

TOY GUN MANUFACTURERS: A NEW TARGET FOR NEGLIGENT MARKETING LIABILITY

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I. INTRODUCTION

Modern American history chronicles the 1990s and 2000s as decades imbued with high-profile violent events that left a wide wake of injury, maiming and death.¹ Throughout the years between 1990 and 2010, public exposure highlighted brutalities occurring across the United States. The decade's deadly incidents poignantly portrayed by the media, the mass of violent acts receiving less media attention, particularly youth offender violence, and the spread of violent crime from the city centers to the suburbs and rural areas² prompted health experts to increasingly characterize violence in the 1990s as a "public health epidemic."³ Unfortunately, the decade that followed ushered in the 21st century with little in the way of inoculation against crime. The century began with the unimaginable events of 9/11 and a new era in high-profile violence. With the world watching, America endured the terrorists' attacks in Washington, D.C., New York and Pennsylvania, and America experienced a new dimension of vulnerability.

It is, therefore, not surprising that the tragic outcomes of two decades of expansive media coverage of extreme violence energized both gun control advocates and second amendment proponents, intensifying an already heated gun control debate. Civil suits also grew in number as victims and survivors demanded accountability. Many plaintiffs targeted gun manufacturers more often as some companies' marketing strategies revealed intentional appeals to individuals with criminal intentions. Negligent marketing theory provided a novel legal approach directed at weapons manufacturers and distributors that achieved limited success.

Toy weapons unexpectedly began receiving increased attention during this time as well. As an unforeseen means of perpetrating crime, the production, sale and use of imitation guns grew in prevalence, in large part due to their accessibility and, in part, due to the significant swell in violent juvenile offenders. This article explores whether the negligent marketing theory may serve as a viable cause of action for establishing liability against toy gun manufacturers and distributors today for injuries suffered by gun purchasers and by third parties. Part I presents an overview of high-profile crime in the 1990s and 2000s and the attempts to hold gun manufacturers and distributors liable for deaths and injury resulting from guns. Part II introduces data concerning deaths and injuries related to toy weapons. This section also provides an overview of legislation addressing imitation guns. Part III examines the historical development of the negligent marketing theory and traces reported opinions of cases in which negligent marketing theory was employed. Before concluding, Part IV considers whether negligent marketing theory is a viable legal theory against toy gun manufacturers.

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¹ BARRY GLASNER, *SOCIOLOGY: EXPLORING THE ARCHITECTURE OF EVERYDAY LIFE* 20-31 (David M. Newman & Jodi O'Brien eds., Pine Forge Press 2008).

² Michael Epstein, *Crime Rate vs. Public Perception of Crime: An Analysis*, HELVIDIUS, Fall 1994, at 22-24.

³ D. FLANNERY & C. R. HUFF, *YOUTH VIOLENCE: PREVENTION, INTERVENTION, AND SOCIAL POLICY* (1998); M. L. ROSENBERG, P. O'CARROLL, & K. POWELL, *Let's Be Clear: Violence Is a Public Health Problem*. 267 J. OF THE AMERICAN MEDICAL ASS'N 3071, 3071-72 1992; M. L. ROSENBERG & M. A. FENLEY, *VIOLENCE IN AMERICA: A PUBLIC HEALTH APPROACH* (1991); DEBORAH PROTHROW-STITH, *DEADLY CONSEQUENCES* (1991).

II. BACKGROUND

A. High-Profile Violent Crime

The West Coast provided the setting for the South-Central Los Angeles riots,⁴ a community's reaction to the acquittal of the LAPD officers⁵ charged in the beating of Rodney King. On the East Coast, the world watched the coverage of the first terrorist bombing of the World Trade Center.⁶ New York also served as the setting for the Long Island Railroad Massacre during which six people died and nineteen more were injured.⁷ In Texas, the unsuccessful raid by federal authorities of the Branch Davidian compound in Waco⁸ received global television attention. Few escaped the discovery of the murders of Nicole Brown Simpson and Ronald Goldman⁹ in California, along with the moment-by-moment coverage of the double-

⁴ Seth Mydans, *Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, April 29, 1992, at A1. Reports indicated that almost no one, including the mayor of Los Angeles, expected a complete acquittal of the four LAPD officers accused in the beating of motorist Rodney King. After the verdict was announced on April 29, 1992, riots broke out in South-Central Los Angeles. Neighboring cities assisted Los Angeles emergency crews in responding to the thousands of emergency calls. Additionally, thousands of guardsmen, including 100 military police, were delayed in being deployed due, in part, to a shortage of ammunition. *Id.*

⁵ *Id.* After seven weeks of testimony, on April 29, 1992, a jury consisting of ten whites, one Asian and one Hispanic acquitted each of the four Los Angeles police officers accused of beating Rodney King during a traffic stop in March 1991. The charges against the policemen included assault with a deadly weapon, excessive use of force as a police officer, filing a false report and acting as an accessory after the fact.

⁶ Robert D. McFadden, *Explosion at the Twin Towers: Overview; Blast Hits Trade Center, Bomb Suspected; 5 Killed, Thousands Flee Smoke in Towers*, N.Y. TIMES, February 27, 1993, available at <http://www.nytimes.com/1993/02/27/nyregion/explosion-twin-towers-overview-blast-hits-trade-center-bomb-suspected-5-killed.html?scp=1&sq=1993+world+trade+center+bombing+February+27%2C+1993&st=cse&pagewanted=all>. Early reports of the February 26, 1993 bombing indicated that the explosion caused by a car bomb killed five, injured over 650, trapped hundreds in debris or in smoke-filled stairwells and elevators, and required the evacuation of over 50,000 people. The blast was felt a mile away and left much of the surrounding area without power. Authorities reported no warning of an attack and contemplated the possibility that the blast was an accident. *Id.*

⁷ Lawrence Mondt & David Thigpen, *Confronting the Killer*, TIME, April 3, 1995, available at <http://www.time.com/time/magazine/article/0,9171,982757,00.html>. On December 7, 1993, Colin Ferguson boarded a crowded commuter train at rush hour. Using a Ruger P89 9mm semi-automatic handgun, he opened fire on passengers. He was eventually overpowered by passengers as he stopped to reload his gun for the third time. During his trial, Ferguson fired his attorneys, choosing to represent himself. He was found guilty and sentenced to 200 years in prison. *Id.*

⁸ Joe Rosenbloom III, *Waco: More than Simple Blunders*, WALL STREET JOURNAL, October 17, 1995, available at <http://www.pbs.org/wgbh/pages/frontline/waco/blunders.html>. On February 29, 1993, the ATF proceeded with their raid of the Branch Davidian compound in Waco, Texas, even after learning that David Karesh and his followers had been tipped off. Four agents and five Davidian followers were killed in a fierce gun battle. After a 51-day standoff, the FBI raided the Branch Davidian compound which eventually burned killing 75 of the 84 present in the compound. The cause of the fire has been debated and a topic of controversy. It is believed that the Branch Davidians intentionally set fire to the compound. *Id.*

⁹ Police responded to a call by a passerby who found Nicole Simpson's body sprawled on the steps of a walkway in front of her townhouse shortly after midnight on June 13, 1994. Ronald Goldman was found a few feet away in the shrubbery. Both victims had been stabbed to death.

murder trial of Nicole's accused celebrity ex-husband, O.J. Simpson.¹⁰ In Oklahoma City, the bombing of the Alfred P. Murrah Federal Building reminded America that she remained capable of nurturing home-grown terrorists steadfast in their commitment to instilling fear and distributing destruction.¹¹

The Columbine High School massacre¹² in the affluent Denver suburb of Littleton, Colorado, failed to demonstrate the United States' articulated progress toward a "kinder, gentler nation."¹³ Nationally publicized reports of the decade's fourteen other school shootings dazed the nation and provided a crescendo in the disturbing realization of an unprecedented rise in youth offender violence.¹⁴ In fact, youth violence reached an all-time high in the 1990s.¹⁵ According to a report released by the U.S. Office of Juvenile Justice and Delinquency Programs, the number of violent crimes committed by juvenile offenders in 1994 was nearly 60% greater than the 24-year national average between 1980 and 2003.¹⁶ The last decade of the twentieth century also served witness to the nation's peak in adult offender violent crime rates, an unfortunate and overshadowing precursor for the historical decline in criminal violence that would follow.¹⁷

¹⁰ After over nine months of trial, it took less than five hours for the jury to acquit O. J. Simpson of the double murder charge resulting from the stabbing deaths of his former wife Nicole Simpson and her friend Ronald Goldman. The jurors, ten women and two men, delivered their verdict on September 29, 1995, responding that the lack of credible evidence formed the basis for their decision.

¹¹ David Johnston, *At Least 31 Are Dead, Scores Are Missing After Car Bomb Attack in Oklahoma City Wrecks 9-Story Federal Office Building*, N.Y. TIMES, April 20, 1995, at A1. In the most destructive act of terrorism on U.S. soil before September 11, 2001, the Oklahoma City bombing on April 19, 1995, claimed 168 lives, including 19 children under the age of six, and injured 680 more. Timothy McVeigh and his accomplices were motivated by hatred for the American government and angered by the events at the Branch Davidian compound in Waco, Texas, and the events at Ruby Ridge. *Id.*

¹² Mark Obmascik, *Bloodbath Leaves 15 Dead, 28 Hurt*, The Denver Post, April 21, 1999. Two masked students, heavily armed with bombs and guns, opened fire at Columbine High School on April 20, 1999. The two young men began targeting specific victims, particularly ethnic minorities and athletes, before randomly shooting other students and faculty. Fifteen people were killed, including the shooters, and nearly 20 others were seriously wounded. The two shooters left over 30 bombs and booby traps that were dismantled by police. *Id.*

¹³ President George H. W. Bush, Nomination Acceptance Speech at the Republican National Convention (August 18, 1988), available at <http://bushlibrary.tamu.edu/research/pdfs/rnc.pdf>. In his acceptance speech for the Republican nomination of President of the United States, George H. W. Bush announced his desire for a "kinder, gentler nation." *Id.* Again, on January 20, 1989, during his Inaugural Address, President Bush reminded the nation of his commitment to guiding America. "America is never wholly herself unless she is engaged in high moral principle. We as a people have such a purpose today. It is to make kinder the face of the Nation and gentler the face of the world. My friends, we have work to do." President George H. W. Bush, Inaugural Address (January 20, 1989), available at http://bushlibrary.tamu.edu/research/public_papers.php?id=1&year=1989&month=01.

¹⁴ HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 63-90 (Office of Juvenile Justice and Delinquency Programs March 2006).

¹⁵ *Id.*

¹⁶ HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 64 (Office of Juvenile Justice and Delinquency Programs March 2006).

¹⁷ See Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Reasons that Explain the Fall and Six that Do Not*, 18 J. OF ECON. PERSPECTIVES 163, 164-87 (Winter 2004).

Public outcry was loud, frequent and voluminous. Discussions of a culture of violence¹⁸ in America erupted, and the public began to more intensely question what affects graphically violent video games, films, television, and toy weapons were having on the nation's children.¹⁹ Grassroots movements grew and gained support for increased mandatory censorship of the violent influences existing in our society, through changes in both state and federal laws.

B. Early Attempts to Hold Private Sector Legally Accountable for Gun Violence

An additional outgrowth of the violence across the country was a somewhat frantic necessity to hold more people legally accountable in an attempt to stop the violence. Blame was lodged across a wide spectrum that encompassed both the public and private sectors, and civil lawsuits erupted. Desperate for accountability, many surviving victims, as well as the families of victims, of deadly incidents involving handguns began seeking civil redress by suing both handgun manufacturers and distributors.²⁰ Ironically, as the actual numbers of violent crimes began to drop there was a simultaneous rise in the number of civil lawsuits lodged against the handgun industry.²¹ The suits filed against gun manufacturers and sellers for the negligent marketing of firearms generally fell into one of two categories – either suits filed by victims or victims' family members, or actions prosecuted by public entities seeking to recover costs associated with gun violence. Few civil claims, however, were successful.

Government entities also sought solace in the judiciary through attempts to exert control over the gun manufacturers in the form of civil litigation. Money would provide the leverage for municipalities who sought to recoup expenditures from the gun manufacturers for gun-related governmental expenses, such as “costs of police protection, emergency services, police pensions, medical care, and lost tax revenue related to handgun violence.”²² Inspired by government agencies' lawsuits against tobacco companies, the City of New Orleans was the first municipality to seek recompense from the gun manufacturers.²³ Not far behind New Orleans, Chicago, Miami, Atlanta, Philadelphia, San Francisco, Los Angeles, St. Louis, Seattle, St. Paul, Cleveland, and Detroit all followed with their own causes of action against gun manufacturers.²⁴ The New Orleans, Atlanta and Miami suits challenged the way guns are manufactured rather than the way they are distributed.²⁵ These government subdivisions asserted that gun

¹⁸ See Jeremiah W. Nixon, *Juvenile Justice in a Culture of Violence*, 66 UNIV. OF MISSOURI KANSAS CITY L. REV. 489 (1998).

¹⁹ See, e.g., DEBORAH PROTHROW-STITH, *DEADLY CONSEQUENCES: HOW VIOLENCE IS DESTROYING OUR TEENAGE POPULATION AND A PLAN TO BEGIN SOLVING THE PROBLEM* (1991).

²⁰ See Megan O'Keefe, *NACP v. AcuSport: A Call for Change to Public Nuisance Law*, 70 BROOKLYN LAW REVIEW 1079 (2005).

²¹ *Id.*

²² Doug Morgan, Comment, *What in the Wide, Wide World of Torts Is Going On? First Tobacco, Now Guns An Examination of Hamilton v. Accu-Tek and the Cities' Lawsuits Against the Gun Industry*, 69 MISS. L. J. 521, 550 (1999).

²³ *Id.*

²⁴ Jon S. Vernick & Stephen P. Teret, *New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufacturers and Constitutional Challenges to Gun Laws*, 36 HOUSTON L. REV. 1713, 1745-46 (1999).

²⁵ Richard C. Ausness, *Tort Liability for the Sale of Non-Defective Products: An Analysis and Critique of the*

manufacturers should be doing more to ensure that their weapons are not misused by criminals or children by including trigger locks and “smart gun” technologies that permit only an owner to fire them.²⁶ Chicago, on the other hand, invoked a “public nuisance” theory, attempting to assign liability to those gun manufacturers who “create ‘an unreasonable interference with a right common to the general public.’”²⁷ The basis of the suit rested in the city’s claim that “threats to public safety, and the economic costs of gun-related violence caused by the marketing practices of gun manufacturers, constitute ... an interference with public rights.”²⁸ The government-sponsored suits were only marginally more successful than the actions brought by victims and their families.

Public concern has not been limited to manufacturers and distributors of handguns. Any contributor to what America perceived as an alarming escalation in violent crime, especially among youthful offenders, became a target for change. While video games, television programming and movies took center stage, these were quickly joined by toy or imitation weapons and the manufacturers and distributors of toy guns.²⁹ Seemingly innocuous, toy guns may now give birth to renewed challenges to the Second Amendment. Additionally, an increase in high profile crimes employing toy weapons could provide new life and a new arena for the negligent marketing theory born of the earlier failed suits against gun manufacturers in the 1990s.

III. COULD CULTURE BE A CULPRIT IN AMERICA’S VIOLENCE?

“[C]ulture becomes the culprit, responsible for the collective violence we perpetrate together against others.”³⁰

Concept of Negligent Marketing, 53 SO. CAR. L. REV. 907, 937 (2002).

²⁶ *Id.* at 937-38.

²⁷ *Id.* at 938.

²⁸ *Id.*; see also, Scott R. Preston, Comment, *Targeting the Gun Industry: Municipalities Aim to Hold Manufacturers Liable for Their Products and Actions*, 24 SO. ILL. U. L.J. 595, 603-05, 612-613 (2000). In *James v. Arms Technology, Inc.*, 359 N.J. Super. 291, 820 A.2d 27 (App. Div. 2003), allegations that gun manufacturers, distributors and retailers knew or reasonably should have foreseen risk of harm and severity of harm associated with illegal use of their products, knew of the existence of the illegal gun market, and should reasonably have foreseen resulting costs to government, supported the existence of a duty, for purposes of city’s negligence claim against manufacturers, distributors and retailers for flooding the gun market and failing to develop a reasonable distribution scheme. *Id.* See also, *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 2002 -Ohio- 2480, 768 N.E.2d 1136 (2002) (finding that City’s allegation that handgun manufacturers, trade associations, and handgun distributor failed to exercise reasonable care in designing, manufacturing, marketing, advertising, promoting, distributing, supplying, and selling their firearms without ensuring that the firearms were safe for their intended and foreseeable use by consumers stated a claim for negligence).

²⁹ See, Bureau of Justice Statistics, *Toy Guns: Involvement in Crime and Encounters with the Police* 1-6 (1990); United States General Accounting Office, *Use of Toy Guns* GAO-03-1135R (2003).

³⁰ Michael Harris Bond, *How Good People, Usually Men, Do Bad Things*, in ARE WE LOST IN TRANSLATIONS? ON INTERCULTURAL ENCOUNTERS IN TREATMENT OF COMPLEX TRAUMA AND PTSD 1, 2 (B. Drozdek & J. P. Wilson, eds., nd).

A. *Is There a Culture of Violence in America?*

The 1990s hosted an unprecedented peak in youth offender violence, a fact that in many ways shocked the nation. In the late 1990s and early 2000s, following the trend of adult crime juvenile crime began a decline. Unfortunately, in 2005, crimes committed by youth experienced a dramatic rise. In 2009, the Center for Disease Control released statistics addressing juvenile offenses.³¹ In the age group between 10 and 24 year olds, there were 5,958 murders in 2006, and homicide was the second leading cause of death.³² Nearly 85 percent of the youth who died were killed with a firearm.³³ In 2007, 18 percent of the youth reported carrying some form of a weapon and 5.2 percent carried a gun.³⁴ Also in 2007, over 1,000 juveniles were arrested for murder, over 3000 for rape, and over 57,000 for aggravated assault.³⁵ These statistics only begin to convey the magnitude of the problem presented by the nation's rise in violent juvenile offenses.³⁶

In 2009, Chicago topped the news headlines after a series of youth deaths occurred as a result of student-on-student violence in the first few weeks of school.³⁷ A decade earlier when violent crime was in decline, Missouri's Attorney General urged Missourians to work to change the culture of violence.³⁸ He stated that "[c]hanging this culture of violence is the challenge of our generation."³⁹ His call is, perhaps, even more meaningful today. There are many factors in our society that potentially influence what has been referred to as the "culture of violence" and its influence on our youth – television, movies, video games, and exposure to weapons and crime. This paper focuses specifically on toy and imitation weapons.

³¹ Center for Disease Control, Youth Violence, Facts at a Glance (Summer 2009).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ See, Alfred Blumstein, *Youth Violence, Guns, and the Illicit Drug Industry*, 86 J.CRIM.L. & CRIMINOLOGY 10 (1994); CENTERS FOR DISEASE CONTROL, FIREARM MORTALITY AMONG CHILDREN, YOUTH, AND YOUNG ADULTS 1 TO 34 YEARS OF AGE, TRENDS AND CURRENT STATUS: UNITED STATES 1985-1990 1 (1993); A. Kellerman, *Annotation: Firearm-Related Violence—What We Don't Know Is Killing Us*, 84 AM.J.PUB. HEALTH 541 (1994); NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, PRESENTATION: VIOLENCE PREVENTION (1994); C. Browning, *Handguns and Homicide: A Public Health Problem*, 236 JAMA 2198 (1976).

³⁷ Randall Pinkston, *Chicago Youth Murders Spur National Action*, CBS, October 7, 2009, available at <http://www.cbsnews.com/stories/2009/10/07/eveningnews/main5370043.shtml>.

³⁸ Jeremiah W. Nixon, *Juvenile Justice in a Culture of Violence*, 66 UNIV. OF MISSOURI KANSAS CITY L. REV. 489, 492 (1998).

³⁹ *Id.* at 42. He further admonished that "[c]hanging the culture of violence means more attention to safe school issues, gun-free school zones, violence on television, in the movies and on the video screens. Changing a culture of violence means providing violence-free environments and role models for our children. Changing a culture requires nothing less than a generational response. It is up to this generation of law enforcement officials and this generation of community leaders to join together to change this culture of violence."

B. Toy Guns

Deaths and serious injuries are real tragedies resulting from the use of hoax and imitation handguns. Whether displayed during play or employed to instill fear, brandishing toy weapons is credited with school suspensions, criminal detentions, arrests, bodily injuries, permanent physical disabilities, unnecessary deaths, school closings, hospital evacuations and airport evacuations.⁴⁰ The prevalence of actual crimes involving imitation weapons is unknown, and the records of incidents where imitation or toy guns were involved are scant. Notwithstanding the fact that insufficient information exists for providing a national perspective, adequate data exists suggesting the need for further inquiry into the role hoax and imitation handguns play in the commission of crimes, injury and deaths in the United States.⁴¹

In 1970, the State of New York led the nation enacting state-wide legislation regulating toy guns.⁴² Other states have since followed, and according to the National Conference of State Legislatures, between 1990 and June 2008, eleven states enacted 21 statutes regulating imitation or toy weapons, including replica handguns, BB guns, paintball guns, pneumatic weapons and toy hand grenades.⁴³ During the reported period, California enacted seven statutes addressing toy weapons⁴⁴ creating civil causes of action for violation of toy gun laws,⁴⁵ refining the definition of “dangerous weapon” to include toy guns,⁴⁶ restricting imitation weapons in airports,⁴⁷ and regulating other toy or replica weapons, such as hand grenades.⁴⁸ During the same period of time New Jersey enacted three pieces of legislation – restricting toy guns in schools,⁴⁹ creating misdemeanor sanctions,⁵⁰ and enhancing penalties to include felony sanctions.⁵¹ Pennsylvania adopted legislation prohibiting toy weapons in vehicles,⁵² and other states banned imitation weapons in public places.⁵³

The various pieces of legislation can be categorized generally into three primary areas of regulation. These include statutes addressing (1) types of toy or imitation weapons that may be subject to criminal penalties, (2) locations where toy and imitation weapons are prohibited or strictly regulated, and (3) types and degrees of sanctions related to misuse of toy and imitation weapons.

⁴⁰ International Health and Epidemiology Research Center, *Antiviolence Campaign Fact Sheet about Toy Guns*, 2008, available at http://www.irol.com/avc/Fact_Sheet_About_Toy_Guns.html.

⁴¹ United States General Accounting Office, *Use of Toy Guns* GAO-03-1135R (2003).

⁴² NY Gen Bus Law § 10-131 (1999).

⁴³ 2008 NAT’L CONF. OF ST. LEGISLATURES at 4.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 2008 NAT’L CONF. OF ST. LEGISLATURES at 4. Illinois also enacted legislation expanding Class 3 felonies to include criminal trespass in restricted areas and restricted landing areas of an airport while in possession of a replica weapon; see 2005 Ill. Laws 94-547 (2005).

⁴⁸ *Id.*

⁴⁹ *Id.*; New York also adopted legislation applying felony penalties for the possession of pneumatic guns on school properties, NY AB9235 (1994); Virginia modified its Gun-Free Schools statute to ban air rifles and BB guns from school properties and school-sponsored activities.

⁵⁰ *Id.*

⁵¹ 2008 NAT’L CONF. OF ST. LEGISLATURES at 4.

⁵² *Id.*

⁵³ *Id.*

Specific types of toy and imitation weapons included pneumatic weapons, BB guns, paintball guns, toy guns (both those that are designed to release a projectile as well as those that do not shoot a projectile), replica guns and toy hand grenades. New Jersey, New York, Oklahoma, Pennsylvania and Virginia adopted legislation specifically addressing pneumatic weapons.⁵⁴ California, Minnesota and Virginia enacted regulations concerning BB guns, and Delaware, Pennsylvania and Virginia addressed paintball guns. California, Illinois, Massachusetts, Oklahoma and Wisconsin all enacted statutes addressing toy guns and replica weapons. In addition to legislation specifically discussing toy hand grenades, California has in the last 18 years enacted three additional pieces of legislation defining weapons as they relate to criminal enterprises and including toy and replica weapons within those definitions.

Six states enacted statutes that prohibited or restricted possessing toy and replica weapons in airports, schools and automobiles. Particularly, Illinois and California both passed legislation prohibiting imitation firearms in airports.⁵⁵ New Jersey, New York and Virginia adopted laws restricting or prohibiting toy and replica guns on school properties or at school sponsored events.⁵⁶ Pennsylvania also passed legislation prohibiting imitation weapons in vehicles.⁵⁷

In the final category three states, California, New Jersey and New York, each passed two pieces of legislation defining types and degrees of sanctions related to misuse of toy and imitation weapons.⁵⁸ New Jersey and New York enacted statutes creating both misdemeanor and felony sanctions for violative uses of simulated firearms.⁵⁹ California, on the other hand, adopted two pieces of legislation specifically addressing civil sanctions for the misuse of toy and imitation weapons.⁶⁰

Further, during the 2007 and 2008 legislative sessions, lawmakers from 11 states considered 24 additional pieces of legislation.⁶¹ The proposed laws ranged from prohibiting imitation firearms in vehicles to banning toy weapons from convenience stores.⁶² Additionally, the bills considered whether toy weapons qualify as firearms,⁶³ whether enhanced criminal sanctions for brandishing imitation guns,⁶⁴ and whether the sale of toy weapons to minors should be prohibited.⁶⁵ Both New York⁶⁶ and New Jersey⁶⁷ proposed five pieces of legislation, followed by Florida⁶⁸, which introduced four bills for consideration. Other states considering new policies include California, Kansas, Massachusetts, and Michigan. Since 1990, twenty-one states have enacted legislation prohibiting or restricting toy weapons.

⁵⁴ Pneumatic guns are guns that use compressed air or gas to propel a projectile. *See*, VA. CODE ANN. §§ 15.2-915.2, *et. seq.* (2010).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ VA. CODE ANN. §§ 15.2-915.2, *et. seq.* (2010).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ VA. CODE ANN. §§ 15.2-915.2, *et. seq.* (2010).

⁶⁷ *Id.*

⁶⁸ *Id.*

C. *Incidents Involving Toy Guns*

Statistics related to the use of toy guns in the commission of a crime are not regularly kept. In part, this may be due to the fact that many states have adopted legislation that treats a toy or imitation weapon used in the commission of a crime the same as an actual firearm. Most states consider toy or imitation guns to be dangerous weapons when employed in criminal pursuits. Reports referring to unofficial statistics are informative and suggest that crimes involving toy weapons and deaths and injuries related to mistaken identity of toy guns are all on the rise and increasing in numbers.⁶⁹ What is available is some limited data related to reported injuries caused by toy guns.

The Center for Disease Control reported 167,417 injuries resulting from toy guns between 2000 and 2007.⁷⁰ In 2007 alone, 19,645 children and teens under the age of 19 suffered injuries related to toy guns.⁷¹ Unfortunately, many of the injuries related to imitation weapons have been fatal.

On August 31, 2008, an Inglewood Police Officer in Los Angeles shot and killed a homeless man who, police said, had a gun in his waistband. The gun turned out to be a silver toy pistol.⁷² In other incidents, the toy guns' orange safety tips had been painted black to make the guns appear more realistic.⁷³

On June 22, 2007, a 12-year-old West Memphis, Arkansas boy was shot and killed by a Memphis police officer because he was holding a gun in his hand. The police officer mistakenly believed the toy to be real.⁷⁴ In November 2006, St. Louis police officers shot and wounded a 13-year-old boy in the hip, leg, and arm. Officers reported that the young teen reached into his waistband and pointed a toy revolver at them. They mistook the toy for an actual weapon.⁷⁵

These are only a sampling of the thousands of incidents involving injuries related to toy or imitation weapons. With these types of incidents seemingly on the rise, it is not unlikely that there will be a corresponding increase in efforts to hold manufacturers and distributors liable for injuries. The potential for an increase in civil suits may offer fertile ground for the application of the negligent marketing theory liability.

IV. NEGLIGENT MARKETING THEORY

A. *Historical Development of Negligent Marketing Theory*

Historically, plaintiffs have looked to traditional strict liability principles to hold handgun manufacturers liable when their properly functioning products are used to kill or

⁶⁹ See, United States General Accounting Office, *Use of Toy Guns* GAO-03-1135R (2003).

⁷⁰ International Health and Epidemiology Research Center, *Antiviolence Campaign Fact Sheet about Toy Guns*, 2008, available at http://www.irol.com/avc/Fact_Sheet_About_Toy_Guns.html.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* (discussing suspension of five elementary school students in Southaven, Mississippi).

⁷⁴ *Id.*

⁷⁵ *Id.*

maim.⁷⁶ Courts, however, have consistently rejected plaintiffs' efforts to impose strict liability on gun manufacturers under both a risk utility analysis⁷⁷ and the abnormally dangerous activity theory.⁷⁸ Thus, plaintiffs were left to seek recovery by relying upon design defect and failure to warn theories.⁷⁹ In a strange sense of irony, courts rarely sustained design defect claims because the firearms performed as they were intended to perform.⁸⁰ Failure to warn actions met a similar fate because courts opined that gun-related hazards presented risks for which no warning was necessary.⁸¹

In the strict liability arena, plaintiffs asserting claims against gun manufacturers had little in their arsenal for support. Giving credence to the adage "necessity is the mother of invention," legal scholars and plaintiffs' attorneys developed a new fault-based theory of liability, negligent marketing, in response to the needs of the victims of handgun incidents.⁸² In his explanation of the negligent marketing theory, commentator Jay McClung⁸³ suggests that plaintiffs should return to the application of basic negligence principles in their efforts to hold handgun manufacturers liable for injuries resulting from the misuse of their products.⁸⁴ The theory of negligent marketing requires sellers to market their products in a manner that will not increase the products' inherent risks to consumers or third parties. "There are three categories of negligent marketing claims: (1) product designs that make the product more attractive to criminals; (2) advertising and promotional activities that target inappropriate users; and (3) product distribution practices that [encourage or] facilitate retail sales of dangerous products to vulnerable or unsuitable users."⁸⁵

In many instances, particularly for plaintiffs in suits against gun manufacturers, the advantages of the fault-based liability presented by negligent marketing theory are greater than the disadvantages.⁸⁶ The advantages to plaintiffs include, but are not limited to, "avoiding the Restatement's requirement that a product be defective, avoiding federal preemption of certain types of common law tort claims, and enabling plaintiffs to focus attention on the conduct of the defendant instead of the condition of the product."⁸⁷

It is, in fact, these advantages that first gave impetus to the possibility of applying negligent marketing theory to lawsuits against toy manufacturers. It seems that the advantages

⁷⁶ Andrew Jay McClung, *The Tortious Marketing of Handguns: Strict Liability Is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777, 778-79 (1995).

⁷⁷ The only judicial decision to impose strict liability upon a gun seller under the risk-utility analysis was *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143 (Md. 1985), but the Maryland legislature responded by enacting legislation prohibiting the imposition of strict liability upon firearm manufacturers or distributors. See MD. CODE ANN., CRIMES AND PUNISHMENTS § 36-1(H)(1)(1992).

⁷⁸ For a discussion of the history of strict liability suits against gun manufacturers see McClung, *supra*, note 64.

⁷⁹ Richard C. Ausness, *Tort Liability for the Sale of Non-defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 SO. CAR. L. REV. 907, 908 (2002).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*; see also, McClung, *supra* note 76.

⁸³ *Id.*

⁸⁴ *Id.* at 795-96.

⁸⁵ Richard C. Ausness, *Product Liability's Parallel Universe: Fault-Based Liability Theories and Modern Products Liability Law*, 74 BROOKLYN L. REV. 635, 645 (2009)(citations omitted).

⁸⁶ *Id.* at 654.

⁸⁷ *Id.*

available to plaintiffs against gun manufacturers would likewise be available to plaintiffs similarly harmed, but by conduct involving toy or imitation weapons. The theory seems particularly applicable to establishing liability against those who negligently market toy weapons to children and other vulnerable populations and also those who market toy weapons in a manner that facilitates their use in criminal pursuits. To date, no such legal action could be identified.

B. *Negligent Marketing Cases*

The first negligent marketing cases arose during the 1980s and involved defendants who were manufacturers of guns, ammunition or weapons accessories. The decisions in these cases mirrored the unsuccessful efforts of plaintiffs who sought to establish liability against gun manufacturers employing strict liability theories. As McClung declared, strict liability for handgun manufacturers was “dead, or at least in a deep sleep.”⁸⁸ The majority of the attempts to return to a more basic negligence approach against gun manufacturers can be seen in the 1990s; however, a total of 19 reported cases discuss the negligent marketing of firearms in the context of a new tort approach. Nine of those arose in the 1990s, and seven cases have been reported since 2000. Successes may be few when applied against actual gun manufacturers, but the following discussion reveals that negligent marketing liability may be more persuasive when used against toy gun manufacturers.

Negligent marketing claims against gun manufacturers were first reported in *Linton v. Smith & Wesson*,⁸⁹ in 1984. Linton, shot and injured during a tavern brawl, posited that Smith & Wesson as the gun manufacturer had “a duty to use ‘reasonable means to prevent the sale of its handguns to persons who are likely to cause harm to the public.’”⁹⁰ Linton’s reliance on *Semeniuk v. Chentis*⁹¹ and *Moning v. Alfonso*⁹² to support his suggestion of the existence of the gun manufacturer’s duty would not be persuasive.⁹³ The *Linton* court refused to find that the gun manufacturer owed a duty to control the distribution of its products at the retail level.⁹⁴

A year later, another group of Illinois plaintiffs attempted allegations of negligent marketing against firearms manufacturers and distributors, but the court found that *Linton* served as precedent in *Riordan v. International Armament Corporation*.⁹⁵ Riordan and the other plaintiffs had been victims of shootings by individuals using “Saturday Night Specials.”⁹⁶ Together, the plaintiffs argued that the “manufacturers and distributors were negligent in

⁸⁸ McClung, *supra* note 76.

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

⁹⁰ *Id.* at 340.

⁹¹ 117 N.W.2d 883 (Ill. App. Ct. 1954). The *Semeniuk* court held a retailer liable for selling an air-rifle to an adult and his seven-year-old son. *Id.* After determining that it should have been obvious to the seller that the rifle was purchased for the child, the court also concluded that it was clear the boy lacked sufficient judgment and experience to use the gun safely. *Id.* at 884.

⁹² 254 N.W.2d 759 (Mich. 1977). In *Moning*, a toy manufacturer who marketed toy slingshots directly to children faced a new trial after the Michigan Supreme Court held that the manufacturer owed a “legal obligation of due care to a bystander affected by the use of the product.” *Id.* at 772-775.

⁹³ *Linton*, 469 N.E.2d at 340.

⁹⁴ *Id.* The court recognized that “[n]o Illinois decision has imposed a duty upon the manufacturer of a non-defective firearm to control the distribution of that product to the general public....” *Id.* at 348-49.

⁹⁵ 477 N.E.2d 1293, 1298-99 (Ill. App. Ct. 1985).

⁹⁶ *Id.*

marketing its [sic] handguns to the general public without taking adequate precautions to prevent the sale of its' [sic] handguns to persons who were reasonably likely to cause harm to the general public."⁹⁷ The court failed to find merit in the plaintiffs' proposition that the defendants had an affirmative duty to ensure that unsuitable buyers were prevented from purchasing the "Saturday Night Specials."⁹⁸

"Saturday Night Specials" were, again, the subject of litigation in the Washington case of *Knott v. Liberty Jewelry & Loan, Inc.*⁹⁹ There, the plaintiff asserted that the handguns had no legitimate purpose,¹⁰⁰ were often used in crimes,¹⁰¹ and were known to pose a threat to the general public.¹⁰² Notwithstanding the plaintiff's efforts, the court refused to find that the defendants had any duty to warn retailers of the dangerous propensities of the weapons or any duty to provide retailers with guidelines that ensure the safe marketing of the handguns.¹⁰³ In so finding, the court affirmed the dismissal of Knott's negligence suit.¹⁰⁴

*First Commercial Trust Co. v. Lorcin Engineering, Inc.*¹⁰⁵ provides the next case in which negligent marketing theory was attempted against a gun manufacturer.¹⁰⁶ The victim was an Arkansas woman who was shot and killed by her psychopath ex-boyfriend Michael Leon Catlett.¹⁰⁷ Although a mentally disturbed young man who had been in and out of mental institutions, Catlett successfully purchased the Lorcin handgun from a local pawn shop three days before the shooting.¹⁰⁸ The victim's estate sued Lorcin and others alleging that the manufacturer was negligent in aggressively promoting and selling cheap handguns to individuals who would use the weapons to perpetrate criminal acts.¹⁰⁹ The Arkansas Supreme Court affirmed the judgment of the trial court concluding that the gun manufacturer owed no duty to protect a third party, such as the victim, against the criminal misuse of its product in the absence of a special relationship with the victim.¹¹⁰

⁹⁷ *Id.* at 1295.

⁹⁸ *Id.*

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

¹⁰⁰ *Id.* at 664.

¹⁰¹ *Id.*

¹⁰² *Id.*

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

¹⁰⁴ *Id.*

¹⁰⁵ 900 S.W.2d 202 (Ark. 1995).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 202-03.

¹⁰⁸ *Id.* at 203-04. After hearing evidence about Catlett's shooting of his former girlfriend while she sat in her car at a crowded intersection, the Arkansas jury rejected his insanity defense and found Catlett guilty of capital murder. Linda Satter, *Jury Takes Hour: Catlett Gets Life*, ARK. DEM. GAZETTE, Sept. 16, 1994, at 1A.

¹⁰⁹ *Lorcin*, 900 S.W.2d at 204.

¹¹⁰ *Id.* at 205. Professor David Stewart, Professor of Marketing at the University of Southern California was retained as an expert by the plaintiffs and asked to conduct a preliminary study to determine whether the Lorcin handgun was "being marketed to any identifiable group of consumers, and if that were being done pursuant to a recognizable product marketing plan." Affidavit of David W. Stewart, Robert E. Brooker Professor of Marketing in the College of Business Administration, University of Southern California, Los Angeles, Exhibit 1 to Plaintiff's Motion for Reconsideration fo Defendant Lorcin's Motion to Dismiss (filed Aug. 29, 1994), *noted in, McClung*, *supra* note 76. Professor Stewart concluded that the Lorcin handgun is being marketed to the very low end of the handgun market, with retail emphasis on high volume sales in pawn shops, cash-and-carry outlets, and the like in high-crime metropolitan areas. The emphasis on low price rather than quality and craftsmanship implies an avoidance, if not disdain, of traditional police, sporting and enthusiast markets. *Id.* at 4.

In 1993, Colin Ferguson opened fire using a semi-automatic weapon on a New York commuter train.¹¹¹ Six passengers died in the attack, and another nineteen people were wounded.¹¹² Several civil suits against the gun, ammunition and magazine manufacturers ensued.¹¹³ One such suit, *Forni v. Ferguson*,¹¹⁴ involved a negligent marketing lawsuit against the manufacturers of Ferguson's semi-automatic weapon, the magazines and the ammunition.¹¹⁵ The plaintiffs consisted of representatives of victims and victims who had been injured or killed after Ferguson opened fire on the Long Island Railroad commuter train.¹¹⁶ Plaintiffs asserted that the defendant manufacturers had a duty of care that required them to refrain from marketing such dangerous products to the general public.¹¹⁷ The court disagreed finding that the manufacturers were not liable for placing their products into the stream of commerce because they owed no duty to the plaintiffs to refrain from marketing non-defective, legal products.¹¹⁸

In another case whose genesis was also in the unfortunate events on the Long Island Railroad in 1993, the plaintiffs in *McCarthy v. Sturm, Ruger & Company*,¹¹⁹ named only the manufacturer of the specialized ammunition used by Ferguson.¹²⁰ The plaintiffs argued that the manufacturer of the Black Talon ammunition was negligent in marketing its product to the general public¹²¹ and that the company's advertisements emphasized the ammunition's destructive properties in a way that made the product unusually attractive to criminals.¹²² Further, the plaintiffs asserted that the manufacturer's duty to protect everyone who might be affected by its dangerous product arose upon the company's mere act of advertising the ammunition to the general public because its use by the criminal element was foreseeable.¹²³

The federal district court dismissed the plaintiffs' suit, rejecting the argument that duty could be based solely on the foreseeability of harm.¹²⁴ Additionally, the court noted its reluctance to impose a duty on the manufacturer to control the actions of another, such as Ferguson, in the absence of a special relationship that provided the manufacturer with control over the person's conduct.¹²⁵ In *McCarthy*, the court failed to find that such a special relationship between the ammunition manufacturer and Ferguson.¹²⁶ The court's reticence was also noted in its concern that imposing liability for negligent marketing would expose the

¹¹¹ See *Forni v. Ferguson*, 648 N.Y.S.2d 73 (App. Div. 1996); *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366 (S.D.N.Y. 1996), *aff'd sub. nom. McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997).

¹¹² *Id.*

¹¹³ *Id.*

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

¹¹⁵ *Id.*

¹¹⁶ *Id.* See also, *McCarthy*, 119 F.3d at 151.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 79-80.

¹¹⁹ *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366 (S.D.N.Y. 1996).

¹²⁰ *Id.* at 366-67. The hollow point bullets, marketed under the "Black Talon" trademark, were designed specifically to increase their destructive power. The manufacturer originally intended to restrict the sale of the specialized ammunition to law enforcement agencies. See *McCarthy*, 916 F. Supp. at 369.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *McCarthy*, 119 F.3d at 157.

¹²⁵ *Id.*

¹²⁶ *Id.*

manufacturer to almost unlimited liability and potentially drive a valuable product off the market.¹²⁷ The court concluded by suggesting that the legislature was the more appropriate authority to determine what products should be offered for or restricted from the general public's purchase.¹²⁸

McCarthy, however, continues to offer hope no matter how slight for the future of negligent marketing of toy guns, in part because the audience to whom the guns are marketed – children—do not have the same reasoning skills as adults and are entitled to heightened protection. Judge Guido Calabresi offered a dissenting opinion in which he noted that courts have long held manufacturers responsible for protecting others against the risk of their products.¹²⁹ While conceding that New York courts had not explicitly imposed a duty of care on manufacturers with respect to their marketing decisions, Judge Calabresi noted that “New York law recognizes that a defendant can be held liable for negligently marketing a product ... and there is no reason why that principle should not allow recovery against a manufacturer who introduces a harmful product into general circulation, where the social utility of marketing that product to the public is outweighed by its social utility.”¹³⁰

Furthermore, Judge Calabresi pointed out that recognized manufacturers' duties included those to bystanders and those associated with the misuse of their products.¹³¹

In 1997, after an attempted robbery at a New Jersey post office, victims and the families of victims wounded or killed during the commission of the crime brought yet another lawsuit against Olin Corporation, the manufacturer of the Black Talon ammunition.¹³² The facts in *Leslie v. United States*¹³³ revealed that the specialized hollow point bullets were used by the robber and contributed to the injuries and deaths that resulted.¹³⁴ According to the plaintiffs, Olin Corporation negligently marketed the specialized ammunition emphasizing the destructive characteristics of the bullets making the Black Talon ammunition particularly appealing to criminals.¹³⁵ The federal district court's findings are consistent with the earlier court decisions.¹³⁶ The court found no special relationship between the manufacturer and the purchaser of the ammunition that would enable Olin to prevent the purchasers' eventual criminal acts.¹³⁷ To impose a duty in such an impossible situation would be futile, according to the court.¹³⁸

¹²⁷ *Id.*

¹²⁸ *McCarthy*, 119 F.3d at 157.

¹²⁹ *Id.* at 162.

¹³⁰ *Id.* at 163-65. Judge Calabresi's analysis considered that the manufacturer's marketing of the Black Talon ammunition to the general public could be a breach of duty when the value of the product to the community is weighed against the immense destructive force of the ammunition. *Id.* at 163.

¹³¹ *Id.* at 166-67.

¹³² 986 F. Supp. 900 (D.N.J. 1997).

¹³³ *Id.*

¹³⁴ *Id.* at 902.

¹³⁵ *Id.* at 911. The plaintiffs also faulted Olin Corporation for failing to ensure that its retailers timely removed the ammunition from their shelves after the company made the decision to restrict sales to law enforcement agencies. *Id.*

¹³⁶ *Supra* note 132.

¹³⁷ *Id.* at 916.

¹³⁸ *Id.* at 913.

The first major success for negligent marketing liability against handgun manufacturers is found in *Hamilton v. Accu-Tek*.¹³⁹ Twenty-five gun manufacturers were named defendants in an action brought by one shooting survivor and the families of six people shot and killed by handguns.¹⁴⁰ The plaintiffs brought negligent marketing claims alleging that the gun manufacturers intentionally capitalized on the weapons black market providing youths and violent criminals with easy access to the defendants' lethal products.¹⁴¹ The plaintiffs asserted that the defendants accomplished this by oversupplying their weapons to states known to have less stringent gun restrictions with full knowledge that their guns would be transported eventually to states with greater restrictions and sold illegally through an underground market.¹⁴² The plaintiffs argued against fierce opposition that the defendant manufacturers had a duty to market and distribute the weapons in a manner that would minimize the possibility that the guns would fall into the hands of individuals, including children and adolescents, who might use the lethal products to commit crimes.¹⁴³

The defendants, on the other hand, raised the issue of causation pointing to the fact that the plaintiffs were unable to sufficiently demonstrate which product caused which injury.¹⁴⁴ In addition, the manufacturers vehemently defended that they owed no duty to protect shooting victims from the criminal acts of third parties.¹⁴⁵ United States District Judge Jack Weinstein disagreed with the defendants finding instead that the manufacturers had an affirmative duty to market their products in a reasonable and prudent manner.¹⁴⁶ He also allowed the plaintiffs to establish causation through a market share liability approach, relieving them of the obligation of satisfying which weapon was responsible for which injury.¹⁴⁷

¹³⁹ 62 F. Supp. 802 (E.D.N.Y. 1999).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 808.

¹⁴² *Id.* at 832.

¹⁴³ *Id.* at 825.

¹⁴⁴ *Id.* at 817-18.

¹⁴⁵ *Hamilton*, 62 F. Supp. 2d at 817.

¹⁴⁶ *Id.* at 827. The court also considered statistics it found to be alarming in its decision. For instance, the court reported that each year, more than 600,000 firearm crimes are reported in the United States; the number of violent attacks involving firearms increased 55 percent between 1987 and 1992; about 1.3 million Americans faced assailants armed with guns in 1993; among people aged 15 to 25, one of every four deaths were by firearm; and gun-related homicides by juvenile offenders more than doubled between 1984 and 1992. *Id.* Further, a federal law enforcement review of illegal gun trafficking investigations conducted in twenty-seven cities between 1996 and 1998 revealed that 51 percent of guns used in crimes by juveniles and persons between the ages of 18 and 24 were acquired from FFLs by intermediaries acting on their behalf. *Id.*, citing, DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, THE YOUTH CRIME GUN INTERDICTION INITIATIVE (1999), <http://www.atf.treas.gov/firearms/ycgii> (as of March 17, 2000). Up to one third of guns used in crimes by juveniles and one half of those used by persons between ages 18 and 24 were purchased from an FFL within three years of the commission of the crime. The time between purchase and use in the commission of a crime it called the "time-to-crime" rate; this rate is shorter for semiautomatic pistols than for revolvers. *Id.*

¹⁴⁷ *Id.* at 843-44. Applying market share liability, a plaintiff does not have to prove that his or her injury was caused by a specific manufacturer's product. A causal link between a shooting and negligent marketing and distribution practices on the part of manufacturers of the type of handgun used is sufficient. *Id.*

The *Hamilton* jury found fifteen of the twenty-five manufacturers negligent and returned damages in favor of one of the plaintiffs.¹⁴⁸ The defendants appealed, and the Second Circuit Court of Appeals certified the issues of causation and duty to the New York Court of Appeals.¹⁴⁹ The New York Court of Appeals refrained from finding the manufacturer owed a duty to control a third person with whom the manufacturer shared no relationship and over whom the manufacturer could exert no control.¹⁵⁰ The court failed to find persuasive the plaintiffs' assertions that the product manufacturers owed a "general duty to society" at large.¹⁵¹ Rather, a specific duty to the victim was required.¹⁵² The court concluded that the connection between the gun manufacturers and the victims and the connection between the defendant manufacturers and the criminal perpetrators were both too remote to establish liability.¹⁵³ Because there were at a minimum three and potentially four other links in the typical chain of distribution before the manufacturer could be connected to either the tortfeasor or the victim, the court opined that it was unrealistic to require the manufacturer to exercise any meaningful control over the conduct of individuals so far down the distribution chain.¹⁵⁴ Again, finding for the defendant manufacturers, the New York court found that apportioning liability on market share alone would be unfair because firearms are not a fungible product, and the victims could identify the actual manufacturers.¹⁵⁵ The Second Circuit then overturned the *Hamilton* jury verdict and ordered that the plaintiffs' suit be dismissed.¹⁵⁶ Of note, however, is the fact that the Second Circuit did not preclude the possibility that a special relationship could be established between a gun manufacturer and the tortfeasor in other circumstances.¹⁵⁷ Similarly relevant in the case of toy gun manufacturers is the existence of a "special relationship" between toys in general and children.

¹⁴⁸ *Id.* at 808. The court instructed the jury concerning negligence by providing the following: "In order to prove the essential elements of a claim against a defendant, the burden is on each plaintiff to establish, by a preponderance of the evidence in the case, the following facts against that defendant: First, that the defendant was negligent in one or more of the particulars alleged; AND, Second, that the defendant's negligence was a substantial factor in bringing about the injuries and consequent damage sustained by the plaintiff; AND, Third, the damages sustained by the plaintiff as a result. Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent manufacturer would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent manufacturer would not have done under the same circumstances, or, from failing to do an act that a reasonably prudent manufacturer would have done under the same circumstances. A defendant manufacturer must exercise "reasonable care" in marketing and distributing its product, to the extent that it has control, so as to take precautions against creating foreseeable risks of injury. What constitutes reasonable care will vary with the surrounding circumstances. Reasonable care is the care that a reasonably prudent manufacturer of handguns would exercise under the same or similar circumstances. There is negligence if a reasonably prudent manufacturer could foresee injury as a result of its conduct, and acted unreasonably in the light of what could be foreseen. There is no negligence if a reasonably prudent manufacturer could not have foreseen injury as a result of its conduct, or acted reasonably in the light of what could have been foreseen.

¹⁴⁹ *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 46 (2d Cir. 2000).

¹⁵⁰ *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1060-61 (N.Y. 2001).

¹⁵¹ *Id.* at 1060.

¹⁵² *Id.*

¹⁵³ *Id.* at 1061-62.

¹⁵⁴ *Id.* at 1062.

¹⁵⁵ *Id.* at 1066-67.

¹⁵⁶ *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 32 (2d Cir. 2001).

¹⁵⁷ *Id.*

In a second 1999 decision involving negligent marketing theory, the California Court of Appeals recognized a liability claim against a firearms manufacturer. In *Merrill v. Navegar, Inc.*,¹⁵⁸ Gian Ferri used modified semi-automatic weapons to spray fire killing eight people and wounding six before killing himself.¹⁵⁹ The weapons were designed to accept fifty-round magazines and modified with “barrel shrouds” that facilitated spray fire.¹⁶⁰ Additionally, the barrels were threaded to accommodate flash suppressors or silencers,¹⁶¹ and compatible with a “Hell Fire” trigger system that permitted the weapons to be fired at a much faster rate than a normal semi-automatic weapon.¹⁶² A sling device also assisted the firing ease by enabling the shooter to fire rapidly from the hip.¹⁶³ These additional features allowed the weapons to function like a military-style submachine gun.¹⁶⁴ Although Ferri legally purchased the weapons in Nevada, he transported them across state lines into California where the weapons were not legal and where he commenced his attack.¹⁶⁵

The defendant manufacturer marketed these weapons in magazines, such as *Soldier of Fortune*, *SWAT*, *Combat Handguns*, *Guns*, *Firepower*, and *Heavy Metal Weapons*, targeted toward militarists and survivalists.¹⁶⁶ Notwithstanding the fact that Ferri purchased the weapons legally in Nevada, the plaintiffs asserted that Navegar’s marketing campaign included negligently marketing its products in a manner that increased their attractiveness to individuals who were likely to commit criminal acts.¹⁶⁷ The trial court granted the defendant’s dispositive motion, and the plaintiffs appealed.¹⁶⁸

The intermediate appellate court found merit in the plaintiffs’ arguments finding that the physical characteristics of the firearms and the manner in which Navegar marketed the weapons increased the risk that criminals would acquire the guns for nefarious purposes.¹⁶⁹ The court questioned the manufacturer’s marketing plan and noted that the weapons’ promotional materials called attention to certain features that would make the guns particularly suitable for criminal use, not the least of which was the fact that the weapon’s surface had “excellent resistance to fingerprints.”¹⁷⁰ The court also noted that Navegar intended to create a correlation in the public eye between its firearms and acts of violence by providing its weapons for use in violent films and television programs, including *Robocop*, *Freejack*, and *Miami Vice*.¹⁷¹

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

¹⁵⁹ *Id.* at 152.

¹⁶⁰ *Id.* at 154.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Merrill*, 89 Cal. Rptr. 2d at 154-55.

¹⁶⁵ *Id.* at 153.

¹⁶⁶ *Merrill*, 89 Cal. Rptr. 2d at 154-55.

¹⁶⁷ *Id.* at 159-60.

¹⁶⁸ *Id.* at 152.

¹⁶⁹ *Id.* at 165-69.

¹⁷⁰ *Id.* at 157.

¹⁷¹ *Id.*

As had courts before, the Merrill reviewing court questioned both duty and causation.¹⁷² Though the court agreed that neither the manufacturer nor the distributor could be held liable for merely placing a non-defective product into the stream of commerce; however, the court was persuaded that liability might attach if a manufacturer increased the inherent risks associated with a particular activity.¹⁷³ The court acknowledged an existing baseline level of criminal conduct present in the community in part due to the presence of guns in society.¹⁷⁴ In its analysis, the court recognized the difference between misfeasance and nonfeasance: while ordinarily a person has no duty to intervene in order to prevent an increased risk in the absence of a special relationship, there are instances when such a duty may be imposed in the absence of a special relationship when the person's affirmative acts effectively contribute to the increased risk to another.¹⁷⁵

Navegar defended on the basis that finding a duty from which negligent liability could ensue would conflict with California statutory provisions pertaining to assault weapons and be inappropriate as long as the weapons were not defective.¹⁷⁶ The court held that the defendant's compliance with statutory requirements did not relieve it of the duty to exercise due care in the marketing of the guns.¹⁷⁷

The California Supreme Court reversed the intermediate appellate court decision on appeal and reinstated the trial court's judgment for the manufacturer.¹⁷⁸ California's high court ruled that the plaintiffs' action was in fact based on a theory of product category liability and was prohibited by California law.¹⁷⁹ Regardless of the applicability of the California statute, the existence of any causal connection between Navegar's marketing of its semi-automatic weapons and the victims' injuries was too tenuous to survive summary disposition.¹⁸⁰

¹⁷² *Id.* at 161. Rowland v. Christian, 443 P.2d 561 (Cal. 1968), provided the primary authority for the court's analysis of duty. Applying *Rowland*, a number of factors impact the existence of duty; the major factors include: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy [or public interest] of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." *Id.* at 564. The *Merrill* court also considered whether the risk associated with the manufacturer's conduct was foreseeable. *Merrill*, 89 Cal. Rptr. 2d at 165-69. With regard to causation, the court reasoned that the plaintiffs were not required to prove that the manufacturer's actions were the sole cause of the victims' injuries, but instead, need only demonstrate that the defendant's conduct was a "substantial factor" in the injuries. *Id.* at 186.

¹⁷³ *Id.* at 163-64.

¹⁷⁴ *Id.* at 163. The court relied on Knight v. Jewett, 834 P.2d 696 (Cal. 1992) (holding that individuals could be held liable if they increased the inherent risks associated with a particular activity).

¹⁷⁵ *Id.* at 164-65.

¹⁷⁶ *Id.* at 173.

¹⁷⁷ *Id.* at 174-78. Judge Haerle included a lengthy dissent with the majority opinion. *Id.* at 193 (Harele, J., concurring in part and dissenting in part). In particular, Judge Haerle disagreed with the majority's characterization of the plaintiffs' claim believing rather that the plaintiffs' were actually attempting to hold the defendant manufacturer liable for distributing its firearms to the general public. *Id.* at 194-96 (Harele, J., concurring in part and dissenting in part).

¹⁷⁸ *Merrill*, 28 P.3d at 133.

¹⁷⁹ *Id.* at 131.

¹⁸⁰ *Id.*

Two years later, in *Ileto v. Glock, Inc.*,¹⁸¹ the Ninth Circuit Court of Appeals reversed the trial court's dismissal and upheld plaintiffs' right to lodge a negligent marketing cause of action against gun manufacturers and distributors under California law.¹⁸² In *Ileto*, a former felon and psychiatric patient opened fire at a Jewish Community Center injuring children and killing a postal worker.¹⁸³ Prohibited from purchasing a firearm because of his status as a felon, the shooter acquired his weapon at a gun show and avoided the requisite background check.¹⁸⁴

The plaintiffs asserted that Glock knowingly participated in and facilitated the secondary gun market, such as gun shows, where firearms were more readily accessible to illegal purchasers.¹⁸⁵ The plaintiffs also argued that gun manufacturers, including Glock, and weapon distributors "select and develop distribution channels they know regularly provide guns to criminals and underage users."¹⁸⁶ The Ninth Circuit, applying the *Rowland* duty factors, found that the plaintiffs had sufficiently alleged reasonable foreseeability between the manufacturer's negligent marketing scheme and the harm suffered by the victims.¹⁸⁷

V. NEGLIGENT MARKETING THEORY'S APPLICATION TO TOY WEAPON MANUFACTURERS

Success by proponents of negligent marketing theory in actions against gun manufacturers has been limited, to say the least. Nevertheless, the few triumphs have sparked contemplation about the viability of this legal theory against toy weapon manufacturers. It is, in fact, the weaknesses of the theory in application against gun manufacturers that potentially provide strength to the theory's applicability against imitation firearm producers. For instance, the fact that real guns performed as contemplated without defect, notwithstanding injury or death, barred the success of prior product liability theories. Can the same be said for toy weapons when they are employed to simulate real weapons in real crimes?

The burden will, of course, rest on the plaintiff in any civil action to prove by a preponderance of the evidence that the defendant manufacturer committed acts that are elements of the stated cause of action. Assuming that the action is against a toy weapon manufacturer for negligent marketing, the plaintiff must prove that the defendant had a duty to market its product in a responsible manner, that it breached that duty, and that that breach proximately caused the plaintiff's injuries.

There are not currently any reported cases involving the negligent market liability against a toy manufacturer. Therefore, little authority exists regarding the sufficiency of evidence necessary to meet the plaintiff's burden, because the cases involving real gun manufacturers have been decided as a matter of law. *Hamilton* provides one of the few decisions in which the court discussed the nature of the plaintiff's evidence in a substantial manner. The

¹⁸¹ 349 F.3d 1191 (9th Cir. 2003).

¹⁸² *Id.* at 1197.

¹⁸³ *Id.* at 1191-1193.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1197.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1205. The court held that "it is reasonably foreseeable that this negligent behavior and distribution strategy will result in guns getting into the hands of people like Furrow [the shooter] who are forbidden by federal and state law from purchasing a weapon."

court opined that a plaintiff alleging a cause of action for negligent marketing need only produce evidence from which a fair-minded jury could conclude that the defendant manufacturer failed to market and distribute its product reasonably in light of all the circumstances.¹⁸⁸

Perhaps, some guidance may be provided by the California Court of Appeals in *Merrill v. Navegar, Inc.*¹⁸⁹ and the Ninth Circuit Court of Appeals in *Ileto v. Glock, Inc.*¹⁹⁰ Both courts analyzed the factors in *Rowland v. Christian*¹⁹¹ to determine whether the respective manufacturers owed a duty to the plaintiffs. The *Rowland* factors include (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy [or public interest] of preventing future harm, (6) the extent of the burden to the defendant and (7) the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (8) the availability, cost, and prevalence of insurance for the risk involved.¹⁹²

Three of the *Rowland* factors, in particular, have previously been issues when applied against real gun manufacturers but provide arguably viable claims against the toy manufacturers. The first of these is the foreseeability of harm to the plaintiff. According to the CDC information included previously, between 2000 and 2007 over 167,000 people were injured as a result of toy guns.¹⁹³ This statistic suggests that on average over 23,000 people are injured each year, or nearly 2,000 per month, because of toy weapons. These statistics, standing alone, imply that the foreseeability of harm of toy guns is quite likely.

A second factor of negligent marketing theory is strengthened when it is applied to toy weapon manufacturers. It questions whether it would further public policy of preventing future harm to hold the toy manufacturers responsible. This factor encompasses multiple facets for consideration. First, harm may be defined in terms of physical harm, emotional/mental harm and societal harm. Few would argue that preventing physical injuries and deaths is soundly within public policy. Likewise, nurturing the emotional/mental wellbeing of our citizenry, particularly children, falls within clear public policy concerns. Additionally, it is evident that America is experiencing dramatic increases in youth offender crime, occurrences that present multiple forms of injury to society at large. Reducing the injury and costs is, again, consistent with public policy. Increasing numbers of youth injuries and fatalities related to imitation weapons undergirds any examination of this factor.

A third factor relevant to toy gun manufacturers involves the social utility of the manufacturers' conduct. In other words, *Rowland* requires that we assess the burden to the manufacturers and the consequences to the community of imposing a duty of care. In light of the "culture of violence" references, the increase in youth offender violent crime and the large numbers of injuries caused by toy guns, it becomes more challenging to identify the social utility of what the toy manufacturers' imitation weapons offer. Weighing the social utility of an industry's actions against the social costs of the consequences of those actions, the balance weighs heavily in favor of imposing a duty of care upon the toy manufacturers.

¹⁸⁸ *Hamilton*, 62 F. Supp. 2d at 845.

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

¹⁹⁰ 349 F.3d 1191 (9th Cir. 2003).

¹⁹¹ 443 P.2d 561 (Cal. 1968)

¹⁹² *Id.* at 564.

¹⁹³ Centers for Disease Control, *supra* note 31.

The authors of the Restatement (3d) Torts provide additional assistance for any plaintiff contemplating negligent marketing liability against a toy manufacturer. Despite the general product liability rule that requires plaintiffs to provide alternative designs, the authors of the Restatement suggest that there may be situations where an entire category of products has so little social utility that liability should attach even absent proof of a reasonable alternative design.¹⁹⁴ They offer the example of a toy gun that shoots hard rubber pellets with sufficient velocity to cause injury to children. They further suggest that toy guns, which were unlikely to cause injury, would constitute reasonable alternatives to the dangerous toy; however, if the hard-pellet gun was a class in itself, then perhaps no reasonable alternative is possible. Even in that case, though, the court might declare the product design to be defective because its high degree of danger so substantially outweighs its negligible social utility, to the extent that “no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use, the product.”¹⁹⁵ In the case of toy weapons, generally, their accessibility and the prevalence of their use in crime resulting in injury and death would seem to call into question whether the danger posed by imitation weapons has sufficiently increased to a level that could be considered “high.” If so, then does the new rise in danger outweigh any social utility possessed by such toys? Perhaps, under negligent marketing theory, it is reasonably foreseeable that injuries could result from the use of toys manufactured to appear so realistic as to be indistinguishable from real versions.

VI. CONCLUSION

Central to tort law is the concept of deterrence of conduct that imposes an unreasonable risk on others. When those risks are foreseeable tort liability may attach for the actions of third parties. Whether risks associated with toy and imitation weapons are foreseeable is a question to be tried. Testing is also necessary for the other *Rowland* factors relevant to a negligent marketing theory application in a toy manufacturer liability suit.

The challenges in a negligent marketing action are not small and are not for the faint of heart. The issues of duty and causation remain and offer a reluctant court ample opportunity to find fault. On the other hand, negligence presents a familiar geography for the court and does not require new doctrinal considerations. This paper does not mean to suggest that negligent marketing theory is the solution to all plaintiffs’ woes. Certainly, it presents both philosophical and doctrinal concerns. It does, however, provide a viable traditional tort alternative meriting consideration.

¹⁹⁴ Restatement (3d) Torts: Products Liability § 2, Comment e.

¹⁹⁵ *Id.*