Wesson, 127 Ill. App.3d 676,____, 469 N.E.2d 339, 340 (1984) (questioning precedential value of *Moning* outside of Michigan).

182. *See* Bojorquez v. House of Toys, Inc., 62 Cal. App.3d 930, 933, 133 Cal. Rptr. 483, 484 (1976) (rejecting recovery to child injured by toy slingshot in suit against slingshot's manufacturer and distributor). In *Bojorquez v. House of Toys, Inc.,* a child injured another

court, because imposing strict liability on the toy slingshot manufacturer or distributor would result in a ban on toy slingshots in California by judicial fiat, the court properly must leave the decision to ban toy slingshots to the California legislature.[183] A further problem exists in the *Kelley* court's reliance upon *Moning* because the Michigan Supreme Court in *Moning* relied on risk/utility analysis to impose liability upon the manufacturer although the slingshot that fired the injuring projectile did not malfunction.[184] The *Kelley* court, in an earlier portion of its decision, had rejected risk/utility analysis in situations in which the product in question did not malfunction.[185]

Despite the shortcomings that the opinion in *Kelley* arguably contains, other authority adds some support for the finding that Saturday Night Special manufacturers and distributors ought to know that purchasers use their products principally for criminal purposes.[186] A 1976-1977 study conducted by the United States Department of Justice surveyed police departments in Boston, Chicago, and Washington, D.C. to determine the characteristics of weapons used in crime that police had confiscated.[187] Of significant importance was the Department of Justice's findings that more than two-thirds of all handguns used in each category of violent crime surveyed, including homicides, robberies, and assaults, were handguns with a barrel length of three inches or less.[188] This finding is important because less than half of all handguns manufactured or imported in 1974 had barrel lengths of three inches or less,[189] and at least one commentator has pointed out that two-thirds of all handguns in the cities surveyed likely were not

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child when a projectile from a toy slingshot hit the second child. *Id.* at 933, 133 Cal. Rptr. at 484. The parents of the injured child sued the marketer and manufacturer of the toy slingshot claiming that the manufacturer and distributor of the toy slingshot was strictly liable because the injury to the child was foreseeable. *Id.*

183. *Id.* at 933, 133 Cal. Rptr. at 484.

184. *See Moning*, 400 Mich. at 446-49, 254 N.W.2d at 767-70 (invoking risk/utility analysis to test plaintiff's negligent distribution claim against toy slingshot manufacturer although slingshot performed without malfunction).

185. *See* 304 Md. at 138, 497 A.2d at 1149 (rejecting risk/utility analysis when product that is subject of products liability claim has not malfunctioned).

186. *See infra* notes 187-98 and accompanying text (asserting that some authority was available to support *Kelley* court's holding).

187. *See* BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, U.S. DEP'T OF JUSTICE, CONCENTRATED URBAN ENFORCEMENT: AN ANALYSIS OF INITIAL YEAR OF OPERATION CUE IN THE CITIES OF WASHINGTON, D.C., BOSTON, MA., CHICAGO, IL. 96-98 (1977) (study of guns confiscated by police departments in three metropolitan areas from February 1976 to May 1977) [hereinafter cited as CONCENTRATED URBAN ENFORCEMENT].

188. *See id.* at 96-98. In the District of Columbia, of the handguns seized by police, 67% of homicide handguns, 65% of robbery handguns, and 69% of assault handguns had barrel lengths of three inches or less. *Id.* In Chicago, handguns with barrel lengths of three inches or less comprised 73% of homicide handguns, 72% of robbery handguns, and 76% of assault handguns seized by police. *Id.* In Boston, handguns with barrel lengths of three inches or less comprised 61% of homicide handguns, 60% of robbery handguns, and 76% of assault handguns seized by police between February 1976 and May 1977. *Id.*

189. Cook, *supra* note 117, at 1743.

handguns with barrel lengths of three inches or shorter.[190] Therefore, handguns with short barrels are involved in a disproportionately high amount of violent crime in several major cities.[191]

The Department of Justice study also included data concerning the retail price of the weapons confiscated by police in the three urban areas surveyed.[192] Approximately forty percent of all handguns seized retailed for less than fifty dollars.[193] Although comprehensive data is not available concerning the percentage of handguns that sell for less than fifty dollars at retail, handguns that retail for less than fifty dollars likely do not comprise forty percent of the handgun market.[194] The low price of Saturday Night Specials suggests that manufacturers and distributors ought to know that purchasers more often use these handguns in criminal activity than handguns retailing at a higher price.[195] According to several commentators, persons who ordinarily could not afford an expensive handgun commit a disproportionate share of violent crimes.[196] Handguns marketed at a low price, therefore, bear an increased likelihood that purchasers will use the handguns in connection with criminal activity.[197] Although the *Kelly* court's support for the finding that Saturday Night Special manufacturers ought to know that their products have no legitimate use and are attractive only to criminals was weak, the Maryland court's conclusion was not wholly unsubstantiated.[198]

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190. *See id.* (handguns of three inches or less likely did not comprise two-thirds of handguns in cities surveyed by federal study).

191. *See* CONCENTRATED URBAN ENFORCEMENT, *supra* note 187, at 96-98 (finding that two-thirds of all handguns confiscated by police for involvement in homicides, robberies, and assaults were handguns with barrel length three inches or less); Cook, *supra* note 117, at 1743 (small handguns predominate in violent crime in urban areas).

192. *See* CONCENTRATED URBAN ENFORCEMENT, *supra* note 187, at 96-98 (finding that nearly 40% of handguns seized by police in 1976-77 in Washington, D.C., Chicago, and Boston retailed for less than $50).

193. *Id.*

194. *See* Cook, *supra* note 117, at 1743-44 (no data available concerning number of handguns that sell for less than $50); W. JARRETT, SHOOTER'S BIBLE 100-69 (1986) (of handguns listed, including R.G. Industries handguns, few retail used or new for under $50); S. LEWIS, GUN DIGEST'S BOOK OF MODERN GUN VALUES 12-96 (4th ed. 1983) (same); R. QUERTERMOUS & S. QUERTERMOUS, MODERN GUN VALUES 336-446 (5th ed. 1985) (same).

195. *See* Cook, *supra* note 117, at 1740 (arguing that low price of Saturday Night Specials permit purchase by persons who are most likely to use handgun in criminal activity and generally unable to purchase expensive handgun).

196. L. CURTIS, CRIMINAL VIOLENCE 119-51 (1974) (asserting that persons with lower incomes commit disproportionate share of violent crime); Cook, *supra* note 117, at 1740 (arguing that low price of Saturday Night Specials permit purchase by persons who are most likely to use handgun in criminal activity and generally unable to purchase expensive handgun).

197. *See* Cook, *supra* note 117, at 1740 (arguing that setting high minimum price for handguns effectively would reduce availability of handguns to groups of persons most likely to use handguns in criminal activity).

198. *See* Teret & Wintermute, *Handgun Injuries: The Epidemiologic Evidence for Assessing Legal Responsibility*, 6 HAMLINE L. REV. 341, 350 (1983) (handgun manufacturers and distributors are chargeable with knowledge of epidemiological data demonstrating foreseeability of harm caused by criminal use of handguns); *see also supra* notes 188-97 and accompanying text

A major objection to the *Kelley* court's opinion is that the creation of a cause of action in strict liability against Saturday Night Special manufacturers and distributors will result in a ban of Saturday Night Specials by judicial fiat.[199] Some commentators suggest that a court properly should not allow strict liability recovery against manufacturers and distributors of handguns subsequently used in crime because only the legislature should act on political questions such as the utility or disutility of handguns.[200] Contrary to the arguments disfavoring a judicial ruling on the value of handguns, some courts and commentators suggest that a ban of handguns is not the necessary product of a finding of strict liability against a manufacturer or distributor of a handgun used in crime.[201] Instead, a finding of strict liability may permit handguns to retail at their "real" price, the price that accounts for the societal cost of the handguns.[202] The argument is that the price of handguns will reflect the cost to society in lost labor, exorbitant medical expenses, and increased law enforcement expenses only if manufacturers and distributors are liable to victims of handgun crime.[203] Instead of discontinuing the

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(asserting that results of Department of Justice study adds support to *Kelley* court's claim that Saturday Night Special manufacturers ought to know that people use their products principally in criminal activity).

199. *See* Dorr & Burch, *supra* note 108, at 12 (by subjecting Saturday Night Special manufacturers to strict liability for intentional criminal use of their products, *Kelley* court establishes ban of Saturday Night Specials by judicial fiat); *cf.* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1269 (5th Cir. 1985) (finding of strict liability for criminal use of handguns would result in ban of handguns by judicial fiat); Patterson v. Gesellschaft, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985) (same); Mavilia v. Stoeger Industr., 574 F. Supp. 107, 111 (D. Mass. 1983) (same).

200. *See* Patterson v. Gesellschaft, 608 F. Supp. 1206, 1216 (N.D. Tex. 1985) (emotional issue of handgun control is properly addressed only by legislature); Rhodes v. R.G. Industr., Inc., 173 Ga. App. 51,____, 325 S.E.2d 465, 467 (1984) (court is powerless to recognize cause of action against handgun manufacturer for wrongful death without legislative mandate); *see also* Dorr & Burch, *supra* note 108, at 14-15 (asserting that *Kelley* court wrongfully acted as legislative body by recognizing cause of action against Saturday Night Special manufacturers and distributors); Santarelli & Calio, *supra* note 4, at 505-06 (shifting liability for injuries resulting from handgun crime is legislative issue beyond courts' authority); Note, *supra* note 7, at 1924-27 (judiciary is ill-equipped to resolve handgun abuse problem).

201. *See* Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1206 (7th Cir. 1984) (Cudahy, J., concurring) (asserting that imposition of strict liability on manufacturers of handguns used in crime is not attempt to ban handguns by judicial fiat); Note, *supra* note 151, at 184 (asserting that finding of strict liability will not place undue hardship on handgun distributors because liability will force manufacturers to produce better handguns to protect distributors from liability).

202. *See* Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1206 (7th Cir. 1984) (Cudahy, J., concurring) (arguing that imposition of strict liability is not attempt to ban handguns but effort to place inherent costs of handguns on users rather than victims); Note, *Manufacturers' Strict Liability for Handgun Injuries: An Economic Analysis,* 73 GEO. L.J. 1437, 1438 (1985) (imposition of strict liability on handgun manufacturers and distributors would force rise in retail price of handguns to reflect true cost of handguns to society).

203. *See* Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1206 (7th Cir. 1984) (Cudahy, J., concurring) (marketing of handguns presents duty to marketer to bear costs of doing business, including compensation to innocent victims); Note, *supra* note 202, at 1453-62

production and distribution of handguns, manufacturers and distributors may raise the price of their products to reflect their increased insurance premiums and legal fees.[204] In turn, the higher price of the handguns may make handguns less affordable to criminals.[205]

Courts properly cannot hold manufacturers and distributors of handguns strictly liable to persons injured through the criminal use of their products under either an abnormally dangerous activity or traditional products liability theory.[206] Based upon the *Kelley* decision, however, Maryland courts now recognize an action against Saturday Night Special manufacturers and distributors because of their products' attractiveness to criminals and because no legitimate uses for the handguns exist.[207] The new cause of action in Maryland provides relief to a victim of a criminal shooting if a jury determines that the weapon was a Saturday Night Special.[208] The probable success of a claim under this new cause of action is clouded, however, because the precise definition of a Saturday Night Special remains unclear.[209] Although some courts object to expanding strict liability concepts if the innovation likely will cause a judicial ban of a product, the Maryland Court of Appeals' decision in *Kelley* may prompt the Maryland legislature to address the problems posed by small, inexpensive firearms in the hands of criminals.[210] The Maryland Court of Appeals' solution to the problems posed by Saturday Night Specials is to impose strict liability upon those parties responsible for placing the distinct class of handguns on the streets.[211]

(imposition of strict liability on handgun manufacturers will raise price of handguns adequately to reflect full costs of buying and using handguns).

204. *See* Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1206 (7th Cir. 1984) (Cudahy, J., concurring) (consumers ultimately will bear cost associated with producing and marketing handguns if courts impose strict liability on handgun manufacturers and distributors); Note, *supra* note 202 at 1458 (strict liability appropriately may force purchasers of handguns to pay more, enabling manufacturers and distributors of handguns to insure against potential criminal use of their products).

205. *See* Cook, *supra* note 117, at 1740 (increasing price of handguns is effective means of reducing availability of handguns to criminals).

206. *See supra* notes 16-52 and accompanying text (rejecting strict liability claims against manufacturers and distributors of handguns subsequently used in crime under abnormally dangerous activity theories); *supra* notes 53-99 and accompanying text (rejecting strict liability claims against manufacturers and distributors of handguns subsequently used in crime under unreasonably dangerous products theory).

207. 304 Md. at 144-61, 497 A.2d at 1153-61; *see supra* notes 100-205 (discussing *Kelley* court's recognition of cause of action against Saturday Night Special manufacturers and distributors).

208. 304 Md. at 157-59, 497 A.2d at 1159-60.

209. *See supra* notes 151-58 and accompanying text (*Kelly* court did not provide clear guidelines for classifying handgun as Saturday Night Special).

210. *Cf.* CAL. CIV. CODE § 1714.4 (West 1985) (providing that courts cannot find that manufacturer defectively designed handgun based upon finding that risks of firearm outweigh social utility); Note, *supra* note 151, at 171 (California Legislature enacted CAL. CIV. CODE § 1714.4 (West 1985) in response to risk/utility test for design defects described in *Barker v. Lull Eng'g Co.).*

211. *See* 304 Md. at 144-61, 497 A.2d at 1153-61 (establishing strict liability cause of action

Although the *Kelley* court proffered weak evidence to support the finding that Saturday Night Special manufacturers and distributors ought to know that purchasers use Saturday Night Specials principally in criminal activity, courts properly can charge the manufacturers and distributors with knowledge of the injuries inflicted with their products.[212] Unless and until the state legislatures or Congress decides to adopt legislation that addresses the problem posed by cheap, concealable handguns, by banning the sale of Saturday Night Specials or otherwise, American courts properly should consider holding Saturday Night Special manufacturers and distributors strictly liable for injuries resulting from products that the manufacturers design and market principally for criminal use.[213] Any theory of liability devised by a court to hold manufacturers and distributors of handguns liable for the use of their products in criminal activity, however, requires a better legal foundation than that proffered by the *Kelley* court.[214]

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against Saturday Night Special manufacturers and distributors); *supra* notes 100-205 and accompanying text (discussing *Kelley* court's recognition of cause of action against Saturday Night Special manufacturers and distributors).

212. *See* Teret & Wintermute, *supra* note 198, at 350 (arguing that abundance of studies linking firearms with tremendous health impact allows court to charge handgun manufacturers and distributors with knowledge and foreseeability of criminal activity); *supra* notes 164-85 and accompanying text (arguing that *Kelley* court's support for finding that purchasers most often use Saturday Night Specials in criminal activity was weak).

213. *See supra* notes 118-19 and accompanying text (Saturday Night Specials are useless for legitimate uses and are attractive to criminals).

214. *See supra* notes 165-85 and accompanying text (authority cited by *Kelley* court in finding that Saturday Night Special manufacturers and distributors ought to know that people use their products principally for criminal activity was weak).