Public Tort Litigation: Public Benefit or Public Nuisance?

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INTRODUCTION

One of the latest developments in products liability law is "public tort" litigation.1 Public tort or government-sponsored lawsuits are actions by federal,
state, or local government entities to recover the cost of public services provided to persons who have been injured as the result of a defendant's alleged misconduct. The best known example is the tobacco litigation of the mid-1990s in which more than forty states brought suit against the leading tobacco companies to recoup the cost of providing health care services to indigent smokers. Eventually, the tobacco companies agreed to pay the states more than $200 billion and also consented to substantially restrict their advertising and promotion activities. The tobacco industry is now defending itself against a similar suit by the federal government.

Encouraged by the states' success against the tobacco industry, a number of municipalities subsequently brought suits against handgun manufacturers to recover for some of the costs of handgun-related violence. Although government plaintiffs suffered some early defeats, more recent efforts by municipalities have had considerable success persuading courts to allow them to seek to hold firearms manufacturers liable under an expanded theory of public nuisance. The latest target of government lawsuits is the paint industry. The state of Rhode Island and a number of local government entities are currently seeking to recover damages to pay for lead-based paint removal and the cost of health care. If government plaintiffs eventually prevail against handgun and lead paint manufacturers, they will certainly bring public tort actions against other product manufacturers as well. Prospective defendants include purveyors of alcohol and fast food and prescription drug companies.

Legal scholars disagree sharply about the value of public tort litigation. One group strongly approves of government-sponsored lawsuits, arguing that the existence of Medicaid and other welfare programs should not enable profit-making enterprises to shift the social costs of their commercial activities to the government. However, other commentators have expressed severe
reservations about public tort litigation, citing doctrinal, economic, and separation of powers concerns. This Article examines the history of public tort lawsuits and concludes that the social, political, and economic costs outweigh the benefits of this type of litigation.

Part I of this Article looks at the history of government-sponsored lawsuits against tobacco, handgun, and lead-based paint manufacturers. Part II evaluates various liability theories that government plaintiffs have relied upon, including negligent entrustment, strict liability for engaging in abnormally dangerous activities, fraud and conspiracy, unjust enrichment, public nuisance, parens patriae, and violation of federal RICO provisions. This part concludes that public nuisance now appears to be the most promising of these liability theories.

Part III analyzes a number of potential statutory and doctrinal limitations on liability such as statutory prohibitions on municipal lawsuits, standing requirements, duty and proximate cause, the economic loss rule, and the municipal cost recovery rule. Part IV considers the adverse effects of public tort litigation on governmental and legal institutions. Part IV also examines the impact of such lawsuits on product manufacturers and other sectors of the economy. Finally, the Article identifies a number of steps that could be taken to control public tort litigation in the future.

I. SUITS AGAINST PRODUCT MANUFACTURERS

So far, most government-sponsored lawsuits against product manufacturers have targeted those who produce cigarettes, handguns, and lead paint. At this time, while government entities have won a substantial victory against the tobacco industry, they have been less successful in their efforts against handgun manufacturers, and the battle against the lead paint industry is just beginning.


12. See generally DeBow, supra note 4 (claiming that state’s suits against the tobacco industry will one day be looked at as one of the worst developments in American public law in the twentieth Century); William H. Pryor Jr. et al., Report of the Task Force on Tobacco Litigation Submitted to Governor James and Attorney General Sessions October 2, 1996, 27 CUMB. L. REV. 577 (1997) (claiming that suits by the Federal government harm state law with no net financial effect); Turley, supra note 5 (stating that tobacco litigation circumvents the legislative system and is based on dubious claims); Ed Dawson, Note, Legigation, 79 TEX. L. REV. 1727 (2001) (arguing that lawsuits used to pass laws undermine separation of powers principle and are unnecessary); Bryce A. Jensen, Note, From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries, 86 CORNELL L. REV. 1334 (2001) (concluding that tobacco litigation forces the judiciary into the role of policymaker).
A. Suits Against the Tobacco Industry

After a long struggle, the states ultimately forced the tobacco industry to offer them a generous settlement. These lawsuits not only put billions of dollars into the pockets of state governments (and their lawyers), but they also served as a model for subsequent public tort litigation.

1. The Mississippi Lawsuit

Mississippi was the first state to sue the tobacco industry. The complaint, which was filed by Attorney General Mike Moore on May 23, 1994, named as defendants seventeen companies and organizations, including thirteen cigarette manufacturers, a public relations firm, and the Tobacco Research Institute. The state's legal advisors were astute enough to realize that a traditional subrogation claim against the tobacco companies would probably fail and, therefore, reformulated a number of traditional causes of action for use in their pending litigation. These included restitution, indemnity, and public nuisance. Under each of these theories, the state sued in its own right and independently of any claims by individual smokers; consequently, it could avoid assumption of risk and other defenses that might be applicable to those who smoked even though they knew that cigarettes were harmful.

The state originally filed its suit in the Jackson County Chancery Court. The defendants were initially able to have the case removed to federal court, but it was eventually remanded back to the Mississippi chancery court. On February 21, 1995, the court issued an order which struck the defendants' affirmative defenses. However, in the summer of 1997, the parties reached a

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21. Fridy, supra note 20, at 246.
22. Id. at 247-48.
settlement under which the tobacco companies agreed to pay the state $3.6 billion.  

2. The Florida Lawsuit

Florida and Massachusetts avoided the problems associated with subrogation claims by enacting statutes that allowed them to bring direct actions against cigarette companies. The Florida statute, which amended existing legislation known as the Medicaid Third-Party Liability Act ("MTPLA"), was passed in April 1994 and became effective on July 1st of that year. Although MTPLA did not change substantive liability rules, many of its provisions were designed to improve the state's chances of recovering against the tobacco industry for smoking-related Medicaid costs. First of all, the statute declared that the state's cause of action was independent of the tort claims of individual smokers. In addition, the statute permitted the state to sue for aggregate health care costs; therefore, it did not require the state to identify individual Medicaid recipients and it allowed proof of causation and damages to be made by statistical evidence. Moreover, the Florida legislation prevented defendants from asserting defenses such as of assumption of risk and comparative fault. Furthermore, it also eliminated use of the statute of repose as a defense. Finally, the statute expressly allowed damages to be apportioned on the basis of market share liability, while retaining the doctrine of joint and several liability.

25. MASS. GEN. LAWS ANN. ch. 118E, § 22 (West 2003 & Supp. 2004) (providing that any person who suffers a loss for which third party is liable and receives payment of monies from said third party, shall repay the total of all public assistance benefits provided as a result of the loss by the department of transitional services).
27. FLA. STAT. ANN. § 409.910.
28. Fridy, supra note 20, at 240.
29. Massey, supra note 24, at 603.
30. FLA. STAT. ANN. § 409.910(6)(a).
31. Id. § 409.910(9)(a).
32. Id. § 409.910 (9).
33. Id. § 409.910 (1).
34. Id. § 409.910 (12) (h).
35. FLA. STAT. ANN. § 409.910 (9) (b).
36. Id. § 409.910 (1).
A Florida retail trade association and others promptly challenged the constitutionality of the new law. They alleged that MTPLA violated the due process clause of the United States Constitution and the access-to-courts provision of the Florida Constitution. The plaintiffs also claimed that the Agency for Health Care Administration ("Agency"), which was responsible for enforcing the Act, was not properly structured. The trial court upheld most of MTPLA, but struck down several of the Act's key features. Both sides appealed and in June 1996, the Florida Supreme Court in Agency for Health Care Administration v. Associated Industries of Florida, Inc. upheld the validity of MTPLA. Among other things, the Florida Supreme Court determined that the Agency was not unconstitutionally structured. The court also concluded that the legislature has the power to abrogate affirmative defenses as well as the statute of repose. In addition, the court approved the use of statistical evidence to prove causation in Medicaid recoupment actions. Furthermore, the court upheld the use of market share liability and joint and several liability, although it cautioned that the two doctrines can not be used together in the same case.

However, the Florida Supreme Court's decision in Associated Industries was not a complete victory for the state. In the first place, the court concluded that the state was required to identify the recipient of each Medicaid payment it was seeking to recoup. According to the court, a defendant would be unable to argue that Medicaid payments to particular recipients were improper unless the state revealed the identity of each recipient. Secondly, the Florida court ruled that the state could not sue under MTPLA, as amended in 1994, for any Medicaid claims that accrued prior to that date. Rather, the state was required to follow the less advantageous provisions of the pre-1994 version of MTPLA to recover earlier Medicaid expenditures.

After the Florida Supreme Court's decision in Associated Industries, the

37. Sherrill, supra note 18, at 503.
39. Agency for Health Care Admin., 678 So. 2d at 1296.
40. The trial court upheld the Act's provisions with respect to proof of causation, affirmative defenses and market share liability. Fridy, supra note 20, at 244-45. However, the lower court agreed with the plaintiffs that the Health Care Agency was unconstitutionally structured. Id. In addition, the court ruled that the state could utilize MTPRA to recoup only those Medicaid costs that it incurred after the Act's effective date. Id.
41. Agency for Health Care Admin., 678 So. 2d at 1239.
42. Id. at 1248.
43. Id. at 1253.
44. Id. at 1254.
45. Id. at 1256.
46. Agency for Health Care Admin., 678 So. 2d at 1256.
47. Id. at 1254.
48. Id.
49. Id. at 1256.
50. Id.
state filed an amended complaint against the tobacco companies.\textsuperscript{51} However, in September 1996, the trial judge dismissed fifteen of the state's eighteen counts, allowing only those counts to stand which were based on post-1994 expenditures.\textsuperscript{52} Although the court eventually set a trial date for August 1997,\textsuperscript{53} Florida and the tobacco companies settled the case in August 1997, before the start of the trial.\textsuperscript{54} The settlement figure was reported to be $11 billion.\textsuperscript{55}

3. The Minnesota Lawsuit

In August 1994, the Attorney General of Minnesota filed suit against various cigarette companies, alleging antitrust violations and consumer fraud.\textsuperscript{56} More specifically, the state claimed that tobacco company executives conspired to persuade the public, through advertising and other actions, that smoking was safe when they knew of recent scientific studies that showed smoking to be harmful.\textsuperscript{57} Blue Cross and Blue Shield of Minnesota, a private health care insurance provider, also joined the suit as a plaintiff.\textsuperscript{58} The defendants challenged Blue Cross's standing to sue, but the Minnesota Supreme Court ruled in favor of the insurance company.\textsuperscript{59} Furthermore, the United States Supreme Court refused to overrule a Minnesota appellate court decision which gave the state access to a database index of internal tobacco company records.\textsuperscript{60} The state later made available to the public more than 35 million pages of material that it had obtained from the tobacco companies during discovery.\textsuperscript{61} This was the only case to actually go to trial, but the parties reached a settlement in May 1998, just before the case was to go to the jury.\textsuperscript{62} Under the terms of the settlement, the state received $6.1 billion and Blue Cross-Blue Shield received $469 million.\textsuperscript{63}

4. Other State Lawsuits

A number of other states filed lawsuits against the tobacco industry between 1994 and 1998. West Virginia brought suit in September 1994, while

\begin{itemize}
\item \textsuperscript{51} Sherrill, \textit{supra} note 18, at 504.
\item \textsuperscript{52} \textit{Id}.
\item \textsuperscript{53} Fridy, \textit{supra} note 20, at 295.
\item \textsuperscript{55} Cupp, \textit{supra} note 23, at 469.
\item \textsuperscript{56} Fridy, \textit{supra} note 20, at 248.
\item \textsuperscript{57} \textit{Id.} at 248-49.
\item \textsuperscript{58} Sherrill, \textit{supra} note 18, at 511.
\item \textsuperscript{59} State v. Philip Morris, Inc., 551 N.W.2d 490, 495 (Minn. 1996).
\item \textsuperscript{60} R.J. Reynolds Tobacco Co. v. Minnesota, 517 U.S. 1222 (1996).
\item \textsuperscript{62} Samford, \textit{supra} note 14, at 897.
\item \textsuperscript{63} \textit{Id.} at 898.
\end{itemize}
Massachusetts followed in December 1995. The West Virginia suit charged the tobacco industry with fraud, unjust enrichment, and creating a public nuisance, while Massachusetts based its claim on breach of warranty, conspiracy to suppress information about smoking-related health risks, restitution, and unjust enrichment. On March 28, 1996, Texas filed a suit against the tobacco companies in federal court. Texas based its claim for damages on antitrust violations, RICO, fraud, products liability, and restitution. The state of Maryland also filed suit that year. The state accused the defendants of fraud, breach of warranty, negligence, strict liability in tort, conspiracy, breach of antitrust laws, and violation of state consumer protection statutes. In addition to Maryland and Texas, eleven other states filed suit in 1996 and another twenty did so during the first six months of 1997. Thus, by mid-1997, almost forty states had filed lawsuits against tobacco companies.

Not all of these lawsuits went smoothly for the plaintiffs. For example, a West Virginia trial court judge dismissed most of that state’s complaints because the judge concluded that the Attorney General is not authorized to bring common law claims (as opposed to statute-based causes of action) without the permission of the Governor. The Iowa Supreme Court upheld a lower court dismissal of the state’s unjust enrichment, fraud, and indemnity claims against cigarette manufacturers. Lower courts in Idaho, Illinois, and Washington also dismissed some claims against the tobacco industry.

5. The Tobacco Settlements

By 1997, these lawsuits had begun to take their toll on the tobacco industry. First, the financial markets began to exert considerable pressure on the industry

64. See DeBow, supra note 54, at 566 (detailing the filing dates of the suits against the tobacco industry).
65. Fridy, supra note 20, at 249.
68. See Fridy, supra note 20, at 249 (noting the grounds for recovery in the Texas lawsuit).
70. See id. at 117-19 (noting the 13 counts brought by the State of Maryland against the tobacco industry).
71. See DeBow, supra note 54, at 566-67 (describing the growing momentum of suits against the tobacco industry).
73. Fridy, supra note 20, at 249.
74. See State ex rel. Miller v. Philip Morris, Inc., 577 N.W.2d 401 (Iowa 1998) (finding that the States cannot recover damages under certain claims because the injuries were derivative and remote).
75. See Pryor, supra note 17, at 1913-14 (discussing the dismissal of various claims against the tobacco industry).
to resolve its legal problems. Second, with so many lawsuits in progress, tobacco companies were forced to spend a great deal of money on litigation costs because, unlike many private plaintiffs, the states were able to commit significant financial resources to the litigation.

Moreover, as the lawsuits progressed, whistleblowers turned over a large number of incriminating documents to the plaintiffs. For example, in 1994, a paralegal employed by a law firm that represented the Brown & Williamson Tobacco Corporation, photocopied approximately ten thousand pages of sensitive company documents and mailed them to Professor Stanton Glantz at the University of California. Brown & Williamson was unable to recover the documents and they were eventually made public. Additional material came to light through the discovery process. As mentioned earlier, Minnesota made available to the public millions of documents obtained through discovery. Furthermore, Jeffrey Wigand, the former head of research and development at Brown & Williamson, testified that the tobacco industry concealed information about the health risks of smoking from the public for many years. Finally, plaintiffs obtained evidence that tobacco companies not only knew that nicotine was addictive, but that they may have manipulated nicotine levels in order to keep smokers addicted to cigarettes. Consequently, tobacco companies seriously began to consider the settlement option early in 1997.

a. The Liggett Settlement

The first defection among the tobacco companies occurred in March, 1996, when the Liggett Corporation offered to settle with Florida, Louisiana, Massachusetts, Mississippi, and West Virginia. Under the terms of the proposed settlement, Liggett agreed to pay these states $5 million plus a percentage of its profits over a twenty-five year period. More importantly,
Liggett also agreed to turn over any documents in its possession that might incriminate other tobacco companies, to provide information about potential witnesses, and to assist the states with respect to discovery proceedings in their lawsuits against the tobacco industry.87

b. The 1997 Proposed Settlement Agreement

On June 20, 1997, the tobacco companies reached a proposed settlement agreement with forty states.88 Under the proposed settlement, the tobacco companies agreed to pay the states $368.5 billion over a period of twenty-five years to reimburse them for tobacco-related Medicaid costs.89 It was understood that the tobacco industry would make these payments by passing the cost of the settlement on to smokers in the form of higher cigarette prices.90 The tobacco industry also agreed to the regulation of tobacco products by the FDA,91 to restrict the advertising and marketing of tobacco products,92 and to accept regulatory standards directed at minimizing involuntary exposure to second-hand smoke.93 Furthermore, the tobacco companies agreed to an incentive program to reduce underage smoking over a ten-year period.94 In return, the proposed settlement protected liability of tobacco companies from most future tort liability. For example, the proposed settlement disposed of all lawsuits brought against the tobacco industry by state and local governments.95 The settlement also settled most pending class actions96 against the tobacco companies and prohibited the aggregation of claims in the future.97 Although the proposed settlement allowed lawsuits to be brought against tobacco companies by individual claimants, it prohibited claims based on addiction or dependency98 as well as claims for punitive damages.99 Finally, the proposed settlement placed an aggregate cap on the overall liability of tobacco companies to individual plaintiffs to an amount equivalent to thirty-three percent of the amount paid by them to the states each year.100

Because the proposed settlement would have had a significant effect on

87. Player, supra note 78, at 330.
88. Bianchini, supra note 72, at 705.
90. Proposed Settlement, Tit. VI. See also Samford, supra note 14, at 883 (noting the benefit to the tobacco industry in the ability to pass along the cost of the settlement to tobacco users).
91. See Proposed Settlement, Tit. I (creating a new scheme of regulatory control over tobacco by the Food and Drug Administration).
92. Id. Tit. I.
93. Id. Tit. IV.
94. Id. Tit. II.
95. Id. Tit. VIII.A.1.
96. Proposed Settlement, Tit. VIII.A.1.
97. Id. Tit. VIII.B.2.
98. Id. Tit. VIII.A.1.
99. Id. Tit. VIII.B.1.
100. Id. Tit. VIII.B.9.
federal regulatory powers and would have also affected litigation in federal
courts, it was necessary for the parties to obtain Congressional approval for the
proposed settlement.\textsuperscript{101} However, the bill that eventually reached the Senate
floor increased the amount of the settlement to $516 billion, beefed up FDA
regulation over tobacco products, and removed most of the tobacco industry's
protection against tort liability that had been agreed to in the proposed
settlement.\textsuperscript{102} These changes completely undermined the compromise that the
parties had reached in 1997 and eventually caused the tobacco companies and
their allies to withdraw their support for the bill.\textsuperscript{103} On June 17, 1998, the bill
died on the Senate floor when proponents of the settlement legislation were
unable to muster enough votes to break a filibuster by the bill's opponents.\textsuperscript{104}

c. The 1998 Master Settlement Agreement

After Congress failed to approve the terms of the 1997 proposed settlement
agreement, the tobacco companies and the state attorney generals began a
second round of negotiations.\textsuperscript{105} This produced a new agreement, known as the
Master Settlement Agreement, which was revealed to the public on November
14, 1998.\textsuperscript{106} Forty-six states, the District of Columbia, and five U.S. territories
signed the settlement.\textsuperscript{107} Under the terms of this agreement, which did not
require Congressional approval, the tobacco companies agreed to pay the states
$206 billion over twenty-five years to reimburse them for the cost of treating
smoking-related illnesses under the Medicaid program.\textsuperscript{108} The tobacco
companies also agreed to make additional payments to the states in perpetuity to
reimburse them for smoking-related Medicaid costs.\textsuperscript{109}

The 1998 settlement was considerably narrower in scope than its ill-fated
predecessor.\textsuperscript{110} Under the terms of the settlement, the states released the
tobacco companies from past and future Medicaid reimbursement claims.\textsuperscript{111}

\textsuperscript{101} See Vandall, supra note 16, at 483-84 for a discussion of Congressional approval of the
proposed settlement and the influence of the tobacco industry on members of Congress.
\textsuperscript{102} Dawson, supra note 26, at 1733.
\textsuperscript{103} See Samford, supra note 14, at 887 (noting the tobacco industry began to work for the defeat
of the settlement).
\textsuperscript{104} Id. at 845-46.
\textsuperscript{105} Dawson, supra note 26, at 1733.
\textsuperscript{106} Hanoch Dagan & James J. White, Governments, Citizens, and Injurious Industries, 75
\textsuperscript{107} DeBow, supra note 54, at 568.
\textsuperscript{108} Bryce A. Jensen, Note, From Tobacco to Health Care and Beyond-A Critique of Lawsuits
\textsuperscript{109} See DeBow, supra note 54, at 568 (discussing the payments due to the states under the 1998
Master Settlement Agreement).
\textsuperscript{110} See W. Kip Viscusi, A Postmortem on the Cigarette Settlement, 29 CUMB. L. REV. 523, 523-24
(1999) (discussing the difference between the Proposed Settlement and the Master Settlement
\textsuperscript{111} See Viscusi, supra note 110, at 539 (noting the terms of the agreement).
However, the settlement did not purport to affect lawsuits that might be brought against the tobacco industry by individuals. In addition to the $206 billion to be paid to the states, the tobacco companies also made a commitment to spend $1.5 billion over five years to finance an anti-smoking education and advertising campaign. Furthermore, the tobacco industry agreed to contribute $250 million over ten years to fund a foundation to reduce youth smoking. Finally, the tobacco companies were required to pay the private attorneys who represented the states $750 million per year for the first five years and $500 million per year thereafter forever.

The settlement also contained restrictions on the advertising and marketing of tobacco products. For example, the settlement prohibited advertising and marketing practices that targeted underage consumers. It also banned the use of cartoon characters such as “Joe Camel.” In addition, the tobacco companies agreed to eliminate advertising on taxis, buses, and billboards. Furthermore, the settlement outlawed sponsorship of concerts and sporting events, as well as the use of company logos on clothing and other merchandise.

6. The 1999 Justice Department Lawsuit

President Clinton, in his 1999 State of the Union address, announced that the federal government intended to sue the tobacco industry in order to recoup some of the smoking-related health costs paid for by federal health care programs such as Medicare. A few months later, on September 21, 1999, the United States Department of Justice (“DOJ”) filed suit against the leading tobacco companies and tobacco-related organizations in the United States District Court for the District of Columbia. The Government alleged that since 1953 tobacco companies had conspired to mislead consumers about the health risks of smoking. The Government sought damages for past and future smoking-related health care expenditures and also sought equitable relief that would have required the tobacco companies to disgorge its “unjust profits.”

The Government based its claim for damages and equitable relief on three federal statutes, the Medical Care Recovery Act (“MCRA”), the Medical

112. See DeBow, supra note 54, at 569 (noting this difference between the Master Settlement Agreement and the 1997 settlement proposal).
113. Id. at 568.
114. Viscusi, supra note 110, at 539-40.
115. See DeBow, supra note 54, at 568 (listing the payments due to attorneys who represented the states).
116. Id. at 569.
120. Id. at 138.
Secondary Payer Provision of the Social Security Act ("MSP"). The Racketeer Influenced and Corrupt Organizations Act ("RICO"). MCRA permits the federal government to sue tortfeasors to recover the cost of treating injured military personnel. The trial court dismissed the MCRA claim because it concluded that Congress did not intend this statute to authorize the federal government to recover Medicare costs. MSP allows the federal government to sue health insurance companies, health care providers, and health care recipients to recover health care costs that were paid by the government but which should have been paid by the insurer. The trial court also dismissed the government's MSP claim. Although this statute allows suits against "non-insurance entities," the court observed that this provision only applies to entities which made payments under a formal "self-insured plan." The court concluded that the defendants did not have self-insured plans and that payments made pursuant to tort liability did not meet this statutory requirement. The Government also asserted a RICO claim against the tobacco companies, claiming that they had engaged in a pattern of mail and wire fraud in order to conceal the health risks of smoking. The tobacco companies acknowledged that some of their activities might have violated the provisions of RICO, but disputed whether the court could order them to disgorge any profits based on these alleged RICO violations. The tobacco companies argued that disgorgement and injunctive relief were not necessary to prevent future RICO violations because they had already agreed in the Master Settlement Agreement to forewear such conduct in the future. The trial court, however, ruled that the government should be allowed to prove its case at trial and, therefore, refused to dismiss the RICO claim.

As the case proceeded, disgorgement remained a central point of contention between the parties. The government made its disgorgement claim more specific and sought to recover $280 billion that it alleged represented the proceeds from cigarette sales made to the "youth addicted population" between 1971 and 2001. In 2004, after discovery was completed, the defendants moved to dismiss the government's disgorgement claim. The defendants argued that

124. Dawson, supra note 26, at 1737.
125. Philip Morris, 116 F. Supp. 2d at 138-44.
126. Dawson, supra note 26, at 1739.
128. Id. at 135, 144-46.
129. Id. at 145-46.
130. Id. at 136-38. See infra Part II.E for a discussion of the RICO laws.
132. Id. at 148.
133. Id. at 151-52.
the economic model, which the government relied on to calculate the $280 billion disgorgement claim, was flawed because it failed to distinguish between ill-gotten gains, which are subject to disgorgement under section 1964(a) of the RICO statute,\textsuperscript{136} and legitimate profits, which are not.\textsuperscript{137} The defendants also contended that the holding in \textit{United States v. Carson}\textsuperscript{138} provided that only ill-gotten gains that were being used "to fund or promote the illegal conduct, or constitute capital available for that purpose" are subject to disgorgement.\textsuperscript{139} However, the trial court concluded that \textit{Carson}'s limitation on the scope of disgorgement is not consistent with section 1964(a) or the purposes of RICO.\textsuperscript{140} The court also held that the accuracy of the government's economic model was a question of fact that should be decided at trial.\textsuperscript{141} Consequently, the court denied the defendant's motion for partial summary judgment.\textsuperscript{142}

However, the defendants brought an interlocutory appeal and persuaded the United States Court of Appeals for the District of Columbia Circuit to dismiss the disgorgement claim in February 2005.\textsuperscript{143} The circuit court rejected the government's claim that section 1964(a) contains a broad grant of equitable jurisdiction that includes the remedy of disgorgement and concluded that section 1964(a) only gives the courts such equitable powers as are necessary to prevent future violations of RICO.\textsuperscript{144} According to the court, remedies such as divestment, injunctions against future criminal activity, and dissolution of the enterprise are designed to prevent future wrongdoing.\textsuperscript{145} Disgorgement, on the other hand, is measured by the amount of prior unlawful gains and is awarded regardless of whether the defendant is likely to commit other unlawful acts in the future.\textsuperscript{146} Therefore, the court reasoned, disgorgement is "aimed at and measured by past conduct."\textsuperscript{147}

The circuit court also determined that disgorgement is not within RICO's statutory grant of jurisdiction, nor any necessary implication of the language of that statute.\textsuperscript{148} In addition, the court pointed out that since RICO already provides for a comprehensive set of remedies, it is unlikely that Congress intended to authorize the courts to create additional ones.\textsuperscript{149} Finally, the court declared that disgorgement was an inappropriate remedy because it acts like a criminal forfeiture penalty, but deprives the defendants of the benefit of the

\textsuperscript{137} \textit{Philip Morris}, 321 F. Supp. 2d at 74.
\textsuperscript{138} 52 F.3d 1173 (2d Cir. 1995).
\textsuperscript{139} \textit{Philip Morris}, 321 F. Supp. 2d at 74 (citing \textit{Carson}, 52 F.3d at 1182).
\textsuperscript{140} \textit{Id.} at 76-81.
\textsuperscript{141} \textit{Id.} at 81-82.
\textsuperscript{142} \textit{Id.} at 82.
\textsuperscript{143} \textit{United States v. Philip Morris}, 396 F.3d 1190 (D.C. Cir. 2005).
\textsuperscript{144} \textit{Philip Morris}, 396 F.3d at 1198.
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.} at 1199-1200.
\textsuperscript{149} \textit{Philip Morris}, 396 F.3d at 1200.
shorter statute of limitations and the higher standard of proof required for a criminal conviction. For these reasons, the appeals court concluded that the government’s disgorgement claim should have been dismissed.

B. Suits Against Handgun Manufacturers

Encouraged by the states’ success against the tobacco industry, a number of local governments brought suit against gun manufacturers to recover for gun-related expenses. The plaintiffs included New Orleans, Chicago, Bridgeport, Miami-Dade County, Atlanta, Camden County, Philadelphia, Cleveland, Cincinnati, Gary, Newark, San Francisco, Los Angeles, St. Louis, Seattle, St. Paul, Minneapolis, and Detroit. Apparently, the plaintiffs thought that the gun manufacturers would follow the lead of the tobacco industry and settle these cases quickly. Instead, the handgun manufacturers chose to mount a determined legal defense. So far, the results have been decidedly mixed.

1. New Orleans

The City of New Orleans brought the first suit in October 1998, suing fifteen gun manufacturers, five local pawnshops, and three firearms trade associations for the costs of police protection, emergency services, medical care, lost tax revenue, and other losses attributable to gun-related violence. Although the suit was brought in the City’s name, it was actually financed and litigated by the Center to Prevent Handgun Violence and by a group of trial lawyers associated with the Castano Group.

In its complaint, the City alleged that the defendants’ handguns were defectively designed because they did not have locking devices to prevent children from using them. The City also claimed that handgun manufacturers

150. Id. at 1200-01.
151. Brent W. Landau, Note, State Bans on City Gun Lawsuits, 37 HARV. J. ON LEGIS. 623, 624 (2000). For a discussion of state suits against tobacco companies and the resulting settlements, see Dagan & White, supra note 106, at 363-73. See also Fridy, supra note 20, at 240-55 (discussing the success of several states in lawsuits against tobacco companies).
154. Landau, supra note 151, at 624-25.
155. Morgan, supra note 152, at 528-29.
157. Landau, supra note 151, at 625.
failed to develop technology to "personalize" firearms so that they could not be used by unauthorized persons.\textsuperscript{158} Furthermore, the City argued that gun manufacturers failed to warn consumers that a round might still be in a pistol's chamber even though the magazine had been removed.\textsuperscript{159}

Shortly after suit was filed, the Louisiana state legislature passed a law prohibiting municipalities from bringing claims against gun manufacturers or dealers based on the design, manufacture, marketing, or sale of firearms.\textsuperscript{160} Another statute was subsequently enacted that declared that the manufacture of firearms was not "unreasonably dangerous."\textsuperscript{161} The City challenged the constitutionality of these statutes, but its claim was rejected by the Louisiana Supreme Court in \textit{Morial v. Smith & Wesson Corp.}\textsuperscript{162} This effectively put an end to the City's lawsuit.

2. Chicago

A few weeks after the New Orleans suit was filed, the City of Chicago (along with Cook County) sued twenty-two gun manufacturers, twelve suburban retail gun stores, and four distributors.\textsuperscript{163} The City sought $433 million for police, medical, and welfare costs, as well as lost tax revenue, which they claimed resulted from handgun-related violence.\textsuperscript{164} The government plaintiffs also sought to enjoin the defendants from engaging in activities which facilitated the flow of illegal firearms into the Chicago area.\textsuperscript{165}

The City claimed that the defendants by their actions knowingly and deliberately created a public nuisance in the City and in Cook County.\textsuperscript{166} Specifically, the City alleged that the defendants knowingly designed, manufactured, marketed, supplied, and distributed handguns in order to facilitate their transport, sale, and use in Chicago in violation of the City's restrictive gun ownership laws and enabling a black market in illegal firearms to flourish in the City.\textsuperscript{167} The City also claimed that the defendants' advertising emphasized features, such as destructive power, concealability, and resistance to fingerprints, that were likely to appeal to gang members and other potential criminals.\textsuperscript{168}

\begin{itemize}
\item \textsuperscript{159} Morgan, \textit{supra} note 152, at 529-30.
\item \textsuperscript{160} LA. REV. STAT. ANN. § 40:1799 (West 2001).
\item \textsuperscript{161} Id. § 9:2800.60 (West Supp. 2005).
\item \textsuperscript{162} 785 So. 2d 1 (La. 2001).
\item \textsuperscript{163} Morgan, \textit{supra} note 152, at 530.
\item \textsuperscript{164} Vandall, \textit{supra} note 152 at 549.
\item \textsuperscript{166} Note, \textit{Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry}, 113 HARV. L. REV. 1521, 1521 (2000).
\item \textsuperscript{167} Morgan, \textit{supra} note 152, at 531-32.
\item \textsuperscript{168} Burnett, \textit{supra} note 156, at 445.
\end{itemize}
The trial court granted the defendants' motion to dismiss.\textsuperscript{169} The court apparently felt that the City should not be allowed to rely almost entirely on statistical data to establish its public nuisance claim.\textsuperscript{170} In addition, the court suggested that the City might reduce the costs of gun-related violence by enforcing its existing criminal laws more vigorously.\textsuperscript{171} However, in November 2002, the public nuisance claim was reinstated by a state intermediate appellate court.\textsuperscript{172}

The appellate court observed that the public possessed a right "to be free from unreasonable jeopardy to its [sic] health, welfare and safety," which the City alleged was threatened by the defendants' conduct.\textsuperscript{173} The court also declared that a jury could conclude that the marketing practices of the defendants unreasonably interfered with this right.\textsuperscript{174} In addition, the court rejected the defendants' assertion that they could not be held liable for harm caused by the criminal misuse of its products.\textsuperscript{175} Finally, the court held that the defendants were subject to liability even though their activities were not unlawful.\textsuperscript{176}

This decision, however, was reversed in November 2004 by the Illinois Supreme Court.\textsuperscript{177} In a unanimous opinion, the court declared that there is no public right to be free from the threat of illegal conduct by others.\textsuperscript{178} It also observed that handgun manufacturers and distributors were engaged in a lawful, and heavily regulated, activity and were not guilty of negligence.\textsuperscript{179} Consequently, the court reasoned, even if a public right exists, the handgun manufacturers and distributors had not unreasonably interfered with it.\textsuperscript{180} The court acknowledged that the City's public nuisance claim was stronger against retail gun dealers.\textsuperscript{181} The court, however, found that the City had failed to establish "proximate cause," which it defined as cause-in-fact and legal cause.\textsuperscript{182} In addition, the court concluded that the City's damage claim against these defendants was barred by the economic loss rule\textsuperscript{183} and the municipal cost

\begin{itemize}
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id.
\item \textsuperscript{173} Chicago v. Beretta, 785 N.E.2d at 25.
\item \textsuperscript{174} Id. at 25-26.
\item \textsuperscript{175} Id. at 26-27.
\item \textsuperscript{176} Id. at 27-30.
\item \textsuperscript{177} City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004).
\item \textsuperscript{178} Chicago v. Beretta, 821 N.E.2d at 1126.
\item \textsuperscript{179} Id. at 1124-25.
\item \textsuperscript{180} Id. at 1116-27.
\item \textsuperscript{181} Id. at 1127.
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Chicago v. Beretta, 821 N.E.2d at 1139-43.
\end{itemize}
recovery rule.\textsuperscript{184}

3. Bridgeport

On January 27, 1999, the City of Bridgeport, Connecticut filed suit against thirty-five handgun manufacturers, wholesalers, retailers, and trade associations.\textsuperscript{185} In its complaint, the City set forth nine claims upon which liability could be predicated. The first count was based on the Connecticut Product Liability Act.\textsuperscript{186} The City contended that defendant manufacturers failed to utilize existing technology to produce self-locking or childproof handguns and, as a consequence of this failure, many citizens were killed or injured by unauthorized handgun users.\textsuperscript{187} In addition, the City alleged that the gun manufacturers failed to warn consumers about the risk that minors could gain access to handguns if they were not stored properly and that they failed to inform consumers that some pistols could be fired even when the magazine was removed.\textsuperscript{188}

The second count charged the defendants with unfair and deceptive advertising in violation of the Connecticut Unfair Trade Practices Act ("CUTPA").\textsuperscript{189} The City contended that firearms manufacturers falsely claimed that consumers could make their homes safer by purchasing handguns when in fact such weapons actually increased the risk of injury in the home from homicides, suicides, and accidents.\textsuperscript{190} The City's third count, also based on violation of CUTPA, alleged that the defendants engaged in unfair and deceptive sales practices by selling excessive numbers of handguns, knowing that many of them will be sold illegally and used to commit crimes.\textsuperscript{191} The fourth count was based on common-law public nuisance and declared that the defendants' conduct contributed to the flow of illegal handguns into Bridgeport, thereby causing injury to its citizens and their property.\textsuperscript{192} The fifth count alleged that gun manufacturers negligently failed to design safer products, that they failed to provide adequate warnings and directions about handgun safety, and that their advertisements induced consumers to think that handgun possession would increase safety in the home.\textsuperscript{193}

Count six charged that the defendants manufactured and distributed more handguns throughout the nation than they could have reasonably expected to be acquired legally, thus creating, maintaining and supplying the illegal market for

\textsuperscript{184} Id. at 1143-47.
\textsuperscript{185} Morgan, supra note 152, at 532-33.
\textsuperscript{188} Ganim, 780 A.2d at 112.
\textsuperscript{190} Ganim, 780 A.2d at 112-13.
\textsuperscript{191} Id. at 113.
\textsuperscript{192} Id.
\textsuperscript{193} Id. at 115.
handguns. In its seventh count, the City claimed that the manufacturers conspired to violate the Products Liability Act and CUTPA, and to create a public nuisance, by failing to design safe handguns, by failing to instruct about handgun safety, by failing to warn about the risks of handgun ownership, and by failing to prevent illegal handgun sales by retailers. The eighth count alleged that retailers conspired with criminals to promote illegal gun sales in the Bridgeport area. Finally, count nine claimed that the defendants had been unjustly enriched at the City's expense as a result of its unlawful conduct.

The City sought compensatory damages to reimburse itself for the costs of medical care, police investigations, emergency personnel, health care, human resources, lost revenue, and other costs associated with illegal gun use. The City also requested punitive damages, attorneys' fees, and injunctive relief, including a prohibition against distributing handguns without adequate safety features and warnings, a ban on deceptive advertising, and an order requiring the defendants implement measures to reduce the illegal secondary handgun market in the Bridgeport area and requiring them to fund studies and programs on handgun safety.

The trial court dismissed the case for lack of standing and this ruling was affirmed by the Connecticut Supreme Court in Ganim v. Smith & Wesson Corp. Relying on Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc. and Holmes v. Securities Investor Protection Corp., the court concluded that the City could not recover for the economic costs of gun-related injuries suffered by Bridgeport residents. Specifically, the court found that: (1) the City's injuries were remote and indirect; (2) allowing the City to recover would require the court to adopt complicated apportionment rules to prevent multiple recoveries against the defendants; and (3) those who were directly harmed by gun-related violence were more appropriate parties to litigate the issues raised by the City in its lawsuit.

4. Miami-Dade County

In January 1999, Miami-Dade County brought suit against twenty-six
handgun manufacturers, three trade associations, and two retail dealers, seeking to recover the costs it sustained as a result of gun-related violence. The County based its claim on theories of negligence, products liability, public nuisance, and engaging in an ultra-hazardous activity. However, the trial court dismissed the County's lawsuit and this ruling was affirmed by an intermediate appellate court in February 2001.

The appellate court rejected the negligence and product liability claims because the County did not allege that the defendants' handguns were defective. The court also rejected the ultra-hazardous activity claim because the defendants' conduct did not involve activities on their land which created a high risk of harm to neighboring landowners. Finally, the court refused to declare the sale of handguns to be a public nuisance, observing that the County was trying to assume regulatory powers under the guise of abating a public nuisance that had already been vested exclusively in the state by statute.

5. Atlanta

On February 4, 1999, the City of Atlanta filed an action against various gun manufacturers, distributors, and trade associations. The City contended that the defendants' products were defective because they lacked adequate warnings and safety devices. Shortly after this suit was filed, the Georgia Legislature amended the state firearms regulation statute to prohibit lawsuits against gun manufacturers, retail firearms sellers, and trade associations by any government entity other than the state itself. The statute expressly applied to pending, as well as future, lawsuits. Relying on this provision, the defendants sought writs of mandamus and prohibition to prevent the trial court from hearing the case. However, the Georgia Supreme Court held that the defendants were not entitled to such extraordinary relief and must make use of the ordinary appeal process to determine whether the statute precluded the City from proceeding with its lawsuit.
6. Cleveland

The City of Cleveland filed suit in state court on April 15, 1999, against various handgun manufacturers and trade associations. The City's claims included: (1) a design defect claim under Ohio's Products Liability Act; (2) a common-law claim based on defective design; (3) a failure-to-warn claim under the Ohio Products Liability Act; (4) an unjust enrichment claim; (5) a nuisance abatement claim based on a municipal ordinance; (6) a common-law public nuisance claim; and (7) a negligence claim against the trade association defendants. Shortly thereafter, the defendants removed the case to a federal district and moved to dismiss the complaint because the City's claims were inconsistent with public policy, invalid under state law, and inconsistent with the United States Constitution. However, in March, 2000, the federal district court refused to dismiss the complaint.

The defendants contended that it would violate "public policy" if the case went forward because the court would be forced to make judgments about the production, design, and marketing of handguns that were essentially legislative in nature. However, the court rejected this argument, declaring that it was not "legislating," but instead merely enforcing existing state laws that were applicable to all products. The court employed similar reasoning to counter the defendants' claim that the City's lawsuit constituted an attempt to regulate a national industry in a manner that violated the Commerce Clause of the Constitution. In response, the court pointed out that the Commerce Clause does not prohibit the City from protecting its legal interests just because the defendants sold their products in a national market.

The defendants also maintained that the plaintiffs lacked standing and that their claims were barred by the "firefighter's rule." As far as standing was concerned, the court determined that the City met the constitutional requirements because it had suffered a concrete and particularized injury, this injury was traceable to the defendants' conduct, and the City's injury could be redressed by a favorable decision of the court. Furthermore, the court held

220. Id. § 2307.76.
221. White, 97 F. Supp. 2d at 819.
222. Id. at 820.
223. Id. at 819.
224. Id. at 820-21.
225. See id. at 821 (noting the application of products liability law to a wide range of products and rejecting contention that the regulation of firearms exempts them from these laws).
226. See White, 97 F. Supp. 2d at 829-30 (indicating that the plaintiffs do not seek to enact new regulations, but rather allege that the product is defective and unreasonably dangerous).
227. See id. at 829-30 (noting that products liability claims against firearms manufacturers are not unique in their national scope and do not violate the Constitution).
228. Id. at 821-23. See Part III.E. infra for a discussion of the firefighter's rule and a related doctrine, the municipal cost recovery rule.
229. Id. at 823-25.
that while the firefighter's rule prohibits claims against landowners by municipal employees, it does not bar claims by government entities against product sellers.230

The court concluded that the City was entitled to go to trial on each of its substantive claims. The court disagreed with the defendants' assertion that the City's claims were prohibited by the state products liability statute because they sought to hold handgun manufacturers liable on an industry-wide, market share, or alternative liability basis.231 The court also rejected the defendants' argument that City's lawsuit should be dismissed because it sought to recover for purely economic losses.232 The court concluded that dismissal on this basis was improper because the City claimed that it suffered physical damage, as well as economic losses, as a result of the defendants' actions.233 In addition, the court refused to accept the defendant's proposition that it owed no duty of care to the City.234 Furthermore, the court upheld the City's unjust enrichment claim on the theory that the defendants benefited from expenditures by the City to pay for the costs of handgun violence.235 Finally, the court concluded that the City's public nuisance claim would be allowed if it could prove that the defendants negligently created the nuisance conditions.236

7. Cincinnati

On April 28, 1999, the City of Cincinnati sued fifteen handgun manufacturers, one distributor, and three trade associations in state court.237 In its complaint, the City invoked various theories of liability, including public nuisance, negligent marketing, products liability, fraud, negligent misrepresentation, unfair and deceptive advertising, and unjust enrichment.238 The City sought injunctive relief as well as reimbursement for the increased police, emergency services, health, and correction costs that resulted from handgun violence.239 The trial court dismissed the City's complaint and an intermediate appellate court affirmed its decision.240 However, in June 2002, a

230. See White, 97 F. Supp. 2d at 822-23 (distinguishing between prohibiting claims by individual firefighters and police officers and the rule proposed by defendants that would prohibit any recovery for the cost of governmental functions).

231. See id. at 826-27 (indicating that plaintiff's allegations that each manufacturer makes and distributes defective products differs from an argument for market share liability).

232. Id. at 828.

233. Id.

234. See id. at 828-29 (indicating that it is for the jury to decide whether a plaintiff falls within the defendant's duty of care).

235. See White, 97 F. Supp. 2d at 829 (stating that the allegations are sufficient for that stage of the proceedings).

236. See id. (noting that nuisance claims will "rise or fall" with negligence claims).


238. Cincinnati v. Beretta, 768 N.E.2d at 1140 & n. 1. The City eventually abandoned the last four theories in its complaint. Id.

239. Id. at 1140.

240. Id. at 1140-41.
closely-divided Ohio Supreme Court reinstated the City’s lawsuit.\textsuperscript{241}

Relying on the Restatement’s broad definition of nuisance,\textsuperscript{242} the court upheld the City’s public nuisance claim even though no injury to real property was involved.\textsuperscript{243} Rejecting the narrower definition suggested by the defendants, the court declared that “a public nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public.”\textsuperscript{244} The court also rejected the defendants’ contention that they could not be held liable for public nuisance because they had no control over their products when harm to the public occurred.\textsuperscript{245}

The Ohio Supreme Court also upheld the City’s negligence count. This portion of the complaint alleged that the defendants had failed to exercise reasonable care in “designing, manufacturing, marketing, advertising, promoting, distributing, supplying, and selling their firearms.”\textsuperscript{246} This was essentially a “negligent marketing” claim based on the assumption that the defendants’ marketing practices substantially contributed to the maintenance of an illegal firearms market in the Cincinnati area.\textsuperscript{247} The intermediate appellate court had declared that in the absence of a “special relationship,” the defendants owed no duty to protect the City against the criminal acts of third parties.\textsuperscript{248} The Ohio Supreme Court, on the other hand, concluded that the “special relationship” rule was inapplicable because the City’s charge was not that the defendants failed to control the acts of third parties, but that they had committed various affirmative acts in order to promote a market for illegal firearms.\textsuperscript{249} Finally, the Ohio Supreme Court ruled that the City could maintain negligence-based design defect and failure-to-warn actions to recover for economic losses even though such claims cannot be brought on a strict liability basis under the Ohio Products Liability Act.\textsuperscript{250}

8. Camden County

On June 1, 1999, the governing body of Camden County, New Jersey, filed suit against twenty-one gun manufacturers and one distributor, alleging public nuisance, negligent entrustment, and negligent marketing and distribution.\textsuperscript{251}

\begin{itemize}
  \item \textsuperscript{241} Id. at 1141.
  \item \textsuperscript{242} Restatement (Second) of Torts § 821B (1).
  \item \textsuperscript{243} Cincinnati v. Beretta, 768 N.E.2d at 1142.
  \item \textsuperscript{244} Id.
  \item \textsuperscript{245} Id. at 1143 (indicating the creation of the alleged nuisance is a potential basis for liability).
  \item \textsuperscript{246} Id. at 1144.
  \item \textsuperscript{247} For a discussion of negligent marketing, see Richard C. Ausness, Tort Liability for the Sale of Non-Defective Products: An Analysis and Critique of the Concept of Negligent Marketing, 53 S.C. L. Rev. 907 (2002).
  \item \textsuperscript{248} Cincinnati v. Beretta, 768 N.E.2d at 1144.
  \item \textsuperscript{249} Id.
  \item \textsuperscript{250} See id. at 1146-47 (stating that common law claims for negligent design had survived the enactment of the statutory scheme).
  \item \textsuperscript{251} Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245,
Specifically, the County claimed that the defendants were facilitating illegal handgun sales in Camden County by producing, marketing, and distributing firearms in the area far in excess of the legitimate needs of the local population. The County sought damages for the cost of handgun-related violence, punitive damages for the defendants' intentional and reckless conduct, and an injunction to require the defendants to change their marketing and distribution practices. The trial court, however, granted the defendants' motion to dismiss.

On appeal, the County abandoned its other claims and relied solely on public nuisance. In an opinion issued in November, 2001, the U.S. Court of Appeals for the Third Circuit determined that the distribution of non-defective products, lawfully placed into the stream of commerce, is not a public nuisance under existing principles of state law. Furthermore, the court declared that even if it were willing to expand public nuisance law beyond its traditional limits, it would not do so in this instance because there was no evidence that the defendants had any control over the actions of independent third parties whose criminal conduct actually interfered with the rights of the public. Accordingly, the court affirmed the ruling of the trial court.

9. Philadelphia

In April 2000, the City of Philadelphia and five civic organizations brought suit in state court against fourteen gun manufacturers alleging public nuisance, negligence, and negligent entrustment. The City sought to recover the costs of criminal justice administration, police activities, emergency medical services, and educational programs to the extent that these costs were attributable to handgun-related violence. The case was removed at the defendants' behest to the U.S. District Court for the Eastern District of Pennsylvania where it was dismissed in December 2000. The district court concluded that none of the plaintiffs' claims was valid. The court also ruled that the organizational plaintiffs lacked standing to sue and that state law barred the city from suing gun manufacturers.

249-50 & n.3 (D.N.J. 2000).
253. Id. at 252.
254. Id. at 267-68.
257. Id. at 541.
258. Id. at 542.
263. Id. at 896.
264. See id. at 889 (citing The Uniform Firearm Act, 18 PA. CONS. STAT. § 6101 et seq.).
On appeal, the Third Circuit rejected all of the plaintiffs’ substantive claims. In its review of the public nuisance claim, the court concluded that conventional doctrine does not provide any basis for holding manufacturers of lawful, non-defective products liable for interference with public rights caused by remote purchasers of these products. Furthermore, the court stated that a federal court should not expand state law doctrines in the absence of supporting decisions from state courts. The court also rejected the plaintiffs’ negligence and negligent entrustment claims on proximate cause grounds because it concluded that the alleged injuries were too far removed from the actions of the defendants. Finally, the court declared that gun manufacturers had no legal duty to protect victims from illegal acts by third parties.

10. Newark

In 1999, the City of Newark, New Jersey, brought suit against a group of handgun manufacturers, distributors, retailers, and trade organizations. The nine-count complaint alleged, inter alia, defective design, failure to warn, negligent marketing, public nuisance, unjust enrichment, and violation of the New Jersey Products Liability Act. The trial court dismissed the City’s strict liability and unjust enrichment claims, but allowed the negligence and public nuisance claims to go forward.

In 2003, the trial court’s decision was affirmed by the appellate division of the New Jersey Superior Court. The appellate court considered whether the defendants could be held liable for maintaining a public nuisance even though handgun sales did not involve an unreasonable use of real property, cause harm to real property, or violate a statute or ordinance. The court also discussed proximate cause, standing, and duty issues, as well as the potential applicability of the municipal cost recovery rule. Relying on the Restatement of Torts, the court concluded that an activity that causes physical or economic harm to numbers of the public might constitute a public nuisance even though it does not interfere with the use or enjoyment of private property. The court also rejected the defendants’ proximate cause argument, concluding that there was a sufficient causal link between the handgun sellers’ marketing practices and

265. See Philadelphia v. Beretta, 277 F.3d at 420-21 (indicating that public nuisance claims traditionally encompass only interference connected with real property or public rights).
266. Id. at 421.
267. Id. at 426.
268. Id. at 425.
270. James, 820 A.2d at 34.
271. Id.
272. Id. at 50-51.
273. See generally id. at 37-47.
274. See generally id. at 48-49.
276. James, 820 A.2d at 50.
the continued existence of an illegal market for firearms. Furthermore, the court determined that the defendants owed a duty to the City, notwithstanding the absence of a special relationship between them. Finally, the New Jersey court declined to shield the defendants from liability under the municipal cost recovery rule. In the court’s view, the risk spreading policies that justify insulating tortfeasors from liability for one-time accidents does not apply to continuing activities that impose long-term costs on government entities.

11. Gary

In September 1999, the City of Gary, Indiana, brought suit against eleven handgun manufacturers, one wholesaler, five retailers, and a number of “John Doe” defendants in each of these three categories, seeking both damages and injunctive relief. The City based its claim on public nuisance, negligent marketing, deceptive advertising, and negligent design. The City alleged that these activities increased violent crimes and required it to pay more for crime-related expenditures. The complaint sought compensatory and punitive damages, as well as injunctive relief. The trial court dismissed the City’s complaint. The intermediate appellate court affirmed the lower court’s holding with respect to the negligence claims, but upheld the City’s public nuisance claim against retail dealers. In December 2003, the Indiana Supreme Court upheld the City’s public nuisance claim, reinstated its negligent marketing claim against the defendants, and held that the City could proceed with its negligent design claim against the handgun manufacturers.

12. New York State

Although almost all of the government plaintiffs in the handgun lawsuits were municipalities or counties, some states have recently begun to show an interest in suing handgun manufacturers. For example, the Attorney General of New York brought statutory and common law public nuisance actions against handgun manufacturers in People ex rel. Spitzer v. Sturm, Ruger & Co. When the trial court dismissed both claims, the state dropped the statutory nuisance

277. See id. at 37-44 (noting the relationship between the alleged practices of the defendants, criminal use of guns, and harm to the city).
278. Id. at 47.
279. Id. at 49.
280. Id. at 48-49.
283. Id. at 1228.
284. Id.
285. Id. at 1228-29.
claim, but appealed the dismissal of its common law claim.289

As in other cases, the plaintiff alleged that the defendants, by their design, marketing, and distribution choices, knowingly supplied the illegal handgun market, thereby increasing the number of firearms in criminal hands.290 Furthermore, the state contended that the defendants had the power to reduce the black market, and the resulting harm from illegal handguns, by altering their business practices.291 The State did not seek money damages, but rather sought to compel the defendants to abate the alleged nuisance by changing the design and marketing of their handguns.292

Relying on *Hamilton v. Beretta USA Corp.*,293 a negligent marketing case,294 the court rejected the state's claim that trace requests from the federal Bureau of Alcohol, Tobacco & Firearms ("BATF") would have informed the defendants that their marketing policies were facilitating criminal activities.295 The court also held that the defendants did not owe a duty to the community at large to market its products in a way that would minimize access to handguns by criminals.296 Next, the court determined that the manufacture and sale of handguns by the defendants was not the proximate cause of harm to the public caused by the criminal conduct of third parties.297

In addition, the court concluded that common law public nuisance law should not be expanded in order to cope with social problems like handgun violence that could be addressed more efficiently by the executive and legislative branches of government.298 Finally, the court expressed concern that:

> Giving a green light to a common-law public nuisance cause of action today will, in our judgment, likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities.299

Consequently, the intermediate appellate court affirmed the trial court's dismissal of the state's common law public nuisance suit.300 Late in 2003, the New York Court of Appeals denied the state's request to review this decision.301

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289. *Spitzer*, 761 N.Y.2d at 194.
290. Id. at 199.
291. Id.
292. Id. at 194.
296. Id. at 200-01.
297. Id. at 201.
298. Id. at 202-04.
299. Id. at 196.
300. *Spitzer*, 761 N.Y.S. 2d at 204.
13. The Smith & Wesson Settlement

As in the tobacco litigation, the federal government waited in the weeds during the early stages of the handgun litigation, but it eventually entered the fray in December 1999, when the Secretary of the Department of Housing & Urban Development ("HUD") announced that he would file a class action on behalf of local housing authorities unless gun manufacturers agreed to greater regulation. In response to this threat, Smith & Wesson entered into a settlement agreement with HUD and a number of federal, state, and municipal plaintiffs on March 17, 2000. Under the terms of the settlement, Smith & Wesson agreed to redesign its handguns in order to make it more difficult for small children to fire them. Smith & Wesson also agreed to develop safety locks for its handguns and to place a secret set of serial marks on them in order to make it more difficult for criminals to hide a handgun's identity. Finally, Smith & Wesson promised to sell handguns only to dealers and distributors who agreed to a code of conduct designed to prevent retail handgun sales to unauthorized users.

C. Suits Against Lead Paint Manufacturers

Although the handgun litigation has not yet run its course, some government entities have already shifted their attention to lead paint manufacturers. About fifteen years ago, individual plaintiffs and local public housing authorities began to sue lead paint manufacturers for personal injuries and economic losses caused by the exposure of children to lead paint in buildings. The plaintiffs in these cases alleged that paint manufacturers

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302. See Dawson, supra note 26, at 1727 (stating that Secretary Coumo announced the proposed HUD lawsuit to increase pressure on gun manufacturers to accept additional legislation).

303. See Burnett, supra note 156, at 481-82 (explaining why Smith & Wesson entered into an agreement and what the agreement entailed).

304. Id.

305. Dawson, supra note 26, at 1748-49.

306. Burnett, supra note 156, at 482.

307. See Donald G. Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. Rev. 741, 770-71 (2003) (stating that Rhode Island and a number of counties and municipalities have moved on from gun-related lawsuits to lead paint lawsuits).

conspired to conceal information from the public about the dangers of exposure to lead-based paint in order to preserve the existing market for such products.\textsuperscript{309} According to industry sources, these lawsuits were uniformly unsuccessful.\textsuperscript{310}

Recently, however, paint manufacturers have been targeted by a new barrage of lawsuits. For example, in September 1999, plaintiff's attorney Peter Angelos filed a class action lawsuit on behalf of all Maryland residents whose homes were painted with lead-based paint.\textsuperscript{311} However, a Baltimore trial court judge dismissed the case in December 2001.\textsuperscript{312} Another potentially significant case involves a claim by the City of New York, the New York City Housing Authority, and the New York City Health & Hospitals Corporation to recover the costs the City had incurred as the result of the presence of lead paint in public housing projects.\textsuperscript{313} This case began in 1989 and has stalled in the courts for more than ten years. Although the City has been forced to abandon many of its claims, the case is apparently still active.\textsuperscript{314}

A number of other lawsuits have been dismissed at the trial court level. For example, in \textit{County of Santa Clara v. Atlantic Richfield Co.},\textsuperscript{315} a California superior court judge dismissed a lawsuit brought against lead paint manufacturers by six counties, the cities of San Francisco and Oakland, various housing authorities, school districts, and a local redevelopment agency.\textsuperscript{316} These entities sought to recover for the cost of medical care, educational programs, inspections, and abatement.\textsuperscript{317} The court concluded that the plaintiffs' action was barred by the statute of limitations.\textsuperscript{318} A trial court also rejected the public injury victim to invoke market share liability, alternative liability and concert of action theories in suit against lead paint manufacturers).

\textsuperscript{309} Amber E. Dean, Comment, \textit{Lead Paint Public Entity Lawsuits: Has the Broad Stroke of Tobacco and Firearms Litigation Painted a Troubling Picture for Lead Paint Manufacturers?}, 28 \textit{PENN. L. REV.} 915, 933 (2001) (stating that the Rhode Island complaint alleged that Sherwin-Williams had knowledge of the danger of lead paint prior to the manufacturing of lead paint).

\textsuperscript{310} One industry Internet website declares that paint manufacturers did not lose or settle a single lawsuit during this period. Understanding Lead Pigment Litigation, http://www.leadlawsuits.com/ (last visited, Feb. 23, 2005).

\textsuperscript{311} See Richard L. Cupp, Jr., \textit{State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?}, 27 \textit{PENN. L. REV.} 685, 691 (2000) (noting that in 1999 Peter Angelos filed two lawsuits against the lead paint industry, one of which was a class action lawsuit filed on behalf of Maryland homeowners that had lead paint in their homes).


\textsuperscript{314} See City of New York v. Lead Indus. Ass'n, 713 N.Y.S.2d 345, 345-46 (N.Y. App. Div. 2000) (granting partial summary judgment to Defendant American Cyanamid, but affirming ruling that further discovery was needed for other claims).


\textsuperscript{316} Id.

\textsuperscript{317} Id.

\textsuperscript{318} Id.
nuisance theory in *City of Chicago v. American Cyanamid Co.* In that case, the City of Chicago brought a public nuisance claim against paint manufacturers, seeking to require them to abate the alleged nuisance. Affirming the trial court’s dismissal, the intermediate appellate court declared that the city had failed to show that the defendants were the cause-in-fact of the nuisance. In addition, the court held that the city also failed to prove proximate cause. However, the plaintiff fared better in *City of Milwaukee v. NL Industries.* The City contended that lead-based paint manufactured by the defendants created a public nuisance and sought to make them pay for the costs of abatement. The trial court concluded that the City had not established that the defendants had created a nuisance and, therefore, dismissed the case. On appeal, an intermediate appellate court held that there were disputed issues of causation that had to be resolved at trial. The court also declared that lead paint was a community-wide health threat that could be abated most effectively by a public nuisance action.

Perhaps the most significant public tort lawsuit against the lead paint industry involves the State of Rhode Island. In October 1999, the Attorney General of Rhode Island filed suit against eight paint manufacturers. The complaint sought damages to pay for the cost of caring for victims of lead poisoning and for the cost of removing lead-based paint in homes. Rhode Island based its liability claim on public nuisance, products liability, misrepresentation, civil conspiracy, and unjust enrichment. Not surprisingly, Rhode Island is represented in this lawsuit by one of the law firms that was involved in the tobacco litigation. Since the Rhode Island lawsuit was filed, more than forty other government entities and organizations have brought similar suits against paint manufacturers.

On April 2, 2001, the Court dismissed all product liability claims, the claim for equitable relief to children, and the unfair trade practices claim for pre-1970 conduct. However, the court refused to dismiss the State’s claims for public

320. *American Cyanamid,* 823 N.E.2d at 129.
321. *Id.* at 134.
322. *Id.* at 136.
323. 691 N.W.2d 888 (Wis. Ct. App. 2004).
324. *NL Industries,* 691 N.W.2d at 890-91.
325. *Id.* at 890.
326. *Id.* at 890-91.
327. *Id.* at 890.
328. Dean, supra note 309, at 915.
329. *Id.* at 915-16
330. *Id.* at 915.
331. See Jensen, supra note 108, at 1365 (stating that the Rhode Island Attorney General hired a plaintiffs’ firm that had experience with the tobacco litigation to help in the lead paint litigation).
332. Molly McDonough, *Poisoned by Paint,* 88 A.B.A. J. 42, 44 (July 2002) (stating that over forty cities, counties and organizations have filed suits similar to Rhode Island).
333. See Understanding Lead Pigment Litigation, *Lead Pigment Litigation Information by State:}*
nuisance, unjust enrichment, indemnity, unfair trade practices, conspiracy, and property damage. The court divided the trial into three phases: Phase I would determine whether the presence of lead-based paint in public and privately-owned buildings constituted a public nuisance; if a public nuisance was found to exist, Phase II would determine whether the defendants should be held liable for creating it; and if the State's position was upheld, Phase III would determine what sort of damages or equitable relief was appropriate. The case went to trial on the public nuisance claim in October 2002, but the jury was unable to reach a verdict. On June 19, 2003, the trial judge set a trial date of April 5, 2004 for a retrial of the state's public nuisance case. As of this article's publication, the trial date has been pushed to April 5, 2005.

II. LIABILITY THEORIES

Government entities have relied on a variety of legal theories in their efforts to recover damages from product sellers. In some cases, their claims are based on conventional applications of familiar doctrines such as failure-to-warn, defective design, fraud, unfair trade, and conspiracy. However, government plaintiffs have also tried to support their claims by expanding, or even distorting, other liability theories such as unjust enrichment, negligent entrustment, engaging in an ultra-hazardous or abnormally dangerous activity, parens patriae, civil RICO, and public nuisance. This strategy has proved successful in a substantial number of cases.

A. Unjust Enrichment and Restitution

Unjust enrichment occurs when someone receives a benefit under circumstances where it would be unconscionable to allow him or her to retain it. For example, it would be unjust to allow an individual to retain property that he or she has obtained through force or fraud. However, unjust enrichment may be available when the defendant is innocent of wrongdoing as when, for example, he or she obtains a benefit by mistake. Restitution is the


334. Id.

335. Gifford, supra note 307, at 772-73.


337. Id.


339. RESTATEMENT (FIRST) OF RESTITUTION § 1 cmts. a-c (1937).

340. RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. c (1937).

341. RESTATEMENT (FIRST) OF RESTITUTION Ch. 2 Introductory Note (1937).
traditional remedy for unjust enrichment; it requires the defendant to return property when it would be unconscionable to allow the recipient to retain it.\textsuperscript{342} In the cigarette cases, government plaintiffs argued that cigarette companies had imposed significant smoking-related health care costs on the states because they were obligated to provide medical care for indigent smokers under the Medicaid program.\textsuperscript{343} The states maintained that smoking-related health care costs should be borne by the tobacco companies and that tobacco companies were unjustly enriched to the extent that these costs were shifted to the states.\textsuperscript{344}

Unjust enrichment and restitution have also played a prominent role in government-sponsored handgun litigation. For example, in \textit{Ganim v. Smith \& Wesson Corp.},\textsuperscript{345} the City of Bridgeport contended that the defendants had reaped enormous profits from the unlawful sale of handguns in the Bridgeport area, while allowing the economic costs of handgun violence to fall almost entirely on the City.\textsuperscript{346} According to the City, the defendants were unjustly enriched at its expense.\textsuperscript{347} The court, however, concluded that individual victims of handgun violence, rather than the City, are the real injured parties.\textsuperscript{348}

The City of Cleveland's unjust enrichment claim in \textit{White v. Smith \& Wesson Corp.}\textsuperscript{349} fared somewhat better. The City alleged that it had conferred a benefit upon the defendants by paying for the costs of personal injuries caused by poor handgun design and negligent marketing practices.\textsuperscript{350} The court observed that relief from unjust enrichment is not limited to situations where money or property is actually transferred to another, but is also available where another's expenditure saved the defendant from an expense or loss.\textsuperscript{351} Accordingly, the court concluded that the City could recover under an unjust enrichment theory if it could prove that its expenditures for handgun-related injuries should have been paid for by the defendants.\textsuperscript{352}

\textbf{B. Negligent Entrustment}

Several municipal plaintiffs have sought to hold gun manufacturers liable on a negligent entrustment basis. The traditional formulation of negligent entrustment doctrine provides that:

It is negligence to permit a third person to use a thing or to engage in

\textsuperscript{342} See R. Zoppo Co. v. City of Manchester, 453 A.2d 1311, 1313 (N.H. 1982) (stating that plaintiff is entitled to restitution if he shows unjust enrichment).


\textsuperscript{344} \textit{Id.} at 595.

\textsuperscript{345} 780 A.2d 98 (Conn. 2001).

\textsuperscript{346} \textit{Ganim}, 780 A.2d at 117.

\textsuperscript{347} \textit{Id.}

\textsuperscript{348} \textit{Id.} at 123.

\textsuperscript{349} 97 F. Supp. 2d 816, 819 (N.D. Ohio 2000) (denying defendant's motion to dismiss).

\textsuperscript{350} \textit{White}, 97 F. Supp. 2d at 829.

\textsuperscript{351} \textit{Id.}

\textsuperscript{352} \textit{Id.}
an activity which is under the control of the actor, if the actor knows or
should know that such person intends or is likely to use the thing or to
conduct himself in the activity in such a manner as to create an
unreasonable risk of harm to others.353

The majority of negligent entrustment cases involve motor vehicles,354 but
some courts have imposed liability on the owners of other chattels such as
firearms.355 The defendant's duty of care arises from his or her ability to
determine who may use the chattel.356 Thus, to be held liable, the defendant
must own or control the chattel at the time the injury occurs. The negligent
entrustment doctrine is not usually applicable to negligent acts that occur once
title or control has passed from the defendant to the negligent user.357 Some
courts have expanded the negligent entrustment doctrine beyond its original
boundaries and apply it to situations where the defendant does not have legal
title or physical control over the chattel, but helps an unsuitable person to
acquire possession of it.358 For example, a number of courts have imposed
liability upon parents who have donated or purchased motor vehicles for the use
of their reckless or incompetent offspring.359 This has led some commentators to
suggest that the concept of negligent entrustment might be expanded even
further to support the imposition of liability upon retail sellers who sell
dangerous products, such as handguns, to clearly unsuitable people.360

Some municipal plaintiffs have also brought negligent entrustment claims
against handgun manufacturers and sellers. For example, Camden County


354. See, e.g., Fogo v. Steele, 304 P.2d 451, 452 (Kan. 1956) (holding mother liable for giving
adult son, known to be reckless, permission to drive her automobile); Snowhite v. State, 221 A.2d 342,
355-56 (Md. 1966) (holding owner of gasoline truck liable for allowing known alcoholic to drive
vehicle).

355. See, e.g., McBerry v. Ivie, 159 S.E.2d 108, 111 (Ga. 1967) (holding parent liable for giving
shotgun to young child); Stoeiting v. Hauck, 159 A.2d 385, 389 (N.J. 1960) (holding parents of teenage
girl liable for allowing her to play with handgun); Mazzioli v. Selger, 99 A.2d 417, 421 (N.J. 1953)
(holding parents liable for allowing nine-year-old child access to shotgun); LaFaso v. LaFaso, 223 A.2d
814, 819 (Vt. 1966) (holding grandfather liable for giving cigarette lighter to one-and-one-half year old
grandchild).

"[t]hat theory of liability [negligent entrustment] is applicable only when the defendant has a right of
control over the instrumentality entrusted").

357. See, e.g., Estes v. Gibson, 257 S.W.2d 604, 606-07 (Ky. 1953) (holding mother not liable for
negligence of adult son once title to automobile passed to son); Sikora v. Wade, 342 A.2d 580, 582
(N.J. Super. Ct. Law Div. 1975) (holding former owner of automobile not liable for negligent acts that
took place after he donated it to a 16-year-old friend of his son); Brown v. Harkleroad, 287 S.W.2d 92,
96 (Tenn. Ct. App. 1955) (holding no liability for father who purchased motor vehicle for son known
to be an alcoholic and a reckless driver).

358. See, e.g., Vince v. Wilson, 561 A.2d 103, 106 (Vt. 1989) (holding a person may be liable for
negligent entrustment when they provide funding to buy a car to a known incompetent).

359. See, e.g., Kahlenberg v. Goldstein, 431 A.2d 76, 81 (Md. 1981) (citing cases holding parents
liable for giving reckless or incompetent offspring an automobile).

360. See Timothy D. Lytton, Halberstam v. Daniel and the Uncertain Future of Negligent
Marketing Claims Against Firearms Manufacturers, 64 BROOK. L. REV. 681, 689 (1998) (discussing the
doctrinal foundations of negligent entrustment claim raised by plaintiff in Halberstam).
alleged that the manufacturers negligently failed to monitor the sale and distribution of their products, thereby helping to sustain the illegal market in handguns in the Camden area.\textsuperscript{361} The federal district court did not consider whether the manufacturers' conduct amounted to negligent entrustment, but instead dismissed all of the County's negligence-based claims on standing and proximate cause grounds.\textsuperscript{362} On appeal, the County dropped its negligent entrustment claim and elected instead to rely upon public nuisance theory.\textsuperscript{363}

The City of Philadelphia also brought a negligent entrustment claim against handgun manufacturers.\textsuperscript{364} However, the trial court concluded that handgun manufacturers have no duty to protect individuals against gun-related violence by third parties.\textsuperscript{365} For good measure, the court also ruled that the harm suffered by the City was too far removed from the defendants' conduct to satisfy the proximate cause requirement for a negligence claim.\textsuperscript{366} This reasoning was affirmed by the Third Circuit on appeal.\textsuperscript{367}

On the other hand, the Supreme Court of Indiana in City of Gary v. Smith & Wesson Corp.\textsuperscript{368} recently adopted a more expansive version of the negligent entrustment doctrine. The Indiana court stated that a custodian of firearms must exercise reasonable care to ensure that such weapons do not fall into the hands of unsuitable people.\textsuperscript{369} However, the court went on to declare that this duty applies to all of the defendants, including manufacturers.\textsuperscript{370} According to the court, "[e]ach defendant is a custodian and owner of the weapon at the times that defendant possesses it in the chain of distribution."\textsuperscript{371} It remains to be seen whether other courts will be persuaded by the reasoning in the City of Gary decision.

C. Abnormally Dangerous Activities

It has been suggested that those who engage in the manufacture and distribution of inherently dangerous products should be subjected to strict liability for carrying on an ultrahazardous or abnormally dangerous activity.\textsuperscript{372}

\begin{footnotes}
\item[362] Camden v. Beretta, 123 F. Supp. 2d at 255-64.
\item[366] Id. at 903.
\item[368] 801 N.E.2d 1222 (Ind. 2003).
\item[369] Gary v. Smith & Wesson, 801 N.E.2d at 1241-42.
\item[370] Id. at 1242.
\item[371] Id.
\item[372] See John L. Diamond, Eliminating the "Defect" in Design Strict Products Liability Theory, 34 Hastings L.J. 529, 549 (1983) (contending that "strict liability clearly should be imposed on the manufacturers of products that are abnormally dangerous in all uses and applications").
\end{footnotes}
This form of strict liability originated in Rylands v. Fletcher, an English case decided by House of Lords in 1868, which found its way into many American jurisdictions after its adoption by the First Restatement of Torts in the 1930's. The rationale for imposing strict liability is to compensate those who are injured when an enterprise engages in an activity that is inappropriate to its surroundings or one that is so dangerous that injuries are likely to occur even with the exercise of due care.

During the 1980's, a number of commentators argued that the manufacture and sale of "Saturday Night Specials" and other cheap handguns should be treated as an abnormally dangerous or ultrahazardous activity. These efforts were unsuccessful because most courts were unwilling to expand this form of strict liability to activities that were not closely related to the use of land. These courts also concluded that handgun manufacture and marketing are matters of "common usage" and, therefore, can not be treated as ultrahazardous activities under the traditional doctrine. In spite of this precedent, Miami-Dade County invoked the ultrahazardous activity theory in its lawsuit against handgun manufacturers and sellers. The court, however, rejected the County's claim, concluding that strict liability was not appropriate unless the defendants conducted an activity on their land that endangered nearby landowners. Consequently, one may reasonably predict that other courts will refuse to subject those who manufacture non-defective products to strict liability for engaging in an ultrahazardous activity.

373. 3 L.R.-E & I. App. 330 (H.L. 1868).
375. See Langan v. Valicopters, Inc., 567 P.2d 218, 222-23 (Wash. 1977) (arguing that risk of harm from crop dusting cannot be eliminated by due care and that using pesticides adjacent to an organic farming area is an activity conducted in an inappropriate place).
377. See Shipman v. Jennings Firearms, Inc., 791 F.2d 1532, 1534 (11th Cir. 1986) (stating that Florida cases have imposed strict liability for ultra-hazardous activities which occur on the land); Moore v. R.G. Indus., Inc., 789 F.2d 1326, 1328 (9th Cir. 1986) (stating that California law considers an activity ultra-hazardous if it involves a "risk of serious harm to the person, land or chattels of others"); Perkins v. F.I.E. Corp., 762 F.2d 1250, 1268 (5th Cir. 1985) (concluding that because the marketing of handguns is not a land-related activity, it does not fall under the Louisiana doctrine of ultra-hazardous activities).
380. Penlas, 778 So. 2d at 1044-45.
381. See Charles E. Cantó, Distinguishing the Concept of Strict Liability for Ultra-hazardous Activities from Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning that Should Never Meet, 35 Akron L. Rev. 31, 56 (2001) (pointing out that most states require an injured plaintiff to prove a product is dangerous).
D. Parens Patriae

_Parens patriae_ is a doctrine that authorizes a state to protect the health, safety, or welfare of its citizens.\(^{382}\) The concept of _parens patriae_ originated as an aspect of the royal prerogative which allowed the Crown to act on behalf of persons who were unable to care for themselves or their property because of minority, insanity, or mental incapacity.\(^{383}\) In its modern guise, the doctrine of _parens patriae_ enables state officials to bring a civil action in order to protect a state's sovereign or quasi-sovereign interests.\(^{384}\) The doctrine of _parens patriae_ is useful in such cases because it enables the Attorney General to sue independently of other state officials who may be charged with recoupment Medicaid costs or other responsibilities.\(^{385}\) In addition, in a _parens patriae_ action, a defendant cannot raise affirmative defenses, such as assumption of risk, that might be asserted against individual plaintiffs.\(^{386}\) Furthermore, a state may seek damages as well as injunctive relief in a _parens patriae_ action.\(^{387}\)

The leading case in this area is _Alfred L. Snapp & Son v. Puerto Rico ex rel Banez_,\(^{388}\) which was decided by the United States Supreme Court in 1982. In that case, the Commonwealth of Puerto Rico filed a _parens patriae_ action against a number of Virginia apple growers, alleging that they had violated various federal statutes by engaging in discriminatory employment practices against Puerto Rican workers.\(^{389}\) The plaintiff claimed that the defendants' conduct had injured its economy by undermining attempts to develop employment opportunities in the mainland for its citizens in order to reduce unemployment in Puerto Rico.\(^{390}\) The defendants responded that the Commonwealth lacked standing to bring such an action because only a relatively small number of its citizens were affected by the apple growers' alleged discriminatory practices.\(^{391}\)

The Supreme Court distinguished between sovereign interests, quasi-sovereign interests, proprietary interests, and interests pursued by the state as a nominal party.\(^{392}\) States could protect the first two interests through _parens patriae_ actions, but not the latter two.\(^{393}\) The Court identified two sovereign

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385. See id. at 1875-76 (discussing the strength of the Attorney General's authority in Louisiana).
386. See id. at 1876-77 (noting the limitations on the scope of defenses to _parens patriae_ actions).
389. _Banez_, 458 U.S. at 597-98.
390. _Id._ at 598.
391. _Id._ at 599.
392. _Id._ at 601-02.
393. _Id._ at 601.
interests: (1) the exercise of sovereign power over individuals and entities within its jurisdiction; and (2) the demand for recognition by other sovereigns, particularly with respect to the integrity of its borders. Quasi-sovereign interests involve the interests a state has in the well-being of its citizens. According to the Court, these interests fell into two broad categories. The first included the health and well-being, both physical and economic, of its citizens; the second involved the state’s interest in not being denied its rightful status within the federal system. The Court defined proprietary interests as those associated with ownership of land or involvement in business ventures where a state’s interests are no different than similarly situated private owners. Finally, the Court noted that when a state brought a suit solely to benefit the interests of private parties, it has no sovereign or quasi-sovereign interest to protect, but was merely a “nominal party” to the suit. Consequently, the Court upheld the right of Puerto Rico to sue as parens patriae.

Although parens patriae actions have not been very common in the past, some states invoked this doctrine in tobacco litigation. For example, in its lawsuit against cigarette manufacturers, the State of Texas relied upon the parens patriae doctrine to provide an independent basis for standing even though a state statute seemingly provided an exclusive procedure for the reimbursement of Medicaid claims. A federal district court in State of Texas v. American Tobacco Co. concluded that the state had identified a sufficient quasi-sovereign interest to support an action against the manufacturers of tobacco products based on the doctrine of parens patriae. The court observed that the state of Texas was not a nominal party, but spent millions of dollars a year to provide medical care to its citizens through the Medicare program. Consequently, the health consequences of smoking had a direct impact on the economy of the state and the welfare of its citizens.

The District Court for the Eastern District of Texas’ analysis in State of Texas v. American Tobacco Company seems consistent with the Supreme Court’s reasoning in Snapp. In the past, courts have allowed states to bring parens patriae actions to protect their citizens from flooding, air pollution, and other environmental concerns. See, e.g., North Dakota v. Minnesota, 263 U.S. 365, 373-74 (1923) (reviewing multiple parens patriae actions).
water pollution, and other threats to public health and safety. *Parens patriae* actions have also been brought to protect the economic interests of residents from the effects of quarantine measures, price discrimination, and similar activities. It should be noted, however, that in each of these cases the defendant's conduct was either tortious or illegal. This suggests that the doctrine of *parens patriae* gives a state standing to sue, but cannot be used to create new forms of substantive liability. Therefore, if a state wishes to bring a successful *parens patriae* suit against product manufacturers, it will have to prove that the products in question are defective or that the manufacturers engaged in negligent marketing or some other some sort of tortious conduct. In addition, since virtually all *parens patriae* suits have involved claims for injunctive relief, it is questionable whether states may invoke this doctrine to support a claim for damages.

**E. MCRA, MSP, and RICO**

Government plaintiffs have not limited themselves to common-law liability theories, they have also relied on a variety of statutes. For example, in their lawsuits against the tobacco industry, state officials in Florida, Maryland, and Massachusetts benefited from recently-enacted statutes that relaxed proof requirements and protected them against affirmative defenses that could have been raised against individual litigants. In its suit against tobacco companies, the Department of Justice based its claims on three federal statutes, the Medical Care Recovery Act ("MCRA") the Medical Secondary Payer Provision of the Social Security Act ("MSP"), and the Racketeer Influenced and Corrupt Organizations Act ("RICO").

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408. Louisiana v. Texas, 176 U.S. 1, 22-23 (1900) (deliberating on a *parens patriae* action taken by Louisiana against the intentional obstruction by Texas by means of quarantine regulations).


414. Id. § 1395y.

MCRA permits the federal government to sue tortfeasors to recover the cost of treating injured military personnel. In United States v. Philip Morris Inc., the Government contended that under MCRA it could recover twenty billion dollars per year for the past ten years as reimbursement for the cost of treating smoking-related illnesses under its Medicare program. However, the court concluded that the text of the statute appears to create a right of subrogation, rather than an independent cause of action, on behalf of the federal government. Furthermore, the statute seemed to be concerned solely with injuries against military personnel and had never been invoked to recover the cost of treating civilians under the Medicare program.

MSP allows the federal government to sue health insurance companies, health care providers, and health care recipients to recover health care costs that were paid by the government but which should have been paid by the insurer. It also permits suits against non-insurance entities when they were required to pay for health care costs under a "self-insured plan." However, the court in Philip Morris found that nothing in the MSP authorizes the Government to sue the tortfeasors who actually caused the underlying personal injuries.

RICO was the third statute at issue in United States v. Philip Morris, Inc. RICO was enacted in 1970 in order to combat the infiltration of organized crime into legitimate business enterprises. The statute imposes criminal and civil liability on any person who invests income from a pattern of racketeering activity in an enterprise, acquires through a pattern of racketeering activity an interest in an enterprise, conducts an enterprises' affairs through a pattern of racketeering activity, or conspires to do any of these things. An "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." RICO defines "racketeering activity" as various enumerated criminal acts including mail fraud, wire fraud, drug trafficking,

418. See Dawson, supra note 412 at 1737-38 (discussing the outcome of the motion to dismiss).
419. See id. at 1738-39 (same).
420. Id. at 1739.
421. See id. (discussing the outcome of the motion to dismiss).
425. Id. § 1962(b).
426. Id. § 1962(c).
427. Id. § 1962(d).
428. Id. § 1961(4).
murder, arson, gambling, extortion, bribery, or embezzlement.\textsuperscript{429} According to the statute, a “pattern of racketeering activity” consists of two or more acts of racketeering that occur within ten years of each other and which reflect relationship and continuity in terms of purpose, results, participants, victims, or methods, but which are sufficiently distinct so that they amount to more than a single episode or an isolated occurrence.\textsuperscript{430} Because at least two of these offenses must be committed in order to make out a claim under RICO, they are referred to as “predicate acts.”\textsuperscript{431}

There are two types of civil remedies available under RICO, damages and equitable relief. Any person injured in his business or property by reason of a RICO violation may sue for treble damages.\textsuperscript{432} In addition, a court may grant various equitable remedies, including restricting the defendants from engaging in certain activities in the future and even dissolving or restructuring the enterprise.\textsuperscript{433} A provision of RICO expressly authorizes the United States Attorney General to seek equitable relief in appropriate cases.\textsuperscript{434} The federal government took the position that it may seek disgorgement of a defendant's wrongful gains or profits as part of its claim for equitable relief.

In United States v. Philip Morris, Inc.,\textsuperscript{435} the federal government claimed that the tobacco industry since 1953 had engaged in a conspiracy to mislead the American public about the harmful characteristics of tobacco products, the addictive nature of nicotine, and the possibility of developing safer and less addictive tobacco products.\textsuperscript{436} In particular, the government alleged that at a meeting in New York City in 1953, tobacco company executives agreed to deny that smoking was harmful.\textsuperscript{437} According to the government, the tobacco companies created two entities, the Council for Tobacco Research (“CTR”) and the Tobacco Institute (“TI”), in order to conceal and misrepresent the relationship between smoking and health.\textsuperscript{438} The government's complaint also charged that tobacco companies withheld information from the Surgeon General about the addictive qualities of nicotine and through the selective breeding and cultivation of tobacco plants deliberately manipulated the nicotine levels in cigarettes.\textsuperscript{439} Furthermore, in the government’s view, the tobacco industry misled the public about the effectiveness of “low tar” cigarettes, suppressed research about the development of less hazardous cigarettes, and aggressively
targeted their advertising campaigns at underage consumers.440

The government argued that tobacco companies committed mail and wire fraud in order to conceal the health risks of smoking and that these acts constituted racketeering activity for purposes of RICO.441 Furthermore, the government argued, these acts of mail and wire fraud extended over a period of many years, thereby establishing a pattern of conduct.442 Finally, according to the government, the enterprise requirement was satisfied by tobacco companies' joint funding of the CTR, which served as a spokesman for the industry.443

Surprisingly, most of the defendants did not dispute that the facts alleged in the complaint, if true, were sufficient to constitute a RICO violation.444 However, one defendant, the Liggett Group, Inc., argued that the complaint failed to sufficiently allege the existence of either an "enterprise" or a "pattern of racketeering activity."445 Liggett argued that the government had failed to show that the tobacco industry conspiracy had sufficient structure or organization to amount to an "enterprise."446 However, the court declared that an informal group of people working together to obtain money through criminal activity can be characterized as an "enterprise" even though it had no formal organizational structure.447

Liggett also questioned whether the defendants had engaged in a "pattern of racketeering activity."448 The government claimed that various acts of mail and wire fraud committed by tobacco companies constituted the "predicate acts" that were necessary to constitute a pattern of racketeering activity.449 In response, Liggett argued that these activities, if they occurred at all, injured individual consumers, not the federal government.450 However, the court concluded that the requirements of mail and wire fraud were satisfied as long as the defendants attempted to defraud someone, regardless of whether they succeeded.451 Apparently, the court felt that mail and wire fraud could constitute predicate acts for purposes of satisfying RICO's requirements even though the tobacco companies had no intent to injure the government.452

All of the defendants objected to the government's attempt to obtain

440. Id. at 137-38.
442. Id. at 152.
445. Id. at 152.
446. Id.
447. Id.
448. Id.
450. Id.
451. Id.
452. Id.
The government sought a permanent injunction to prohibit the defendants from misrepresenting the health risks of smoking in the future. The government also requested the court to order the tobacco companies to fund various anti-smoking campaigns, to disclose documents relating to the targeting of children, and to make corrective statements regarding the health risks of smoking and the addictive qualities of nicotine. Finally, the government asked the court to order the defendants to “disgorge” any profits that were derived from past racketeering activity.

The defendants claimed that injunctive relief directed at future wrongful conduct was unnecessary because there was no reason to believe that they would engage in such conduct in the future. In particular, the defendants contended that injunctive relief was not needed because the Master Settlement Agreement with the states already prohibited the same sort of conduct. The court observed that it would grant injunctive relief if the defendants’ past conduct indicated a “reasonable likelihood of further violation(s) in the future.” According to the court, this involved a consideration of three factors enumerated in SEC v. First City Finance Corp.: (1) whether the violation was isolated or part of a pattern of conduct; (2) whether the violation was flagrant and deliberate or merely technical in nature; and (3) whether the defendant will have opportunities to violate the law in the future. Applying these factors, the court concluded that it must refuse to dismiss the government’s claim for injunctive relief at this stage in the proceedings.

Finally, the defendants claimed that even if the government alleged that a likelihood of future illegal activity existed, civil RICO does not allow disgorgement as a remedy. According to the defendants, disgorgement is akin to a criminal forfeiture and, therefore, should not be allowed as a remedy in a civil action. However, the court observed that the Supreme Court had already held that a court could order disgorgement in a statutory action unless the statute expressly foreclosed such a remedy, or “by a necessary and inescapable inference,” restricted a court’s power to require disgorgement. The court also observed that several other courts had concluded that disgorgement was

453. Id. at 147.
455. Id. at 147 n.25.
456. Id.
457. Id.
458. Id. at 148.
460. 890 F.2d 1215, 1228 (D.C. Cir. 1989).
462. Id. at 150.
463. Id.
464. Id.
465. Id. (citing Porter v. Warner Holding Co., 328 U.S. 395, 398-99 (1946)).
permitted in a civil RICO suit.466

As the Philip Morris litigation progressed, disgorgement emerged as the predominant issue. The government asked the court to order the defendants to disgorge the proceeds from cigarette sales that were made to the “youth addicted population” between 1971 and 2001.467 After discovery was completed, the defendants moved to dismiss the government’s disgorge ment claim.468 The defendants contended that the economic model that the government relied on to calculate the $280 billion disgorge ment claim was inaccurate because it failed to differentiate between ill-gotten gains, which are subject to disgorgement under section 1964(a) of the RICO statute,469 and legitimate profits, which are not.470 Relying on United States v. Carson,471 the defendants also argued disgorgement is limited to ill-gotten gains that were being used “to fund or promote the illegal conduct, or constitute capital available for that purpose.”472 The trial court rejected the approach of the Carson court and ruled that the accuracy of the government’s economic model was a question of fact that should be decided at trial.473 Following the trial court’s rejection of their motion for partial summary judgment, the defendants undertook an interlocutory appeal.474

On appeal, the Circuit Court of Appeals for the District of Columbia considered whether 18 U.S.C. § 1964(a) authorizes courts to allow disgorgement as a remedy in RICO violation cases. This statutory provision gives federal district courts jurisdiction “to prevent and restrain violations of [RICO] by issuing appropriate orders . . . .”475 The statute enumerates various remedies, “including, but not limited to:” divestiture, imposing restrictions on future activities or investments, and ordering the dissolution or reorganization of the enterprise.476 The appeals court considered whether section 1964(a) allows disgorgement generally, allows disgorgement only to prevent future violations of RICO, or does not allow disgorgement at all.

The government argued that section 1964(a) contains a grant of equitable jurisdiction that should be read broadly to permit disgorgement in RICO cases whenever the court thought that it was appropriate.477 The government relied on Porter v. Warner Holding Co.,478 which declared that when a statute grants general equitable jurisdiction to a court, “all the inherent equitable powers . . .

468. Id. at 73.
471. 52 F.3d 1173, 1182 (2d Cir. 1995).
473. Id. at 81-82.
476. Id.
477. Philip Morris, 396 F.3d at 1197.
are available for the proper and complete exercise of that jurisdiction." In *Porter*, the Supreme Court upheld restitution as a remedy where the defendant had violated the Emergency Price Control Act. However, the appeals court in *Philip Morris* distinguished *Porter*, holding that restitution in that case was directly related to carrying out the purposes of the price control statute, while disgorgement does little to prevent or restrain future violations of RICO. Accordingly, the court rejected the government's broad interpretation of section 1964(a).

The appeals court then concluded that section 1964(a) only gave the courts such equitable powers as are necessary to prevent future violations of RICO. While remedies such as divestment, injunctions against future criminal activity, and dissolution of the enterprise are designed to prevent future wrongdoing, disgorgement is awarded regardless of whether the defendant is likely to commit other unlawful acts in the future. Thus, disgorgement is "aimed at and measured by past conduct." The court also observed that RICO already provides for a comprehensive set of remedies, and for this reason Congress probably did not intend to authorize the courts to create additional ones.

Finally, the court expressed concern that disgorgement acts like a criminal forfeiture penalty, but at the same time deprives the defendants of many of the protections that defendants receive in criminal proceedings. For example, RICO's criminal forfeiture provisions are subject to a five year statute of limitations and notice provisions. In addition, there is a higher standard of proof required for a criminal conviction. Finally, because the private parties could also recover damages under section 1964(c) of RICO, the defendants would suffer a duplicative recovery if the government was able to obtain disgorgement under section 1964(a). According to the court, "permitting disgorgement under section 1964(a) would therefore thwart Congress' intent in creating RICO's elaborate remedial scheme."

F. Public Nuisance

A public nuisance is an unreasonable interference with rights held in common by the general public. Government officials traditionally relied on

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480. *Id.* at 398-99.
481. *Philip Morris*, 396 F.3d at 1198.
482. *Id.* at 1199.
483. *Id.* at 1198.
484. *Id.*
485. *Id.*
486. *Philip Morris*, 396 F.3d at 1200-01.
488. *Id.* § 1963(l).
489. *Philip Morris*, 396 F.3d at 1200-01.
490. *Id.* at 1201.
the concept of public nuisance to stop individuals from harming the public by either charging them with a crime or seeking injunctive relief against them. In contrast, a private individual can sue under public nuisance if he or she sustains a "special injury" that is different from that suffered by the public.

According to the Second Restatement of Torts, to bring a public nuisance claim, the plaintiff must also show that the defendant's conduct was unreasonable. The Restatement identifies three factors that are relevant to the issue of whether an interference is "unreasonable" and therefore a nuisance. The first factor is whether the conduct significantly interferes with the public health, safety, peace, comfort, or convenience. A second consideration is whether a statute, ordinance, or administrative regulation prohibits the defendant's conduct. Finally, a court may take into account "whether the conduct is of a continuing nature or has produced a permanent long-lasting effect, and, as the actor knows or has reason to know, has a significant effect on the public right."

In recent years, public nuisance has emerged as an increasingly popular and effective liability theory for government plaintiffs. Just as public nuisance suits have been brought against both cigarette and lead paint manufacturers, they have also been directed at handgun manufacturers. Municipalities have focused on the distribution and marketing practices of handgun manufacturers, claiming that manufacturers have distributed handguns in quantities that greatly exceed the supply needed for legitimate sales, knowing that this conduct contributes to the existence of an environment where criminals and other unauthorized persons can easily obtain firearms. In the view of municipalities, the market in illegal handgun sales and the violence that results from illegal handgun use constitutes a public nuisance which can be abated by the courts.

492. Gifford, supra note 411, at 814.
494. Restatement (Second) of Torts § 821B.
495. Id. § 821B(2)(a).
496. Id. § 821B(2)(b).
497. RESTATEMENT (SECOND) OF TORTS § 821B(2)(c).
498. Gifford, supra note 411, at 743.
501. Id. at 1173.
A number of issues have arisen in connection with government-sponsored public nuisance actions against product manufacturers. Perhaps the greatest controversy is whether liability for public nuisance should be limited, in the absence of a violation of a statute or ordinance, to activities that occur on the defendant's land or affect the use and enjoyment of public property. A second issue is whether it is appropriate to hold a lawful commercial enterprise liable for creating or maintaining a public nuisance. A third question is whether handgun manufacturers can be held liable under public nuisance theory when they have no control over handguns at the time they inflict harm upon the public. Finally, there is some doubt about whether a government can sue product manufacturers for damages under public nuisance or whether it should be limited to injunctive relief.

1. The Scope of Public Nuisance

Product manufacturers contend that introducing public nuisance into this area would only lead to instability because existing products liability doctrines already govern the production and marketing of products. Accordingly, they have urged courts to refrain from expanding the concept of public nuisance beyond its traditional boundaries. This argument has persuaded some courts to reject public nuisance claims against product manufacturers. The Third Circuit, in *Camden County Board of Chosen Freeholders v. Beretta, U.S.A. Corp.*, agreed that public nuisance should be kept within existing confines and affirmed a lower court's finding that Camden County had failed to establish a valid public nuisance claim under New Jersey law. The appellate court determined that New Jersey courts had maintained a strict separation between products liability and public nuisance. Moreover, the court declared, if governmental entities are allowed to bring public nuisance actions against the manufacturers of lawful products, nuisance law "would become a monster that would devour in one gulp the entire law of tort." The Third Circuit repeated these sentiments several months later in *City of Philadelphia v. Beretta, U.S.A. Corp.* Recently, a New York appellate court reached the same conclusion in *People v. Sturm, Ruger & Co.*

However, other courts have relied on the Restatement of Torts to greatly expand the scope of public nuisance. For example, in *White v. Smith & Wesson*, a federal district court refused to dismiss the City of Cleveland's public nuisance claim. Having found that the City stated a cause of action in negligence based on the defendants' manufacturing, distribution, and marketing practices, the

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*of Public Nuisance Law, 32 CONN. L. REV. 1175, 1179-80 (2000).*

503. 273 F.3d 536, 539 (3d Cir. 2001).


505. Id. (quoting Tioga Public School Dist. v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993)).

506. 277 F.3d 415, 421 (3rd Cir. 2002).


court reasoned that City could make a parallel "qualified" public nuisance claim as long as it alleged that the conduct that created the nuisance was negligent.509

The Ohio Supreme Court also allowed a public nuisance claim to stand in *City of Cincinnati v. Beretta U.S.A. Corp.*510 In that case, the City alleged that handgun manufacturers created a public nuisance by manufacturing, marketing, distributing, and selling their products in a way that unreasonably interfered with public health, welfare, and safety in the Cincinnati area.511 The handgun manufacturers argued that public nuisance claims should be limited to actions involving injuries to real property or to statutory violations involving public health or safety.512 Relying on the Restatement of Torts, the court acknowledged that *private* nuisances are concerned with unreasonable interferences with the use and enjoyment of land, but that the scope of public nuisance is much broader.513 Specifically, the court declared that the Restatement's broad approach permits the City to bring a public nuisance action "for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public."514

In *James v. Arms Technology, Inc.*,515 the defendant handgun manufacturers also argued that state law limits public nuisance claims to statutory violations or activities having "a nexus with, or a defendant's use or effect upon real property . . . ."516 The New Jersey court, however, concluded that public nuisance also includes "[a] continuing course of conduct that is calculated to result in physical harm or economic loss to so many persons as to become a matter of serious concern."517 Accordingly, the court held that the City of Newark could proceed with its public nuisance claim even though the defendants' activities did not harm an interest in property.518

The court in *City of Gary v. Smith & Wesson Corp.* broadly defined a nuisance as "an activity that generates injury or inconvenience to others that is both sufficiently grave and sufficiently foreseeable that it renders it unreasonable to proceed at least without compensation to those that are harmed."519 The court also observed that the Restatement of Torts does not restrict public nuisance to an interference with the use and enjoyment of land.520 This led the

509. *White*, 97 F.3d at 829.
510. 768 N.E.2d 1136, 1143-44 (Ohio 2002).
512. *Id.* at 1142.
513. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 821B, cmt. h (1965)).
514. *Id.*
516. *James*, 820 A.2d at 50.
517. *Id.* (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 90 at 651-52 (5th ed. 1984)).
518. *Id.*
519. 801 N.E.2d 1222, 1231 (Ind. 2003).
520. *Gary v. Smith & Wesson*, 801 N.E.2d at 1233 (citing RESTATEMENT (SECOND) OF TORTS § 821 cmt. h (1977)).
court to reject the defendants' contention that public nuisance should be narrowly restricted to unlawful activities or interference with interests in land.\footnote{521}

2. Legal Activities as a Public Nuisance

The government can abate specific activities which violate the law, such as opium dens or houses of prostitution, as public nuisances. Arguably, this implies that lawful activities cannot be classified as public nuisances, at least not categorically. This sort of reasoning has led defendants in some cases to claim that they cannot be held liable under public nuisance law for the normal consequences of conducting a legal activity, particularly when the activity is already subject to regulation by the government. For example, in *James v. Arms Technology, Inc.*, the defendants contended that the court should not declare the manufacture or sale of a legal commercial product to be a public nuisance, particularly if the manufacturer is already subject to substantial regulation.\footnote{522} Relying on the Restatement, the New Jersey court declared that the power of the state to abate a nuisance has always extended to otherwise lawful conduct.\footnote{523} Furthermore, the court pointed out, while the manufacture and retail sale of handguns is extensively regulated, the specific conduct alleged to constitute a nuisance, namely the supplying of products for an illegal secondary market in handguns, is not.\footnote{524}

The Indiana Supreme Court reached a similar conclusion in *City of Gary v. Smith & Wesson Corp.*\footnote{525} The intermediate appellate court in that case had ruled that legislative authorization of the defendants' business insulated them from liability for creating a public nuisance.\footnote{526} The Indiana Supreme Court, however, disagreed, declaring instead that the defendants might create a public nuisance even though they complied with applicable firearms regulations.\footnote{527} Specifically, the court concluded that the handgun manufacturers could be held liable under public nuisance law if they supplied disreputable dealers with handguns knowing that they accounted for most of the illegal handgun sales in the city.\footnote{528}

The U.S. Court of Appeals for the Ninth Circuit in *Ileto v. Glock Inc.*\footnote{529} also rejected the argument that the defendants could not be held liable under the law of public nuisance because the manufacture and sale of handguns is a legal commercial activity.\footnote{530} Unlike *James* and *City of Gary*, *Ileto* involved private, rather than governmental, plaintiffs. These plaintiffs were all victims, or family

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\begin{itemize}
  \item 521. Gary v. Smith & Wesson, 801 N.E.2d at 1233.
  \item 522. *James*, 820 A.2d at 51.
  \item 523. *Id.* at 52 (citing *RESTATMENT (SECOND) OF TORTS* § 821B cmt. f (1977)).
  \item 524. *Id.*
  \item 525. 801 N.E.2d 1222 (Ind. 2003).
  \item 527. Gary v. Smith & Wesson, 801 N.E.2d at 1234-35.
  \item 528. *Id.* at 1235.
  \item 529. 349 F.3d 1191 (9th Cir. 2003).
  \item 530. *Ileto*, 349 F.3d at 1194-95.
\end{itemize}
members of victims, who were shot by a mentally disturbed individual. They brought suit against a number of handgun manufacturers, distributors, and dealers, alleging, *inter alia*, that the defendants' marketing and distribution practices "knowingly created and maintained an unreasonable interference with rights common to the general public, constituting a public nuisance under California law."

The court in *Ileto* observed that a legal business could become a public nuisance when it is operated in a manner that unreasonably infringed upon a public right. In this case, the plaintiffs' nuisance claim was not based on the manufacture of handguns or the sale of such weapons to those who were legally entitled to purchase them; rather, their claim was based on the allegation that the defendants created an illegal secondary market for handguns by deliberately oversaturating the gun market, knowing that the many of original retail purchasers would resell their handguns to illegal buyers. According to the court, the existence of this illegal secondary market made it more likely that handguns would come into the possession of criminals and mentally unstable individuals, thereby increasing the risk of the harm suffered by the plaintiffs.

3. Control Over the Instrumentality That Caused the Harm

A third problem with the public nuisance theory is the product manufacturer's alleged inability to abate the alleged nuisance. Product manufacturers maintain that they should not be held liable under a public nuisance theory for the conduct of others unless they are able to exercise actual control over the persons who have actually created the nuisance. At least one commentator agrees, pointing out that if the purpose of a public nuisance action is to put an end to an act that harms the public, this goal will not be achieved by targeting a manufacturer or seller who has relinquished control of the product in question.

The Illinois Supreme Court in *City of Chicago v. Beretta, U.S.A. Corp.* rejected the notion that a public nuisance claim could never be brought against handgun manufacturers for the lawful sale of a nondefective product. The Illinois court also determined that it was possible to create a public nuisance by conducting a lawful activity in an unreasonable manner. At the same time, the court expressed reservations about imposing liability on the firearms industry when the legislature had not declared the manufacture or sale of handguns to be

531. *Id.*
532. *Id.* at 1194, 1198.
533. *Id.* at 1214.
534. *Id.* at 1214-15.
535. *Ileto*, 349 F.3d at 1215.
537. No. 95243 et al., 2004 Ill. LEXIS 1665 (Ill. Nov. 18, 2004).
539. *Id.* at *47-49.
a public nuisance. 540 Furthermore, it declared that the manufacture and distribution of handguns would not be considered unreasonable unless the defendants violated specific government regulations or acted negligently. 541 In this case, the court concluded that the City failed to prove that the defendants had violated any law. 542 Moreover, the court determined that there was no negligence because handgun manufacturers did not owe the City or its residents any duty to protect them from handgun violence. 543

In Camden County Board of Chosen Freeholders v. Beretta, U.S.A. Corp., the County argued that control is not essential to a public nuisance claim as long as the defendant contributes to a condition which interferes with public rights. 544 However, the Third Circuit disagreed, finding that New Jersey law requires that the defendant exercise some degree of control over the source of the nuisance. 545 The court traced the chain of causation starting with the sale of a handgun by the defendant manufacturer to a federally licensed distributor. According to the court, the distributor would then sell the firearm to a federally licensed retail dealer, who would sell it to a lawful purchaser. 546 Finally, an unauthorized person would acquire the weapon from the lawful owner (either by theft or by purchase). 547 In the court's view, the nuisance would not come into existence until the handgun came into the hands of a criminal user. The court also concluded that causal connection between the manufacturer and the criminal wrongdoer, which involved four transfers of possession, was simply too attenuated to for the manufacturer to exercise any control over the on-site actions of a remote third party. 548 Furthermore, as the court pointed out, in ordinary tort cases, there is normally no duty to control the actions of independent third party tortfeasors. 549 The court in Camden County concluded that this "no duty" rule should apply in public nuisance actions as well. 550 A short time later, the Third Circuit reaffirmed its reasoning with respect to the control issue in City of Philadelphia v. Beretta U.S.A. Corp. 551

A New York intermediate appellate court also concluded that a close connection must exist between the defendant's conduct and the plaintiff's harm in order for the plaintiff to prevail under public nuisance. 552 In that case, the New York Attorney General argued that handgun manufacturers could be held liable for public nuisance as long as they "create, contribute to, or maintain that

540. Id. at 50
541. Id. at 58.
542. Id. at 59.
543. Chicago v. Beretta, 2004 Ill. LEXIS 1665 at *64.
545. Id.; see also Camden v. Beretta, 123 F. Supp. 2d at 245, 266.
546. Id.
548. Id.
549. Id.
550. Id.
551. 277 F.3d 415, 421 (3rd Cir. 2002).
nuisance." However, the court concluded that the plaintiff must prove duty as well as causation. In this case, it refused to hold the defendants liable because the causal connection between the defendants' lawful activities and the State's harm was too remote; furthermore, this harm was principally caused by the intervening criminal conduct of third parties rather than by the defendants.

Other courts, however, have taken a different view. For example, in City of Cincinnati v. Beretta U.S.A. Corp., the court concluded that the defendants created a nuisance by "marketing, distributing, and selling firearms in a manner that facilitated their flow into the illegal market." Thus, the court concluded, the City could bring a public nuisance claim by alleging that the defendants controlled the illegal secondary market in firearms by supplying it with firearms. It was not necessary for the City to show that the defendants exercised any control over "the actual firearms at the moment that harm occurred." A New Jersey court employed similar reasoning in James v. Arms Technology, Inc. In that case, the defendants contended that they could not be held liable because they did not exercise control over those who caused the nuisance. However, the court did not look to the acts of third parties which directly caused the harm, but instead focused on the illegal secondary gun market, which the defendants allegedly supplied. According to the court, "the 'instrumentality' defendants 'controlled' [was] the creation and supply of this illegal market." Accordingly, the court rejected the defendants' "[lack of] control" argument.

The defendants in Ileto v. Glock Inc. also argued that they could not be held liable for maintaining a public nuisance unless they had physical control over the guns at the time the plaintiffs were injured. Such control, the defendants contended, is necessary to establish the requisite proximate cause for liability. The Ninth Circuit, however, held that California law does not require that the defendants have actual control over the instrumentality at the time the harm occurred. The court also observed that the Ohio Supreme Court rejected a similar argument in City of Cincinnati. It was sufficient, the court concluded, that the defendants exercise control over the creation and supply of the illegal secondary market for firearms; therefore, it was not necessary for them to

554. Id.
555. Id. at 201.
558. James, 820 A.2d at 52.
559. Id.
560. Id.
561. Id. at 53.
562. 349 F.3d 1191, 1212 (9th Cir. 2003).
563. Ileto, 349 F.3d at 1212.
564. Id.
565. Id. at 1212-13; City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002).
control the actual use of the firearms that caused the plaintiffs' injuries.\textsuperscript{566}

Finally, the Illinois Supreme Court in \textit{City of Chicago v. Beretta U.S.A. Corp.},\textsuperscript{567} treated the control issue as an aspect of proximate cause. The court acknowledged that there was some support for a control requirement, but only when a plaintiff sought to abate a public nuisance.\textsuperscript{568} According to the court, a defendant would not be able to obey an order to abate a nuisance if he or she did not have control over the cause of the nuisance or had no legal right to enter the land where the nuisance was located.\textsuperscript{569} However, lack of control would not prevent retail sellers from paying damage claims for past wrongdoing.

4. Damage Claims

Since public nuisance actions are intended to enable the government to put a stop to conduct that harms the public welfare, the government was limited to bringing criminal prosecutions or seeking injunctive relief and were not allowed to sue for damages.\textsuperscript{570} However, in recent years, municipal plaintiffs have not limited themselves to claims for injunctive relief in their public nuisance suits against gun manufacturers, but rather have sought damages for the costs of gun violence as well. For example, in \textit{City of Gary v. Smith & Wesson, Corp.}, the City sought damages "as a party uniquely injured by the nuisance."\textsuperscript{571} Specifically, the City claimed compensation for such things as the cost of providing medical treatment for gunshot injuries, law enforcement, emergency rescue services, security at public buildings, pensions, benefits, and jails.\textsuperscript{572} The Indiana Supreme Court agreed with the City's position, relying on an Indiana statute\textsuperscript{573} that allows damages to be awarded in a nuisance action.\textsuperscript{574} Although the court acknowledged that damages might ultimately be barred by such doctrines as remoteness or proximate cause, it refused to dismiss the City's damages claim at this stage in the proceedings.\textsuperscript{575}

\textit{G. Tentative Conclusions}

At the present time, public nuisance and possibly RICO appear to be the most promising liability theories for government plaintiffs. Unjust enrichment and similar doctrines were commonly invoked against cigarette manufacturers in the early days of public tort litigation,\textsuperscript{576} but they seem to have lost some of their

\textsuperscript{566} \textit{Ileto}, 349 F.3d at 1213.
\textsuperscript{567} No. 95243 et al., 2004 Ill. LEXIS 1665 (Ill. Nov. 18, 2004).
\textsuperscript{568} \textit{Chicago v. Beretta}, No. 95243 et al., 2004 Ill. Lexis 1665 at *81
\textsuperscript{569} \textit{Id.} at *100-101.
\textsuperscript{570} Gifford, \textit{supra} note 411, at 781-82.
\textsuperscript{571} \textit{Gary v. Smith & Wesson}, 801 N.E.2d 1222, 1240 (Ind. 2003).
\textsuperscript{572} \textit{Id.}
\textsuperscript{573} \textit{IND. CODE ANN.} § 32-30-6-8 (West 2002).
\textsuperscript{574} \textit{Gary v. Smith & Wesson}, 801 N.E.2d at 1240.
\textsuperscript{575} \textit{Id.} at 1240-41.
popularity in recent years. Negligent entrustment was unsuccessful at first, but comments in one recent case suggest that this theory might still be used as a basis for imposing liability on product manufacturers. Strict liability for engaging in an abnormally dangerous activity, on the other hand, seems to be completely discredited as a result of a Florida intermediate appellate court's utter rejection of it in *Penelas v. Arms Technology, Inc.* So far, very few government litigants have relied on the doctrine of *parens patriae*, although it may re-emerge if the states become more involved in litigation against lead paint manufacturers. RICO is potentially a very useful theory for government plaintiffs. However, its exact parameters will probably not be defined until the federal government's RICO claims against the tobacco industry are finally adjudicated. Public nuisance has now emerged as the most promising weapon in the governmental arsenal. After some initial misgivings, courts are now more receptive to public nuisance actions against handgun and lead paint manufacturers. Unless this trend is reversed in the near future, government plaintiffs will make public nuisance the predominant liability in public tort cases.

### III. POTENTIAL DEFENSES TO LIABILITY

Suits by government entities face a number of potential barriers. For example, a number of states have enacted statutes that restrict or prohibit municipalities from suing product manufacturers to recoup the cost of governmental services. In addition, government plaintiffs must satisfy standing requirements in order to sue. Finally, doctrines such as proximate cause, duty, the economic loss rule, and the municipal cost recovery rule may enable product manufacturers to escape liability.

#### A. Statutory Restrictions and Prohibitions

State legislation has often been used to either increase or limit the tort liability of product sellers. As mentioned earlier, several states enacted statutes...
that relaxed the requirements for proving causation and abolished affirmative defenses, thereby greatly increasing the prospects for recovering Medicaid costs from tobacco companies.\textsuperscript{585} However, state legislation has played a very different role in the case of suits against handgun sellers. As the result of lobbying efforts by the National Rifle Association, a number of states enacted statutes which prohibit or restrict municipal lawsuits against handgun manufacturers, retailers, and their trade associations.\textsuperscript{586} These statutes have already derailed lawsuits against handgun manufacturers by New Orleans and Atlanta.

In \textit{Morial v. Smith & Wesson Corp.},\textsuperscript{587} handgun manufacturers argued that a state statute prohibited the City of New Orleans from suing to recoup the economic costs of gun-related violence. The trial court concluded that once the City brought suit, it had a vested right in its cause of action which could not be abrogated by subsequent legislation.\textsuperscript{588} The trial court also found that the statute was an unconstitutional special law and that it violated the constitutional guarantees of due process and equal protection.\textsuperscript{589} On appeal, the Louisiana Supreme Court observed that the legislature had the power to give retrospective effect to its enactments\textsuperscript{590} and had expressly done so in this case.\textsuperscript{591} Moreover, because the City was a political subdivision of the state rather than a "person," the court ruled that it could not challenge the statute’s retrospective effects as a denial of due process or an impairment of contract.\textsuperscript{592} Furthermore, the court concluded that the statute involved issues of statewide concern and, therefore, overrode any powers granted to the City by its home rule charter.\textsuperscript{593} Finally, the court determined that the statute was general in nature and, consequently, could not be characterized as invalid special legislation.\textsuperscript{594} The court’s decision in \textit{Morial} effectively put an end to the City’s attempt to obtain damages against handgun manufacturers.

The Georgia Supreme Court also upheld a state statute which prohibited municipal lawsuits against handgun manufacturers. Shortly after the City of Atlanta brought suit against a number of handgun manufacturers, distributors, and trade associations, the Georgia Legislature amended the state firearms regulation statute to prohibit such lawsuits.\textsuperscript{595} The statute expressly applied to

\textsuperscript{587} 785 So. 2d 1 (La. 2001).
\textsuperscript{588} \textit{Morial}, 785 So. 2d at 8.
\textsuperscript{589} \textit{Id}. at 8-9.
\textsuperscript{590} \textit{Id}. at 9 (citing St. Paul Fire & Marine Ins. Co. v. Smith, 609 So. 2d 809, 816 (La. 1992)).
\textsuperscript{591} \textit{Id}. at 11.
\textsuperscript{592} \textit{Id}.
\textsuperscript{593} \textit{Morial}, 785 So. 2d at 14-17.
\textsuperscript{594} \textit{Id}. at 17-19.
\textsuperscript{595} See \textit{Smith & Wesson Corp. v. Atlanta}, 543 S.E.2d 16, 18 (Ga. 2001) (discussing GA. CODE
pending, as well as future, lawsuits.\textsuperscript{596} Relying on this provision, the defendants sought writs of mandamus and prohibition to prevent the trial court from hearing the case.\textsuperscript{597} However, the Georgia Supreme Court held that the defendants were not entitled to such extraordinary relief and must make use of the ordinary appeal process to determine whether or not the statute precluded the City from proceeding with its lawsuit.\textsuperscript{598}

\textbf{B. Remoteness}

As the Ohio Supreme Court observed in\textit{ City of Cincinnati v. Beretta U.S.A. Corp.},\textsuperscript{599} remoteness is not an independent legal doctrine, but rather is associated with the concepts of standing and proximate cause.\textsuperscript{600} Under the standing branch of remoteness, a complaint may be dismissed if the harm suffered by the plaintiff is wholly derivative of harm suffered by a third party; under the proximate cause branch, a complaint will be dismissed if the plaintiff's harm is only remotely related to the defendant's conduct.\textsuperscript{601}

The United States Supreme Court evaluated the remoteness doctrine in\textit{ Holmes v. Securities Investor Protection Corp.} in 1992.\textsuperscript{602} The\textit{ Holmes} case involved a civil RICO action by the Securities Investor Protection Corporation ("SIPC") to recover money that it was required to pay the customers of several brokerage houses which failed due to the defendant's stock manipulations.\textsuperscript{603} SIPC is a non-profit corporation created by the Securities Investor Protection Act of 1970\textsuperscript{604} to provide insurance to customers of brokers who become insolvent.\textsuperscript{605} Holmes and others had allegedly participated in a fraudulent scheme to boost the market price of six companies by making unfounded optimistic statements about their prospective earnings.\textsuperscript{606} This induced a number of broker-dealers to purchase stock in these companies with their own funds. Stock prices collapsed when the fraud was discovered and two of these broker-dealers became insolvent.\textsuperscript{607} SIPC ultimately paid customers of these broker-dealers $13 million and then sought reimbursement from Holmes.\textsuperscript{608} The trial court dismissed SIPC's claim on standing and proximate cause grounds, but

\textsuperscript{596} Smith & Wesson v. Atlanta, 543 S.E.2d at 18.
\textsuperscript{597} Id. at 19.
\textsuperscript{598} Id. at 20-21.
\textsuperscript{599} 768 N.E.2d 1136 (Ohio 2002).
\textsuperscript{600} Cincinnati v. Beretta, 768 N.E.2d at 1147.
\textsuperscript{601} Id. at 1147-48.
\textsuperscript{602} 503 U.S. 258 (1992).
\textsuperscript{603} Holmes, 503 U.S. at 261.
\textsuperscript{605} Holmes, 503 U.S. at 261.
\textsuperscript{606} Id. at 262.
\textsuperscript{607} Id. at 262-63.
\textsuperscript{608} Id. at 263.
the federal appeals court reversed.\footnote{609}

On appeal, the United States Supreme Court offered several reasons why there must be "some direct relation between the injury asserted and the injurious conduct alleged."\footnote{610} First, the less direct the injury, the more difficult it would be for courts to determine the proportion of the plaintiffs’ damages attributable to particular defendants’ misconduct; second, allowing claims against remote parties would require courts to adopt complicated apportionment formulas in order to avoid multiple recoveries by plaintiffs; and finally, those who are more directly injured could vindicate the law without the complications associated with lawsuits by remote parties.\footnote{611} The Court concluded by finding that the link between the defendant’s stock manipulation and the brokers’ inability to pay their customers was too remote to support SIPC’s claim.\footnote{612}

The Iowa Supreme Court relied on remoteness principles in \textit{State ex rel. Miller v. Philip Morris, Inc.}\footnote{613} to defeat a Medicaid reimbursement suit by the State against cigarette manufacturers.\footnote{614} The state brought a common law indemnity claim, alleging that it had sustained substantial costs in providing health care and other services to smokers who suffered from tobacco-related injuries, diseases, and illnesses.\footnote{615} The trial court dismissed a number of the state’s claims on remoteness grounds and this decision was affirmed on appeal.\footnote{616} The Iowa Supreme Court declared that the remoteness doctrine is not based on factual considerations like foreseeability, but rather on “public policy considerations."\footnote{617} In this case, the court concluded that allowing employers or health insurers to recover health-related smoking costs from tobacco companies would open the door to unlimited liability.\footnote{618} Likewise, the court determined that the state’s damages were too remote for it to recover against the defendants.\footnote{619}

1. Standing

In the words of one court, “Standing is the legal right to set judicial machinery in motion."\footnote{620} A party cannot invoke the jurisdiction of the court unless he or she has some real interest in the case or controversy.\footnote{621} Thus, lack
of standing could be a problem for government entities that wish to sue product sellers for indirect economic injuries. So far, one court dismissed a government suit on standing grounds, while two others concluded that the government plaintiff had standing to sue product manufacturers.

The U.S. District Court for the Northern District of Ohio refused to dismiss a lawsuit against handgun manufacturers by the City of Cleveland in *White v. Smith & Wesson*. The defendants in that case moved to dismiss on grounds of "remoteness," without specifically mentioning either standing or proximate cause. The court decided to treat the matter as a standing issue. The court identified three conditions that must be met in order to satisfy the constitutional requirements for standing: (1) the plaintiff must suffer an "injury in fact"—that is, an invasion of a "concrete and particularized" legal interest; (2) the injury must result from the actions of the defendant and not be caused by the independent action of a third party not before the court; and (3) it must be likely that the injury can be "redressed by a favorable decision of the court."

First, the court determined that the City's loss of tax revenue and the additional costs that it incurred for police protection, emergency services, police pension benefits, court and jail costs, and medical care were sufficiently concrete and particularized to constitute an injury in fact. Second, the court found that there was a causal connection between the injuries complained of and the manufacture and sale of handguns by the defendants. Finally, the court concluded that it was "likely that [the] [p]laintiff's injury could be redressed by a favorable decision" in this case.

In addition to these three constitutional standing requirements, the court declared that a plaintiff must satisfy three other "prudential standing restrictions." According to the court, a plaintiff must assert its own legal rights and interests and could not rely on the rights or interests of others. In addition, the claim asserted must be something more than a "generalized grievance" shared by a large segment of the general public. Finally, where

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622. See Dawson, supra note 585, at 1746 (declaring that "[t]he most powerful argument against gun suits by governmental entities is lack of standing").

623. Compare *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 823-26 (N.D. Ohio 2000) (finding that the City of Cleveland had standing to sue handgun manufacturers), and *Cincinnati v. Beretta*, 768 N.E.2d at 1148 (holding that the City of Cincinnati had standing to sue handgun manufacturers); with *Ganim*, 780 A.2d at 108 (concluding that the City of Bridgeport did not have standing to sue handgun manufacturers).


626. Id.

627. Id. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

628. Id. at 824-25.

629. Id. at 825.


631. Id. (quoting *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999)).

632. Id.

633. Id.
statutory claims are involved, the plaintiff's claim must fall within the "zone of interests" addressed by the legislature.\textsuperscript{634} Applying these principles, the court determined that the City of Cleveland's claims for nuisance abatement and recoupment of economic losses were distinct from the personal injury claims of gunshot victims.\textsuperscript{635} Furthermore, the court found that the City's economic loss claims were not based on generalized grievances, but were unique to the City in its governmental capacity.\textsuperscript{636} Finally, the court concluded that municipalities like Cleveland were specifically protected by the Ohio Product Liability Act.\textsuperscript{637} Consequently, the court refused to dismiss the City's lawsuit for lack of standing.\textsuperscript{638}

The Ohio Supreme Court reached a similar conclusion in \textit{City of Cincinnati v. Beretta U.S.A. Corp.} In that case, the trial court dismissed the City of Cincinnati's public nuisance, negligence, and products liability claims against various handgun manufacturers. On appeal, the Ohio Supreme Court agreed with the \textit{White} court's analysis and concluded that the City had standing to sue to recoup the economic costs of gun-related violence.\textsuperscript{639} In the court's view, the damages allegedly suffered by the City, "significant expenses for police, emergency, health, corrections, prosecution and other services," were direct injuries to it and not so remote or indirect as to preclude recovery (by the city) as a matter of law.\textsuperscript{640}

Handgun manufacturers were more successful in \textit{Ganim v. Smith & Wesson Corp.}, where the Connecticut Supreme Court upheld the dismissal of the City of Bridgeport's lawsuit against handgun manufacturers for lack of standing.\textsuperscript{641} The City alleged that it was forced to provide increased public services as a result of handgun violence and also claimed that its citizens' health, safety, and welfare had been adversely affected by violent gun-related crime.\textsuperscript{642} The court stated that a plaintiff would not have standing to sue if his or her injuries are "remote, indirect or derivative with respect to the defendant's conduct."\textsuperscript{643} In particular, injuries suffered by a third party are derivative and cannot be invoked by a plaintiff to assert standing.\textsuperscript{644} Thus, for example, a life insurance company cannot recover from a railroad for negligently causing the death of its insured.\textsuperscript{645} At the same time, the court acknowledged that the question of whether a plaintiff's injury is direct or indirect, remote or derivative involves essentially the

\begin{thebibliography}{99}
\bibitem{634} \textit{Id.}
\bibitem{635} \textit{White}, 97 F. Supp. 2d at 825
\bibitem{636} \textit{Id.}
\bibitem{637} \textit{Id.}
\bibitem{638} \textit{Id.} at 825-26.
\bibitem{639} \textit{Cincinnati} v. \textit{Beretta}, 768 N.E.2d at 1148.
\bibitem{640} \textit{Id.} at 1148-49.
\bibitem{641} \textit{Ganim}, 780 A.2d at 108.
\bibitem{642} \textit{Id.} at 118.
\bibitem{643} \textit{Id.} at 119-20.
\bibitem{644} \textit{Id.} at 120.
\bibitem{645} \textit{Id.} (citing Conn. Mut. Life Ins. Co. v. New York & N.H.R. Co., 25 Conn. 265, 274-75 (1856)).
\end{thebibliography}
same issue that courts traditionally considered in deciding whether a defendant should be liable in tort to a plaintiff who is injured indirectly by a defendant, namely at what point to cut off legal liability for the consequences of negligent conduct.\textsuperscript{646}

The court in \textit{Ganim} adopted an analysis of the standing issue that had recently been applied by the Second Circuit of Appeals in \textit{Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.},\textsuperscript{647} which in turn relied on the Supreme Court's reasoning in \textit{Holmes v. Securities Investor Protection Corp.}\textsuperscript{648} In \textit{Laborers Local}, the Second Circuit denied standing to a union health insurer that had sued cigarette manufacturers to recover benefits paid to union members for smoking-related medical costs.\textsuperscript{649}

The \textit{Ganim} court first looked at the causes of the plaintiff's injury and observed that a whole host of social and economic factors besides handgun violence contributed to the City's economic and quality of life problems.\textsuperscript{650} The court also declared that it would have to "adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts" if it allowed the City to recover damages for its economic losses.\textsuperscript{651} In order to prevent double recoveries, damages would have to be apportioned between the City and victims of fraudulent advertising and handgun violence.\textsuperscript{652} In the court's view, apportionment of such damages "would present a daunting question to any court."\textsuperscript{653} Finally, the court concluded that those who were directly injured by handgun violence could remedy the harm more easily than the City.\textsuperscript{654} Damage claims by injured parties, if successful, would help to deter tortious conduct by manufacturers and sellers of handguns and would avoid the difficult causation and apportionment of damages issues that would arise in suits by municipalities such as the City of Bridgeport.\textsuperscript{655}

The City argued that its injury was not derivative if it "would suffer harm to some degree regardless of another's injuries."\textsuperscript{656} The \textit{Ganim} court construed this to mean that the City would have standing to sue even if none of its residents suffered personal injuries from handgun-related violence.\textsuperscript{657} The court rejected this argument for three reasons: first, it declared that the City's theory was inconsistent with the allegations of social harm set forth in its complaint.\textsuperscript{658} Second, the court declared that the remoteness issue did not depend solely on

\textsuperscript{646} \textit{Ganim}, 780 A.2d at 120.
\textsuperscript{647} 191 F.3d 229 (2d Cir. 1999), cert. denied, 528 U.S. 1080 (2000).
\textsuperscript{648} 503 U.S. 258 (1992).
\textsuperscript{649} \textit{Laborers Local 17}, 191 F.3d at 239.
\textsuperscript{650} \textit{Ganim}, 780 A.2d at 124-126.
\textsuperscript{651} \textit{Id.} at 126.
\textsuperscript{652} \textit{Id.}
\textsuperscript{653} \textit{Id.}
\textsuperscript{654} \textit{Id.}
\textsuperscript{655} \textit{Ganim}, 780 A.2d at 126.
\textsuperscript{656} \textit{Id.}
\textsuperscript{657} \textit{Id.} at 127.
\textsuperscript{658} \textit{Id.}
whether or not others suffered harm, but also depended on the length of the chain of causation and other factors.\textsuperscript{659} Third, the court concluded that limiting the City's standing to victimless crimes would lead to insurmountable causation and apportionment problems.\textsuperscript{660}

Recently, however, a New Jersey Superior Court in \textit{James v. Arms Technology, Inc.}\textsuperscript{661} rejected the Connecticut court's reasoning in \textit{Ganim}. The court in \textit{James} observed that New Jersey traditionally took a liberal approach to standing issues.\textsuperscript{662} According to the court, all that was required to satisfy the state's standing requirement was that the party's concern with the subject matter of the litigation must demonstrate "a sufficient stake and real adverseness."\textsuperscript{663} Under this standard, the court declared, a financial interest in the outcome was sufficient to confer standing.\textsuperscript{664} In this case, the City was not asserting the right of a third party, such as an accident victim, but rather it was seeking to recoup the financial costs imposed upon it by gun-related violence.\textsuperscript{665} Accordingly, the court concluded that the City had standing to bring a public nuisance action against the defendants.\textsuperscript{666}

2. Proximate Cause

Some courts have denied liability on proximate cause grounds. For example, in \textit{Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.}, the Third Circuit affirmed a lower court's dismissal of a public nuisance action by Camden County against a number of handgun manufacturers.\textsuperscript{667} The plaintiff argued that "proximate cause, remoteness, and control" were not essential to a public nuisance claim; however, the court concluded that the causal chain between handgun manufacturers and the County was too attenuated.\textsuperscript{668}

A few months later, in \textit{City of Philadelphia v. Beretta U.S.A. Corp.},\textsuperscript{669} the Third Circuit also upheld the dismissal of negligence and negligent entrustment claims by the City of Philadelphia and various community organizations against handgun manufacturers.\textsuperscript{670} Both the trial court and the appeals court looked at six factors to determine whether the City's damages were too remote:

(1) the causal connection between the defendant's wrongdoing and the plaintiff's harm; (2) the specific intent of the defendant to harm the

\textsuperscript{659} \textit{Id.}
\textsuperscript{660} \textit{Ganim}, 780 A.2d at 127.
\textsuperscript{662} \textit{James}, 820 A.2d at 45.
\textsuperscript{663} \textit{Id.} (quoting \textit{Crescent Park Tenants Ass'n v. Realty Equities Corp.}, 275 A.2d 433 (N.J. 1971)).
\textsuperscript{664} \textit{Id.}
\textsuperscript{665} \textit{Id.}
\textsuperscript{666} \textit{Id.}
\textsuperscript{667} 273 F.3d 536, 542 (3d Cir. 2001).
\textsuperscript{668} Camden v. Beretta, 273 F.3d at 541.
\textsuperscript{669} 277 F.3d 415 (3d Cir. 2002).
\textsuperscript{670} \textit{Philadelphia v. Beretta}, 277 F.3d at 426.
plaintiff; (3) the nature of the plaintiff's injury; (4) whether the claim for damages is highly speculative; (5) the directness or indirectness of the [plaintiff's] injury; and (6) the [need to keep apportionment and other complex issues] within judicially manageable limits.671

Adopting the lower court's analysis, the Third Circuit concluded that most of these factors supported the defendant's position on the proximate cause issue. First, the court observed that the route that a gun takes from manufacturer to the city streets was "long and tortuous," indicating that the causal connection between plaintiffs and defendants was highly attenuated.672 The court also found that even the plaintiffs did not claim that the defendants intended to inflict injury upon them; at most, it alleged that the defendants were aware of the existence of a black market in illegal firearms.673 In addition, the court determined that the plaintiffs' injuries were largely derivative despite the fact that some of them, such as educational and governmental expenses, were not suffered by individual victims of handgun violence.674 Furthermore, the court maintained that individual victims of handgun-related violence are more appropriate parties to recover from the defendants because their damages are more direct.675 The court also declared that the plaintiffs' damages were speculative because it would be impossible to determine how many injuries could have been prevented if handgun manufacturers adopted more responsible marketing practices.676 Finally, the court concluded, it would require substantial judicial resources to apportion damages fairly between the plaintiffs and individual victims.677

Handgun manufacturers also raised the proximate cause issue in People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.678 In this case, the State of New York had argued that in order to advance a cognizable common-law public nuisance claim, it need only allege and prove that defendants' business practices created or contributed to the maintenance of a 'public nuisance.'"679 The New York Superior Court, however, made it clear that principles of proximate cause applied to nuisance claims just as they did to other tort claims. As the court pointed out, "at some point, a party is simply too far removed from the nuisance to be held responsible for it."680 The court then determined that the harm complained of was indeed too remote from the defendants' commercial activity to hold them accountable under principles of public nuisance law.681 In addition, the court concluded that the harm was caused directly and principally by the

671. Id. at 423.
672. Id.
673. Id. at 424.
674. Id. at 424-25.
676. Id.
677. Id.
680. Id.
681. Id. at 201.
criminal activities of intervening third parties and not by the manufacture and distribution of firearms by the defendants.\textsuperscript{682}

Handgun sellers in City of Chicago v. Beretta, U.S.A. Corp.,\textsuperscript{683} claimed that the sale of firearms merely furnishes a condition by which the criminal acts of others are made possible and, thus, are too remote to constitute the legal cause of any nuisance that might have resulted from such criminal activity.\textsuperscript{684} However, the Illinois Supreme Court declared that a defendant can be held liable for damages caused by the criminal acts of third persons if such acts are reasonably foreseeable.\textsuperscript{685} In this case, the Illinois court, relying on the reasoning in Spitzer, concluded that it was not foreseeable that handgun sales by dealers in the Chicago area would create a public nuisance in Chicago.\textsuperscript{686}

However, more recently, a number of courts have reached a different result. The first of these was the Ohio Supreme Court in City of Cincinnati v. Beretta U.S.A. Corp.\textsuperscript{687} Applying the three factors set forth by the United States Supreme Court in Holmes, the court concluded that the City's economic losses from gun-related violence were sufficiently connected to the sale of handguns to satisfy the requirements of proximate cause.\textsuperscript{688} The first factor, difficulty of determining the plaintiff's damages, was easily satisfied, according to the court, because the economic losses sustained by the City (as opposed to other victims) could be accurately calculated.\textsuperscript{689} The second factor in Holmes was also established because the City was seeking to recover damages for losses suffered by itself and no other; consequently, there was little danger of a double recovery.\textsuperscript{690} Finally, the court concluded that it was in the general interest for the City to bring this suit, even though it was attempting to protect its citizens from the effects of gun-related violence, because it was also suing on its own behalf as well.\textsuperscript{691}

The New Jersey Superior Court in James v. Arms Technology, Inc. also refused to dismiss a lawsuit against handgun manufacturers for lack of proximate cause.\textsuperscript{692} As part of its consideration of the proximate cause issue, the court examined the six-factor analysis employed the lower court in Camden County Bd. Of Chosen Freeholders v. Beretta.\textsuperscript{693} These factors included cause-in-fact, the defendants' intent, the nature of the plaintiff's injuries, the directness or indirectness of these injuries,

\textsuperscript{682} Id.
\textsuperscript{683} 821 N.E.2d 1099 (Ill. 2004).
\textsuperscript{684} Chicago v. Beretta, 821 N.E.2d at 1133.
\textsuperscript{685} Id. at 1134.
\textsuperscript{686} Id. at 1136-38.
\textsuperscript{687} 768 N.E.2d 1136 (Ohio 2002).
\textsuperscript{688} Cincinnati v. Beretta, 768 N.E.2d at 1149.
\textsuperscript{689} Id.
\textsuperscript{690} Id.
\textsuperscript{691} Id.
\textsuperscript{692} 820 A.2d at 44.
\textsuperscript{693} Id. at 37. See also Camden County Bd. Of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245, 258-64 (D. N.J. 2000), aff'd, 273 F.3d 536 (3d Cir. 2001) (applying the six factor analysis).
whether the plaintiff's damage claim was speculative, and whether the recognition of the plaintiff's damage claim would result in duplicative recoveries or require the court to develop complex apportionment formulas.\footnote{James, 820 A.2d at 37-38.} After considering these factors, the New Jersey court determined that the City's case should not be dismissed on proximate cause grounds.\footnote{Id. at 39-42.} The court noted that other considerations of fairness and policy supported this conclusion.\footnote{Id. at 42-44.} In particular, the court felt that allowing negligent parties to escape liability on proximate cause grounds undermines the deterrent effect of tort law.\footnote{Id. at 44.}

The Indiana Supreme Court in City of Gary v. Smith & Wesson Corp.\footnote{801 N.E.2d 1222 (Ind. 2003).} also refused to dismiss a case for lack of proximate cause.\footnote{Gary v. Smith & Wesson, 801 N.E.2d at 1245.} As the court observed, under Indiana law "liability may not be imposed on an original negligent actor who sets into motion a chain of events if the ultimate injury was not reasonably foreseeable as the natural and probable consequence of the act or omission."\footnote{Id. at 1244 (citing Control Techniques, Inc. v. Johnson, 762 N.E.2d 104, 108 (Ind. 2002); Havert v. Caldwell, 452 N.E.2d 154, 158 (Ind. 1983)).} The court expressed doubt that the City would be able to satisfy the proximate cause requirement at trial. First, it observed that a significant amount of time often passes between the sale of a handgun and the time that a crime is committed with it.\footnote{Id.} In addition, the court noted that guns that are lawfully sold are often used in crimes as well.\footnote{Id.} Furthermore, the court observed, even when unlawful sales contribute to handgun-related injuries, "the relationship of each defendant to the sale may vary, and the vast majority of defendants will have no relationship to the transaction that placed the gun in the hands of its user."\footnote{Id.} Nevertheless, despite these concerns, the court concluded that "[r]esolution of these issues must await the proof offered to substantiate each claimed item."\footnote{Gary v. Smith & Wesson, 801 N.E.2d at 1245.}

C. Duty

One cannot be held liable for injuring another unless he or she owes a duty to the victim to protect the victim from harm. Courts invoked this requirement on numerous occasions to defeat "negligent marketing" claims against handgun manufacturers by individual plaintiffs.\footnote{See Richard C. Ausness, Tort Liability for the Sale of Non-Defective Products: An Analysis and Critique of the Concept of Negligent Marketing, 53 S.C. L. REV. 907, 918-930 (2002) (analyzing cases where the court found no duty owed by handgun manufacturers).} The general approach adopted by these courts is to classify handgun manufacturers' failure to discourage retail
sales to criminals as nonfeasance rather than misfeasance. If a manufacturer’s conduct is characterized as nonfeasance, it has no duty, in the absence of a special relationship, to protect victims from the criminal acts of third parties. Presumably, this reasoning would also apply to negligence-based claims by government entities.

So far, only a few courts have discussed the duty issue in any significant way. The Third Circuit’s decision in City of Philadelphia v. Beretta U.S.A. Corp. was primarily concerned with standing issues, but the court also addressed the duty issue. The district court in that case ruled that handgun manufacturers were under no legal duty to protect individuals from the effects of gun-related violence. The Third Circuit agreed with this conclusion, declaring that manufacturers ordinarily have no duty to prevent retail purchasers from misusing their products.

The New York Superior Court based its dismissal of a public nuisance by the State of New York in part on a duty analysis. The court cited Hamilton v. Beretta USA Corp. for the proposition that handgun manufacturers have no duty to control the conduct of third parties in order to prevent them from harming others even if they had the power to do so. The court went on to hold that this principle applied to public nuisance actions brought by the state just as it did to personal injury actions brought against handgun manufacturers by private individuals.

However, the New Jersey Superior Court in James v. Arms Technology, Inc. took a different view of the duty issue. The defendants maintained that they owed no duty of care in the absence of a special relationship between them and either the tortfeasors or the injured parties. However, the court expressly denied that a special relationship is required. Instead, the court declared that it must balance several factors in order to determine whether or not the defendants owed a duty to the City, including: (1) the foreseeability and severity of the risk, (2) the defendants’ ability to prevent the harm through the exercise of due care, (3) the relationship of the parties and (4) the public interest in the

706. See, e.g., Leslie v. U.S., 986 F. Supp. 900, 912 (D. N.J. 1997) (noting that gun manufacturers, in general, have no duty to control the advertising and distribution of weapons, but that liability may be imposed if advertisements contained false or misleading information).

707. See, e.g., McCarthy v. Olin Corp., 119 F.2d 148, 157 (2d Cir. 1997) (holding that, absent a special relationship, manufacturers have no duty to protect and control the distribution of dangerous products).

708. 277 F.3d 415 (3d Cir. 2002).


714. Id. at 200-01.


716. James, 820 A.2d at 46.

717. Id. at 47.
proposed solution.\textsuperscript{718} The court found that the City's pleadings charged that the defendants were aware of the possibility that handguns might be misused and that they were also aware of the resulting harm to the City from such misuse.\textsuperscript{719} The court also determined the pleadings charged that the defendants knew of the existence of the illegal gun market and had the ability to prevent some of the resulting harm by exercising greater control over the distribution and sale of its products.\textsuperscript{720} Finally, the court observed, the public would benefit if tort liability created an incentive for the defendants to reduce the risk of gun-related violence.\textsuperscript{721}

\textbf{D. The Economic Loss Rule}

In most states, consumers cannot bring a strict liability action against a manufacturer or product seller unless they sustain a “physical injury.”\textsuperscript{722} This includes personal injuries as well as direct physical damage to a consumer's property.\textsuperscript{723} In other words, a plaintiff cannot recover for economic losses alone.\textsuperscript{724} A similar rule applies to negligence actions\textsuperscript{725} and possibly to public nuisance actions as well.\textsuperscript{726} Since most of the claims brought by government entities involve purely economic losses rather than physical injury or property damage, one would expect product manufacturers to invoke the economic loss

\textsuperscript{718} Id. at 46.
\textsuperscript{719} Id. at 47.
\textsuperscript{720} Id.
\textsuperscript{721} James, 820 A.2d at 47.
\textsuperscript{722} See, e.g., Morrow v. New Moon Homes, Inc., 548 P.2d 279, 285-86 (Alaska 1976) (noting that strict liability in tort extends only to physical damages and not economic loss); Seely v. White Motor Co., 403 P.2d 145, 150-52 (Cal. 1965) (stating that a manufacturer may be held strictly liable for physical injuries caused by defects in a product, but not for the level of performance of a product in a consumer's business); Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987) (holding that contract principles are more appropriate than tort principles for resolving economic loss without an accompanying physical injury); Waggoner v. Town & Country Mobile Homes, Inc., 808 P.2d 649, 653 (Okla. 1990) (holding that, because the loss suffered was solely economic in nature, recovery must be based on the contractual relationship between the parties and not on strict liability principles); Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc., 437 N.W.2d 213, 217-18 (Wis. 1989) (holding that physical damages constitute a tort claim, while economic loss constitutes a contractual claim).
\textsuperscript{723} See John G. Culhane & Jean Macchiaroli Eggen, Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Experience, 52 S.C. L. REV. 287, 328 (2001) (declaring that “[e]ven if recovery for economic loss is appropriate in municipal suits against gun sellers, it should not be permitted under a public nuisance theory”).
rule whenever possible. In fact, the issue has only been raised in a few of the handgun cases where municipal plaintiffs have avoided the impact of the economic loss rule by alleging property damage as well as economic loss.

For example, the defendants in *White v. Smith & Wesson*, argued that the Ohio Products Liability Act did not permit the City of Cleveland to recover for economic losses allegedly caused by the defendants' sale of defectively designed firearms. The U.S. District Court for the Northern District of Ohio acknowledged that the Ohio statute excludes recovery for "economic loss," but refused to dismiss the City's product liability claims because it declared that it had suffered "physical damage." The court concluded that if the City was able to prove that it suffered some sort of physical harm, then it could recover damages for any economic losses that proximately resulted from the defective characteristics of the defendants' handguns.

The Ohio Supreme Court took another approach in *City of Cincinnati v. Beretta U.S.A. Corp.* In that case, the City charged various handgun manufacturers with producing defectively designed firearms and with failure to warn. The intermediate appellate court had upheld the lower court's dismissal of the City's lawsuit because, among other things, it concluded that the Act did not allow the City to recover for economic loss alone. The Ohio Supreme Court agreed with the intermediate appellate court that the City had alleged only economic losses and, therefore, could not bring a statutory claim. However, the court ruled that the Ohio Products Liability Act does not preclude the City from basing its claims on negligent design and negligent failure to warn. Without citing any authority, the court concluded that these negligence-based claims were valid even though the City's losses were entirely economic in nature.

*City of Chicago v. Beretta U.S.A. Corp.* appears to be the only case where a court relied on the economic loss rule to deny recovery. In that case, the City of Chicago argued that the economic loss doctrine does not apply in a public nuisance action where a defendant breaches a duty to the general public. However, the court determined that the damages sought by the City were

728. See Ohio Rev. Code Ann. § 2307.71 (G) (Anderson 2001) (excluding economic loss from the statutory definition of "harm").
730. *Id.*
731. 768 N.E.2d 1136 (Ohio 2002).
733. *Id.* at 1145.
734. *Id.* at 1146.
735. *Id.* at 1146-47.
736. *Id.* at 1147.
737. 821 N.E.2d 1099 (Ill. 2004).
"solely economic damages' in the sense that they represent costs incurred in the absence of harm to a plaintiff's person or property" and held that the economic loss rule prevents the recovery of such damages in public nuisance cases.739

E. The Municipal Cost Recovery Rule

The municipal cost recovery rule is another potential barrier to efforts by government entities to recover for the costs of providing certain government services.740 The municipal cost recovery rule has its origins in the traditional "fireman's rule," which provides that a landowner is not liable to police officers, firefighters, or other government employees who are injured on the premises even though the landowner's negligence caused the condition which required them to enter.741 Under a somewhat similar rationale, the municipal cost recovery rule bars government entities from suing tortfeasors to recover for the costs of normal governmental services such as police and fire protection. The municipal cost recovery rule itself can be traced to an opinion by Judge (later Justice) Anthony Kennedy in City of Flagstaff v. Atchison, Topeka & Santa Fe Ry, decided in 1983.742 In that case, the City of Flagstaff sued a railroad to recover approximately $42,000 that it spent to evacuate residents after four tank cars carrying liquefied petroleum gas derailed.743 These expenses included the costs of overtime pay, emergency equipment, emergency medical personnel, and the food provided to residents who had to be evacuated.744 The lower court dismissed the City's suit and this decision was affirmed on appeal.745

The court in Atchison declared that the cost of government services is traditionally spread among the public by taxes and that the reasonable expectations of individuals, business entities, and liability insurers would be upset if these costs are reallocated by a change in existing liability rules.746 Moreover, the court reasoned, because "the governments has chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates fiscal policy ...."747 In the court's view, the legislature, rather than the courts, is the appropriate forum to address such fiscal issues.748 Furthermore, the court declared that the rule that it announced

739. Id. at 1143.
742. 719 F.2d 322 (9th Cir. 1983).
743. Atchison, 719 F.2d at 323.
744. Id.
745. Id.
746. Id.
747. Id. at 324.
748. Atchison, 719 F.2d at 324.
did not depend on whether the City's claim was based on negligence or strict liability, nor was it based on notions of remoteness or causation. Finally, the court observed that a government entity could recover the cost of government services when authorized by statute or regulation, when required to carry out the intent of a statute or to pay for the cost of abating a public nuisance. According to the court, these exceptions to the "no recoupment" rule are unrelated to normal police, fire protection, or emergency services.

At the present time, defendants have invoked the municipal cost recovery doctrine in a number of cases, but without much success. For example, in White, handgun manufacturers relied on Ohio's "firefighter's rule" and the municipal cost recovery rule to avoid liability for gun-related violence. The U.S. District Court for the Northern District of Ohio concluded that the firefighter's rule is concerned with premises liability and only bars claims against negligent landowners by injured government employees (who are protected by workers compensation laws) and does not apply to claims brought by government entities against the manufacturers of dangerous products. The defendants also argued that the municipal cost recovery rule should prevent the City of Cleveland from suing them to recover the costs of providing police, medical, fire protection, and emergency services in cases of gun-related violence. However, the court concluded that the City had alleged willful, intentional, and purposeful conduct, affirmative acts of negligence, and other facts to which the traditional rule did not apply.

Handgun manufacturers also invoked the municipal cost recovery rule in City of Cincinnati v. Beretta U.S.A. Corp. The City of Cincinnati sought to recover for the cost of providing "police, emergency, health, corrections, prosecution and other services" in gun-violence cases. Citing the Atchison case, the defendants argued that costs of these services were not recoverable because the City was legally obligated to provide normal governmental services. The Supreme Court of Ohio, however, distinguished between the facts in Atchison, a single discrete event requiring a single emergency response,

749. See id. (explaining that the denial of recovery was not based on tort theory but rather "the identity of the claimant and the nature of the cost").
750. Id.
751. Id.
752. White, 97 F. Supp. 2d at 821-22.
753. See id. at 822-23 (concluding that it would be a "deafening amplification" of the firefighter's rule to use it to prevent recovery in claims by municipalities against manufacturers of dangerous products).
754. See id. at 822 (indicating that the defendants argued the municipality could not recover the cost of certain governmental functions because those functions are traditionally provided by the government and cost is most efficiently spread to public).
755. Id. at 823.
756. See Cincinnati v. Beretta, 768 N.E.2d at 1149 (noting appellees' argument that cost of public services is not recoverable because the city has a duty to provide the services).
757. See id. (listing government expenses as damages from gun manufacturers' misconduct).
758. See id. (noting appellees' reliance on Flagstaff and summarizing court's holding).
and the facts in the Cincinnati case, which involved an ongoing and persistent condition.\(^759\) It concluded that the “no recoupment” policy articulated in Atchison was not applicable to the continuing problem of gun violence that afflicted the City of Cincinnati.\(^760\) Finally, the court pointed out that even the Atchison court had exempted public nuisance abatement claims from the purview of the municipal cost recovery rule.\(^761\)

In an amicus brief, the Product Liability Advisory Council argued in James v. Arms Tech., Inc. that the municipal cost recovery rule should preclude the City of Newark from recovering damages against handgun manufacturers.\(^762\) The New Jersey Superior Court offered a number of reasons why the municipal cost recovery rule is not applicable in a public nuisance case. First, the court did not believe that the municipal cost recovery rule should be extended beyond single-event accidents involving relatively small costs to situations where the government might be required to expend substantial amounts of public funds on a continuing basis to correct a problem.\(^763\) Second, the court expressed doubt about whether the rule should apply where a municipality brought a public nuisance action to recover abatement costs.\(^764\) Third, the court stated that it was unfair to require taxpayers to subsidize the tortious conduct of product manufacturers.\(^765\) Finally, the court observed that if the municipal cost recovery rule was applied, handgun manufacturers would be immunized from liability and, therefore, have no incentive to reduce the risk of harm or to insure against it.\(^766\)

Handgun manufacturers also invoked the municipal cost recovery rule in City of Gary v. Smith & Wesson Corp. The Indiana Supreme Court rejected a per se rule that would prevent municipalities from recovering any emergency response costs from tortfeasors.\(^767\) The court declared that some of these costs could properly be shifted to the defendants.\(^768\) At the same time, the court acknowledged that some of the costs that the City was seeking to recoup might be characterized as a general cost of government.\(^769\)

The one exception to this rejection of the municipal cost recovery rule appears to be City of Chicago v. Beretta.\(^770\) In that case, the Illinois Supreme

\(^759\) Id.

\(^760\) See id. (distinguishing Flagstaff holding because misconduct in Cincinnati v. Beretta was “ongoing and persistent”).

\(^761\) Cincinnati v. Beretta, 768 N.E.2d at 1149-50.


\(^763\) Id. at 48-49.

\(^764\) Id. at 49.

\(^765\) Id.

\(^766\) Id.

\(^767\) Gary v. Smith & Wesson, 801 N.E.2d at 1243.

\(^768\) Id.

\(^769\) See id. (explaining that some costs incurred by a municipality in responding to an incident are not directly attributable to the particular incident).

\(^770\) 801 N.E.2d 1099 (Ill. 2004).
Court declared that "where a system already exists for the rational allocation of costs, and where society as a whole relies upon that system, there is little reason for a court to impose an entirely new system of allocation." Refusing to follow the reasoning of the court in *James*, the Illinois court concluded that there is no meaningful distinction between single, discrete disasters, such as fires and explosions, and everyday occurrences, such as handgun violence. In addition, the court declared that the legislature could enact cost-recovery legislation if it believes that handgun manufacturers and sellers, rather than taxpayers, should pay for the cost of handgun-related violence. Furthermore, because the damages claimed by the City did not necessarily represent the costs of abatement, the exception recognized in *City of Flagstaff* to the municipal costs recovery rule for that purpose did not apply in this case. Finally, the court expressed doubts about whether awarding damages to the City would provide the firearms manufacturers with an economic incentive to employ more responsible marketing practices.

**F. Tentative Conclusions**

Product manufacturers can defend themselves against public tort litigation in a number of ways. Probably the most effective strategy is to obtain a legislative ban on such lawsuits. For example, preemptive state legislation sidetracked municipal lawsuits against handgun manufacturers in Louisiana and Georgia. Of course, Congress could also preempt public tort lawsuits by state and local governments as well. Manufacturers can also take advantage of a formidable array of common-law doctrines to defend against lawsuits by government entities. However, some of these doctrines have proved more useful than others. Defendants have raised standing as an issue in a number of cases. The Connecticut Supreme Court dismissed a lawsuit by the City of Bridgeport on standing grounds in *Ganim v. Smith & Wesson Corp.* However, standing challenges by defendants were rejected in a number of other cases.

Proximate cause arguments have been somewhat more successful. Courts dismissed public tort suits on proximate grounds in *Camden County Board of
Chosen Freeholders v. Beretta U.S.A. Corp.,780 City of Philadelphia v. Beretta U.S.A. Corp.,781 and People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.782 On the other hand, proximate cause arguments failed to persuade the courts in Cincinnati v. Beretta,783 James,784 and Gary v. Smith & Wesson.785 Thus, it appears that proximate cause is only a moderately effective defense.

Duty is somewhat problematic. The Third Circuit in Philadelphia v. Beretta U.S.A. Corp. mentioned duty786 as well as standing787 as the basis for upholding the dismissal of a lawsuit by the City of Philadelphia.788 A New York state intermediate appellate court also determined in People ex rel. Spitzer v. Sturm, Ruger & Co., Inc. that handgun manufacturers do not have a duty to protect the government from harm caused by the intervening actions of third parties.789 On the other hand, the New Jersey Superior Court in City of Gary v. Smith & Wesson Corp. rejected the special relationship rule proposed by the defendants and concluded that they do have a duty to exercise reasonable care.790

Very few courts have discussed the economic loss rule. In White v. Smith & Wesson, the U.S. District Court for the Northern District of Ohio declared that Ohio's product liability statute does not allow the City of Cleveland to recover for purely economic losses, but concluded that the losses the City alleged also included property damage.791 Later, the Ohio Supreme Court in City of Cincinnati v. Beretta U.S.A. Corp. concluded that the Ohio statute's restriction on economic losses does not apply to negligence claims.792 In view of these mixed results, it is difficult to predict whether products manufacturers will rely upon the economic loss rule to any great extent in the future.

780. See Camden v. Beretta, 273 F.3d at 541 (concluding that the causal chain linking manufacture of handguns and municipal crime-fighting costs is too attenuated to sustain public nuisance claim).
781. See Cincinnati v. Beretta, 277 F.3d at 423-24 (discussing the causal chain from gun manufacturers to commission of a crime and concluding that it is too remote to establish proximate causation).
782. See Sturm, Ruger & Co., 761 N.Y.S.2d at 201-02 (concluding that the harm alleged is far too remote from the defendant's lawful commercial activity to support a finding of liability).
783. See Cincinnati v. Beretta, 768 N.E.2d at 1149 (concluding that the city's claim was not too remote to permit recovery).
784. See James, 820 A.2d at 44 (finding proximate cause based on conclusion that insulating gun manufacturers from liability would undermine strong public interest in protection from social costs associated with criminal misuse of firearms).
785. Gary v. Smith & Wesson, 801 N.E.2d at 1245 (noting that, although there may be an issue regarding whether or not the unlawful sale of a gun was the proximate cause of a crime involving the gun, it cannot be stated as a matter of law that no recovery is allowed).
787. Id. at 425.
788. Id.
789. Sturm, Ruger & Co., 761 N.Y.S.2d at 200-01
791. See supra notes 727-30 and accompanying text for a discussion of the economic loss rule in White.
Product manufacturers have also invoked the municipal cost recovery rule in several cases, but these efforts have yet to be successful. Thus, in *White v. Smith & Wesson Corp.*, handgun manufacturers attempted to avoid liability by raising the municipal cost recovery rule as a defense. The court, however, side-stepped the issue by finding that the rule does not apply to intentional acts. Other cases, such as *City of Cincinnati v. Beretta U.S.A. Corp.* and *City of Gary v. Smith & Wesson Corp.* have discussed the municipal cost recovery rule on its merits and concluded that it should not apply to claims arising from continuing activities or conditions.

IV. CONCERNS ABOUT PUBLIC TORT LAWSUITS

Commentators have offered many justifications for government-sponsored lawsuits. One popular rationale emphasizes accident cost avoidance or "deterrence." Conventional wisdom assumes that manufacturers are unlikely to invest sufficiently in safety if product-related accident costs are externalized to the public, but that they will have an incentive to make their products safer if they are held liable to injured consumers. Arguably, this principle provides support for public tort lawsuits as well. Successful public tort lawsuits help to internalize product-related health costs by ensuring that they are borne by the manufacturer.

Another benefit of cost internalization is that it encourages efficient levels of consumption. When these costs are internalized, consumers can make efficient decisions about consumption even though they have no specific information about a product's social costs because the price they must pay for the product fully reflects these costs. On the other hand, if accident costs are not internalized, but are externalized to third parties, the price charged to consumers will be too low and they will over-consume the product. This appears to be true in the case of cigarettes because Medicaid and other social

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793. See supra notes 752-55 and accompanying text for a discussion of the municipal cost recovery rule in *White*.

794. See id. (noting that rule does not apply to circumstances of intentional negligence).


799. See Raymond E. Gangarosa et al., *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 FORDHAM URB. L.J. 81, 104 (1994) (providing as an example that the price of tobacco is low because third parties like society and public hospitals incur cost of treating cancer).
welfare programs pay for a large part of the health costs of smoking. If government entities were able to recover some of these costs from tobacco companies, the cost of cigarettes would rise and consumption would presumably fall. This same rationale could presumably be invoked to justify public tort lawsuits against manufacturers of handguns, alcoholic beverages, and other dangerous products.

Tort liability can also achieve greater corrective justice by forcing product manufacturers to compensate victims who have been injured by the sale or marketing of defective products or other wrongdoing. Principles of corrective justice require that one who has obtained property from another by theft or fraud be compelled to return this property to the victim. If product manufacturers have been unjustly enriched by shifting the costs of product-related injuries to the government, then public tort lawsuits arguably serve a corrective justice function by forcing them to compensate the public for the cost of treating injuries caused by their products.

Notwithstanding these apparent benefits, government-sponsored lawsuits raise a number of concerns. First, public tort litigation may interfere with the operation of government and encourage undesirable conduct by governmental entities. Second, government-sponsored lawsuits may harm the legal system and the legal profession. Finally, public tort lawsuits threaten the economic well-being of product manufacturers and their employees and suppliers, as well that of retail sellers and other businesses.

A. Impact Upon Government Institutions

Public tort suits arguably have a detrimental effect upon existing government institutions. For example, because they resemble regulation and taxation, the settlement agreements that result from public tort litigation may usurp the powers of the legislative branch by implementing policy choices that should be made by the legislative branch of government. In addition, because of


801. See Frank J. Vandall, Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers, 52 OHIO ST. L.J. 405, 415 (1991) (arguing that imposing liability on tobacco companies will result in higher prices for cigarettes and decreased sale of cigarettes).

802. See Andrew O. Smith, Comment, The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity, 54 U. CHI. L. REV. 369, 376 (1987) (explaining that imposing liability costs on handgun manufacturers will result in higher prices for handguns and decreased sales of handguns).

803. See Robert F. Cochran, Jr., From Cigarettes to Alcohol: The Next Step in Hedonic Product Liability?, 27 PEPP. L. REV. 701, 716 (1999) (explaining that corrective justice seeks to put parities in the place they were in prior to their wrongful loss).

804. See Galligan, supra note 796, at 1031 (arguing that permitting government entities to recover in suits against tobacco companies promotes goals of corrective justice).
the way public tort litigation is financed, government officials can often avoid political accountability for the decisions they make. Moreover, because settlement agreements are not "legislation" in a formal sense, government officials may be tempted to use them as a means of imposing unconstitutional restrictions and requirements on product sellers. Finally, public tort litigation sometimes causes governmental entities to act in ways that are not consistent with principles of morality or good government.

1. Interference with Legislative Powers

Some government officials seem to view litigation as an alternative to the existing legislative process. Settlement agreements which attempt to regulate product design and marketing practices are the primary mechanism for bypassing the legislature. For example, the 1998 Master Settlement Agreement between the states and the tobacco industry prohibited cigarette companies from "targeting youth in ads and marketing," banned the use of cartoon characters like Joe Camel in cigarette advertising, proscribed cigarette advertising on billboards, buses and taxicabs, forbade the sponsorship of concerts and sporting events, and prohibited tobacco companies from selling or distributing any clothing or other merchandise which bore their logos.

The federal government also sought to achieve its regulatory goals through litigation instead of through legislation. Thus, in its lawsuit against the tobacco industry, the Department of Justice asked for a permanent injunction to prohibit cigarette companies from misrepresenting the health risks of smoking in the future. It also tried to force the tobacco companies to fund various anti-smoking campaigns, to disclose documents relating to the targeting of children, and to make corrective statements regarding the health risks of smoking and the addictive qualities of nicotine.

The federal government used the same tactics in its attempt to impose restrictions and affirmative duties on handgun manufacturers. For example, the settlement agreement between Smith & Wesson and HUD mandated significant changes in the manufacturer's marketing and distribution practices. The manufacturer was required to place a second set of hidden serial numbers on its

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809. See Philip Morris, 116 F. Supp. 2d at 138 (noting that government argued tobacco companies aimed advertising at children and were untruthful about health effects of cigarettes).

products to deter criminals from erasing serial numbers, to equip new handguns with trigger locks, and to develop smart-gun technology within three years.  

Local government litigants have also relied on litigation as an alternative to legislation in their efforts to impose controls over the manufacture and sale of handguns.

Settlement agreements also sometimes require manufacturers to make periodic payments that resemble excise taxes to government plaintiffs. The most elaborate payment regime was embodied in the 1998 Master Settlement Agreement which set up a complex formula for the payment of $206 billion to the states over a twenty-five year period. Almost all of the settlement's costs were directly passed on to consumers. In practical terms, cigarette users were forced to pay an additional 45-cents per pack to the state governments for the privilege of smoking. However, unlike a normal tax measure enacted by the legislature, the settlement process did not offer an opportunity for public discussion about the merits of financing government health care programs by means of a "tax" on smoking.

One can argue that it is improper for government officials to implement regulatory policies that would normally require the assent of the legislative branch. Under our American system of government, each branch exercises power within its assigned area of responsibility. Although agencies of the executive branch sometimes carry out legislative and judicial functions, this is done pursuant to legislative authorization. In general, the separation of powers doctrine requires each branch of government to respect the prerogative of the other branches and to refrain from encroaching upon the functions of another branch. Public tort litigation, particularly when its goal is to implement a regulatory agenda by means of a settlement, amounts to an interference by members of the executive branch with the legislature's powers. Bypassing the legislature in this way not only encroaches upon the legislature's constitutional role, it also undermines the democratic process by depriving popularly elected representatives of any control over regulatory policy.

2. Avoidance of Political Accountability

Public tort litigation sometimes enables government officials to avoid accountability for actions that may impose significant regulatory and financial

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812. See Part I.B for a discussion of cases brought by local government entities against handgun manufacturers.
814. See DeBow, supra note 807, at 569 (pointing out that tobacco companies increased cigarette prices as way to transfer cost of settlement agreement to public); Edward Winter Trapolin, Comment, Sued into Submission: Judicial Creation of Standards in the Manufacture and Distribution of Lawful Products – The New Orleans Lawsuit Against Gun Manufacturers, 46 LOY. L. REV. 1275, 1300 (2000) (explaining that tobacco companies, as a result of settlement, have passed costs onto consumers in the form of increased cigarette prices).
815. Dawson, supra note 811, at 1759.
costs on producers or consumers. When the legislature increases regulatory burdens or raises taxes, the process is open to public scrutiny and constituents who are adversely affected by such decisions can try to hold legislators accountable by replacing them with others in the next election. There are no such guarantees when regulatory and taxation measures are formulated by unelected government officials and trial lawyers. One reason for this lack of political accountability is the fact that government-sponsored litigation is usually privately financed. In most of the tobacco cases, for example, state officials entered into contingent fee arrangements with private lawyers. Because they did not have to seek public funding, these officials were largely exempted from any legislative oversight. Many of the lawsuits that were brought against handgun manufacturers seem to have been financed in this fashion as well. Obviously, it is more difficult for legislative bodies to control the activities of the executive through the “power of the purse” when the cost of public tort litigation is largely off the books.

Secrecy also enables public officials to avoid accountability. Lawyers and their clients do not discuss litigation strategies in public. Consequently, decisions about who to sue, what kinds of claims to make, and what kind of relief to seek are not openly debated, nor is there any provision for public comment at this, or any other, stage of the process. Likewise, settlement negotiations between plaintiff and defense lawyers are held in private and are usually not subject to public scrutiny until a final agreement has been reached.

The secrecy associated with the litigation and settlement process also leaves affected third parties without any influence or input. For example, negotiations between state officials and representatives of the tobacco industry during the 1997 settlement would have had a significant impact on tobacco farmers and smokers. Had the settlement been approved by Congress, the price of cigarettes would have increased substantially, the right of injured smokers to sue tobacco companies would have been circumscribed, and tobacco farmers would have suffered financial losses from reduced tobacco sales to cigarette companies as the numbers of smokers decreased. However, the interests of smokers and tobacco farmers were not adequately represented because they had no serious role in the settlement process.

3. Unconstitutional Restrictions and Requirements

Manufacturers may be forced to accept settlement provisions that subject them to regulations that would be considered unconstitutional if they were imposed by legislation. This is particularly true of attempts to restrict

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817. See Richard L. Cupp, Jr., State Medical Reimbursement Lawsuits after Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?, 27 PEPP. L. REV. 685, 695 (2000) (explaining that entering into contingency fee agreements with private lawyers meant that state officials did not have to ask legislature for funding).
818. Trapolin, supra note 814, at 1299.
commercial speech by manufacturers. Although commercial speech is not treated like other forms of expression, it is entitled to some protection under the First Amendment. According to the Supreme Court, the government can regulate commercial speech only if it is deceptive, intended to serve an illegal purpose, or: (1) the regulation in question is necessary to advance a substantial governmental interest; (2) the regulation directly advances that interest; and (3) the regulation is no broader than necessary to advance that interest.

However, the Master Settlement Agreement contained a number of content-based restrictions on marketing and advertising that arguably would have violated the tobacco companies' right to commercial speech if they had been imposed by law. One such measure was the prohibition against cartoon characters such as "Joe Camel." This restriction on advertising, if enacted by the legislature, might have been held invalid because it was content-based even though the cartoon characters in question were allegedly designed to encourage children to smoke. The Master Settlement Agreement also regulated advertising at concerts and sporting events. Once again, such a sweeping restriction on commercial speech would probably be held unconstitutional if it were implemented directly by the government.

Proponents of tobacco regulation would no doubt argue that the tobacco companies "waived" their constitutional rights when they agreed to the Settlement's advertising and marketing restrictions. As a technical matter that is correct in the sense that the tobacco companies might be estopped from subsequently challenging these restrictions in court. However, concerns about restrictions on basic constitutional rights go beyond the interests of the contracting parties. The public has a strong interest in upholding and supporting constitutional rights even when the immediate beneficiaries of these rights are willing to waive them. As the cases involving unconstitutional conditions illustrate, the courts have imposed limits on the "voluntary" waiver of constitutional rights. This is particularly true when there is an element of coercion involved. Although the advertising and marketing restrictions that were imposed by the tobacco settlement might not be invalid as unconstitutional

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822. DeBow, supra note 807, at 569 (citations omitted).


824. See DeBow, supra note 807, at 569 (stating that agreement imposed limitations on marketing).

825. See Redish, supra note 823, at 632-35 (arguing that a ban on tobacco advertising raises constitutional questions).
conditions, they do raise legitimate concerns about the impact of public tort litigation on free expression and other constitutional rights.

4. Encouragement of Bad Government

The experience to date suggests that government-sponsored litigation encourages government officials to act in ways that are not always consistent with the best interests of the public. For example, the payment structure established by the 1998 Master Settlement Agreement made the states financially dependent upon the continued sale of tobacco products. The more cigarettes are sold, the more money that the states will receive. Obviously, states that have become accustomed to a steady flow of tobacco revenue will be reluctant to implement policies that substantially reduce smoking. This same concern will be present with any settlement agreement that government officials negotiate in the future with purveyors of alcohol, fast food, or other unhealthy products.

Public tort litigation has also given rise to a "litigation lottery" mentality among states and municipalities as government entities are encouraged to compete with one another in order to get a share of the spoils when a manufacturer or industry starts to lose or settle cases. A "race to the courthouse" occurred in both the tobacco and the handgun litigation. For example, when it began to look like the cigarette companies were going to reach multi-billion dollar settlements with Mississippi, Florida, and Minnesota, more than forty states jumped on the litigation bandwagon within a year. This also occurred in connection with the handgun litigation. History is now repeating itself as a number of government entities have followed the lead of Rhode Island and begun to bring suits against the lead paint industry.

This phenomenon is a reflection of the fact that product sellers have only so much money to pay claims. Once these funds are exhausted, the defendants will probably have to seek bankruptcy protection. Consequently, those government entities who win judgments or settle their cases early are likely to get paid in full, while latecomers may have to settle for much less. Of course, when one state or city obtains a large judgment or settlement against a particular defendant or group of defendants, one would expect other government entities to also bring

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827. Trapolin, supra note 814, at 1298.
828. See Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 448 (2000) (pointing out that states, ironically rely on consumers to continue smoking in order to ensure tobacco companies are able to pay settlement award).
829. Id. at 468.
831. See Jensen, supra note 813, at 1370 (indicating that other cities have begun suits similar to Rhode Island's against the lead paint makers).
suit. So to some extent this process is perfectly normal. However, as the discussion below will show, when the financial stakes are high and the competition among government litigants is intense, it can lead to questionable behavior.

For example, public tort litigation puts pressure on courts and legislatures to change their procedural rules and substantive liability doctrines in order to make it easier for government litigants to gain an advantage. Unlike the case, discussed above, where one branch of government bypasses another, this typically requires cooperation among two or more branches of government. This occurred when several states enacted legislation to allow recoupment actions against tobacco companies, while at the same time stripping them of many of their traditional defenses. In one instance, the Florida Legislature amended the state's Medicaid Third-Party Liability Act, allowing the state to sue tobacco companies for aggregate health care costs rather than requiring it to identify individual smokers. The amendments also allowed the state to prove causation and damages by means of statistical evidence and also eliminated the defenses of comparative default, assumption of risk, and the statute of repose. Massachusetts also passed Medicaid recoupment legislation that eliminated many affirmative defenses and Maryland enacted a statute to authorize Medicaid recoupment suits against tobacco companies after a state judge ruled that the state did not have a non-statutory right to proceed against the tobacco companies. This sort of self-serving behavior on the part of government litigants erodes public confidence in the integrity of governmental institutions.

Another problem is that public tort lawsuits encourage government entities to engage in extortion. Of course, any party to a lawsuit has some degree of leverage and government litigants typically have more bargaining power than private parties. As in other litigation scenarios, one would expect parties with a great deal of leverage to take advantage of their strength in dealing with adversaries. However, government litigants may have gone too far, at least in some cases, in public tort litigation. For example, because virtually all public tort lawsuits are based on questionable legal grounds, government plaintiffs, with good reason do not want to go to trial when it is safer and less expensive to bully their adversaries into a settlement. To achieve this objective, government entities are not shy about employing heavy-handed tactics. Taking advantage of their credibility, moral stature, and access to the media, government officials wage relentless public relations campaigns against product manufacturers in

832. See Dawson, supra note 811, at 1731 (stating that three states enacted laws permitting states to directly bring claims against tobacco companies and denying companies typical defenses).
834. Id. § 409.910 (9).
835. Id. §§ 409.910 (1), (12)(h).
836. MASS. GEN. LAWS ANN. ch. 118E § 16 (West 2003).
order to force them to settle. They have also made free use of the discovery process to disseminate and publicize embarrassing information about the defendants and have frequently shared confidential information with other litigants. For example, the state of Minnesota made public more than 35 million pages of material that it had obtained from tobacco companies through the discovery process. Another instance of questionable behavior was HUD's threat to bring a class action against the handgun industry unless it settled with municipal litigants and agreed to accept changes in product design and marketing activity.

Finally, the prospect of recovering millions, or even billions, of dollars from product sellers and others in public tort litigation is turning state and local governments from public servants into predators. Because the reasoning employed in the tobacco and handgun cases can potentially be applied to almost any unhealthy or dangerous product, government entities will be constantly tempted to seek out new parties to sue. Moreover, since these types of lawsuits are usually brought on a contingent fee basis, government entities have much to gain, and nothing to lose, by suing any product manufacturer they can find with a deep pocket.

B. Impact on Courts and the Legal Profession

Public tort litigation affects courts, lawyers, and the legal system in general. More specifically, this type of litigation creates pressure on courts to distort traditional legal principles and it enables some lawyers to collect grossly excessive fees.

1. Effect on the Judicial System

Because government plaintiffs often have weak cases if courts adhere to traditional liability rules, they must persuade courts to expand these rules in order to make out a cause of action. For example, in the early days of the tobacco litigation, most of the states based their claims on an unjust enrichment theory even though recovery should not have been allowed under this theory.

839. See Jensen, supra note 813, at 1384 (arguing that the plethora of lawsuits by government entities against manufacturers forces them to settle).

840. See Erichson, supra note 816, at 11-12 (noting that Minnesota established a publicly accessible website containing documents discovered in the tobacco suit).


842. See Dawson, supra note 811, at 1727 (explaining that the United States Department of Housing and Urban Development threatened to bring suit if gunmakers did not accept new regulations).

843. See Cupp, supra note 817, at 690 (pointing out that other industries facing lawsuits "may become caught in the same trap" as tobacco companies).


Negligent entrustment is another theory that the government plaintiffs tried to expand in some of the handgun cases. Plaintiffs' lawyers in both *Camden County Board of Chosen Freeholders v. Beretta U.S.A., Corp.*, 846 and the *City of Philadelphia v. Beretta U.S.A. Corp.*, 847 relied upon that doctrine to support claims against handgun manufacturers even though no "entrustment" existed within the traditional meaning of that term. 848

Similar overreaching occurred in *Penelas v. Arms Technology, Inc.*, 849 where Miami-Dade County tried to argue that the manufacture and sale of handguns is an ultrahazardous activity, notwithstanding the fact that this doctrine had always been restricted to activities on the land that endanger other landowners and are not matters of common usage. 850 This attempt to expand the principle of strict liability for abnormally dangerous activities did not succeed either. 851

Arguably, this same sort of distortion has occurred with respect to public nuisance. Public nuisance is normally limited to activities involving the use of land, and, until recently, was not applied to the manufacture and sale of legal and nondefective products. 852 Nevertheless, municipal plaintiffs have relied upon it extensively in their lawsuits against handgun manufacturers. 853 Although the use of public nuisance in public tort cases recently received a serious setback by the Illinois Supreme Court in *City of Chicago v. Beretta U.S.A. Corp.*, 854 this liability theory has been accepted by a number of courts despite the fact that it is entirely inappropriate in the context of products liability.

One of the reasons why government plaintiffs are so willing to base their claims on questionable legal theories is that they apparently do not expect their cases to actually go to trial. If they can survive a motion to dismiss, government plaintiffs feel that the defendant will settle the case and, therefore, the doctrinal soundness of their position will never be truly evaluated. This strategy worked quite well in the tobacco litigation where the states obtained billions of dollars without ever having to defend their dubious and novel liability theories in court.

While there is nothing unethical about litigants proposing innovative

850. Penelas, 778 So. 2d at 1044-45.
851. *Id.*
theories in order to overcome problems with conventional legal doctrines, this practice may have some adverse effects on the legal system. First, there is the possibility that courts will eventually accept questionable legal theories because they are proposed by government entities and implicitly are backed by the moral authority of the government. It is interesting to note that some courts seem to be more receptive to dubious legal theories when they are proposed by government entities than when they are proffered by private parties.

An even greater concern is that questionable legal theories will gain legitimacy through the settlement process. The accepted way for new legal doctrines to become incorporated into the common law is through written opinions by appellate courts. In this way, the policies that underlie new doctrines are disclosed so that they can be evaluated and critiqued. However, novel legal theories are now finding their way into the legal system through the settlement process without any formal evaluation by the judiciary. Thus, when a lawsuit is based on a questionable legal theory and the defendant settles the case, it gives some legitimacy to that theory and encourages other plaintiffs to rely upon it. This may have happened in connection with the government entities' use of unjust enrichment theory in the tobacco cases to assert an independent claim for compensation. It could happen as well with public nuisance if handgun and lead paint manufacturers begin to settle cases that have been brought against them under that theory.

2. Effect on the Legal Profession

Although some attorneys have profited mightily from their involvement in public tort litigation, the practice of financing this type of litigation by means of contingent fees has not been so good for the legal profession as a whole. First, there are questions about how attorneys are selected. Unlike private class actions, where there is some opportunity for the trial court to evaluate the competence of legal counsel, in public tort cases, selection of the government's attorney is entirely within the discretion of politicians such as the attorney general. In some cases, government officials have chosen friends and political cronies to act as their lawyers instead of selecting them through competitive bidding or some other visible process. For example, there were serious scandals in Mississippi, Kansas, and Texas over the hiring of private attorneys to


856. E.g., White, 97 F. Supp. at 828 (waiving the economic loss rule); City of Chicago v. Beretta U.S.A. Corp., 785 N.E.2d 16, 26-27 (Ill. App. Ct. 2002) (distinguishing cases involving private plaintiffs that held that defendants did not have a duty to protect individuals from the criminal acts of third parties), rev'd, 213 Ill. 2d 351 (2004); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1146 (Ohio 2002) (waiving the economic loss rule).


858. See Cupp, supra note 817, at 688-89 (noting that state officials resort to "back-room deals" to hire private attorneys).
Another concern is that a relatively small group of attorneys have dominated public interest litigation. One of the most significant network of lawyers is the Castano Group. This consortium of law firms joined together in 1994 to represent many of the states in their lawsuits against the tobacco industry. Many members of the Castano Group also participated in lawsuits against handgun manufacturers, and the legal fees earned by the Castano Group in the tobacco cases helped to finance the handgun litigation. Of course, it is natural for government entities to choose attorneys who have handled similar cases in the past and have the necessary experience, expertise, and resources. Nevertheless, it is somewhat disturbing that a small number of attorneys exercise a virtual monopoly over public tort litigation, while the rest of the plaintiffs' bar is effectively foreclosed from participating.

An even greater concern is that those attorneys who represent government clients in public tort litigation have received vast amounts of money as a result. Because this litigation is usually handled on a contingent fee basis, the attorneys may receive millions of dollars when a case is settled. For example, the attorneys who handled the tobacco litigation for the states recovered an estimated $13.75 billion in legal fees and some individual law firms made more than a billion dollars from the tobacco litigation. This level of compensation seems grossly excessive for the amount of work involved and members of the public, who indirectly pay for this largesse, are not likely to have positive thoughts about the legal profession.

C. Adverse Economic Effects

Public tort litigation imposes economic costs upon manufacturers and their shareholders, as well as upon employees, suppliers, retail sellers, consumers, and the general public. Obviously, the most immediate economic burden falls upon those manufacturers who are sued by government plaintiffs. Litigation costs make up a large part of this economic burden. Even when they win, product manufacturers incur enormous legal expenses to defend themselves. Public tort litigation may impose other costs on manufacturers in addition to legal fees. Because these are usually high-profile cases, efforts by government plaintiffs and

861. Id.
862. Id. at 1362.
863. See Pryor, supra note 852, at 1912 (discussing the high fees obtained by trial lawyers in tobacco litigation).
864. Cupp, supra note 817, at 688.
865. Debow, supra note 807, at 563-64.
866. See Daniel J. Capra et al., The Tobacco Litigation and Attorneys' Fees, 67 FORDHAM L. REV. 2827, 2827 (1999) (observing that one law firm would have made $1.5 billion under its contingent fee contract, but eventually settled for less).
their allies to embarrass or demonize defendants may result in lower sales, profits, or stock prices. In addition, threats of further government regulation, which are sometimes used to force a favorable settlement, can also make a company’s stock less attractive to investors.

The greatest cost for manufacturers, however, may be the damage award or settlement itself. Even if the manufacturer can pass these costs on to consumers, the resulting price increase will normally reduce sales of the product. In addition, settlement agreements often contain provisions that restrict the sale and marketing of the defendant’s product, thereby reducing revenue even further. Thus, a settlement may create financial problems for a manufacturer, or even an entire industry, by siphoning off economic resources and reducing opportunities for future growth and product development. Companies that face such economic stagnation will be less able to pay competitive dividends to shareholders, hire new employees, or purchase goods from suppliers.

Public tort litigation may have adverse economic effects on consumers as well. For example, when manufacturers must obtain the money to make the payments mandated by the settlement, they are often forced to charge higher prices for goods, thereby shifting much of the economic burden of public tort litigation onto consumers. Moreover, settlement agreements may indirectly increase the costs of goods by reducing competition and establishing barriers to market entry, thereby keeping the price of goods higher than they might be otherwise. In addition, tort victims may be disadvantaged by public tort litigation to the extent that payments to government entities reduces the amount of money available to pay individual tort claims.

Finally, public tort litigation may be economically inefficient because it requires the public to pay more to finance government services. To illustrate, assume that public health care is largely financed by taxes that yield $1 million. This involves a transfer of $1 million from taxpayers to the government. Assume further that the government recovers an additional $1 million from product manufacturers, but must pay 40% for litigation costs and contingent fees. However, the public, or those members of the public who consume the defendant’s product, must pay $1 million to the defendant in higher prices to pay for the cost of the settlement. This process involves additional transfers: the manufacturer transfers money to the government and then consumers transfer money to the manufacturer. Even if taxes are reduced by $600,000 because of the settlement, the public still pays a total of $1.4 million in taxes and higher prices, but still only receives $1 million worth of health care. In the above hypothetical, public tort litigation has added an additional $400,000 to the cost of providing the public with $1 million worth of health care.

867 There may be additional transfers if the federal government imposes the tax and then transfers money to state or local governments.
D. Proposed Solutions

There are a number of steps that courts and legislatures can take to address the concerns associated with public tort litigation. The most drastic solution is to prohibit such litigation altogether. For example, Congress could amend the Medicaid statute to prohibit the states from recovering Medicaid costs from product manufacturers. Likewise, the states could prohibit local governments from bringing public tort suits.

Even if public tort lawsuits are not prohibited, there a number of reforms that could be implemented to reduce their harmful impact. One problem with public tort litigation is that it bypasses the legislature and, therefore, interferes with the legislative process. This problem could be reduced if state officials are required to obtain legislative approval and funding before initiating government-sponsored litigation. Settlement agreements should also be subjected to legislative oversight and approval. This would provide greater openness and political accountability. Moreover, if settlement agreements are embodied in formal legislation, it would become more difficult for government plaintiffs to impose unconstitutional conditions upon manufacturers.

Certain measures might also reduce the temptation for state and local governments to engage in morally questionable conduct. For example, requiring legislative approval would require state officials to persuade a disinterested third party that their decision to bring suit against a product manufacturer is appropriate and necessary. Prohibiting contingent fees and requiring state officials to finance public tort litigation would force them to internalize the costs of litigation and might discourage them from bringing lawsuits based on dubious or radical legal theories.

Courts could do their part to discourage unwarranted public tort litigation by dismissing claims that are not consistent with existing legal doctrines. In particular, trial courts should reject government claims based on distorted versions of unjust enrichment and public nuisance and appellate courts should reverse trial courts that fail to act responsibly. In addition, the courts should require government plaintiffs to plead and prove the elements of their case according to the same rules that apply to other litigants. Courts should also carefully review settlement agreements and reject provisions that adversely affect third parties or the interests of the public.

Courts and legislatures could also do more to prevent overreaching by trial lawyers. First of all, legislatures could exercise oversight over the selection and compensation of lawyers in public tort cases. One way to do this is to establish statutory procedures for the selection of outside legal counsel. Another reform would be to prohibit contingent fees in public tort cases and to require that outside legal work for the government be billed at fixed hourly rates. If necessary, the legislature could also authorize trial courts to regulate contingent fees in public tort cases. Finally, the legislature could increase opportunities for more lawyers by requiring that contracts for legal services be awarded on the basis of competitive bidding.

In its present form, the costs of public tort litigation probably outweigh its
benefits. The reforms suggested above address some, but not all, of the problems associated with this form of litigation. For example, it will be difficult to change the litigation lottery mentality of state officials or to discourage them from engaging in predatory behavior. It is also difficult to control the development of a "shadow legal system" by the use of settlements instead of conventional adjudication. Nevertheless, if public tort litigation is retained, changes, as suggested above, should be implemented.