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LEGAL LIMITS OF A HANDGUN MANUFACTURER'S LIABILITY FOR THE CRIMINAL ACTS OF THIRD PERSONS

*Richman v. Charter Arms Corp.*¹

No court or jury has held a handgun manufacturer liable for the wrongful death of a murder victim killed by a handgun. In fact, until recently, no court had recognized that such a claim was actionable. In *Richman v. Charter Arms Corp.*, the United States District Court for the Eastern District of Louisiana concluded that marketing handguns for sale to the general public may be an "ultrahazardous activity" subjecting the manufacturer to absolute liability for the harm the gun causes.² The court's decision was a major victory for plaintiffs' lawyers and gun control advocates, who launched a concerted judicial attack against handgun manufacturers in 1980.³

The case was triggered by the criminal acts of Willie Watson, who, on April 4, 1981, obtained a handgun from an acquaintance. Later that evening, Watson abducted third year medical student Kathy Newman at gunpoint as she arrived at her apartment in a residential area of New Orleans. Watson forced Newman to drive to a secluded area, where he robbed and raped her. Watson then told Newman to dress herself, and as she did so, shot her in the back of the head, fearing that she would identify him.⁴ The murder weapon was a "snub nose .38" designed, manufactured, and marketed by Charter Arms Corporation.⁵

Watson was tried, convicted of first degree murder, and sentenced to death.⁶ Rather than seek civil redress from Watson, Judie Richman, the vic-

1. 571 F. Supp. 192 (E.D. La. 1983).

2. *Id.* at 204.

3. See S. SPEISER, *LAWSUIT 369* (1980); Podgers, *Tort Lawyers Take Aim at Handguns*, BRIEF, Nov. 1981, at 4; Weiss, *Guns in the Courts*, ATLANTIC, May 1983, at 9; *Taking Aim at Handguns*, NEWSWEEK, Aug. 2, 1982, at 42; Speiser, *Disarming the Handgun Problem By Directly Suing Arms Makers*, Nat'l L.J., June 8, 1981, at 29, col. 1; *Suits Target Handgun Makers*, Nat'l L.J., Nov. 29, 1982, at 1, col. 1.

4. 571 F. Supp. at 193; *State v. Watson*, 423 So. 2d 1130, 1132 (La. 1982). Most of the facts were taken from Watson's confession. *Id.* at n.1.

5. 571 F. Supp. at 193-94. For purposes of a summary judgment motion, the court assumed that Charter Arms had designed, manufactured, and marketed the murder weapon. *Id.* at 194 & n.2.

6. *Id.* at 193. On appeal, the Louisiana Supreme Court affirmed the conviction but reversed the death sentence and remanded for a new sentence hearing. 423 So. 2d at 1132.

tim's mother, filed a diversity action⁷ for wrongful death against Charter Arms. Richman contended that Charter Arms was liable for the death of her daughter because it designed, manufactured, and made the murder weapon available for sale to the general public and because a foreseeable consequence of doing so was the loss of human life.⁸

Charter Arms moved for summary judgment on the ground that Louisiana law prohibits courts from imposing liability on handgun manufacturers for injuries resulting from the criminal misuse of their products.⁹ In ruling on the motion, the court concluded that Richman could not prevail under Louisiana products liability law. Summary judgment was denied, however, as to Richman's ultrahazardous activity theory. The court held that Charter Arms' marketing practices may be an ultrahazardous activity.¹⁰

Both the products liability and ultrahazardous activity theories of recovery are novel in their application to a handgun manufacturer's liability for the criminal acts of third parties. As between the two theories, lawyers and commentators have targeted the products liability approach as the primary vehicle for recovery against handgun manufacturers.¹¹ This approach imposes liability for defective products.¹² Most jurisdictions require that the defect be unreasonably dangerous.¹³ Three categories of defects have been recognized: manu-

7. The substantive law to be applied in *Richman* was the law of Louisiana. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

8. 571 F. Supp. at 194.

9. *Id.*

10. *Id.* at 208.

11. See generally Fisher, *Are Handgun Manufacturers Strictly Liable in Tort?*, 56 CAL. ST. B.J. 16 (1981); Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41 (1982); Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common-Law Approach*, 51 FORDHAM L. REV. 771 (1983); Note, *Manufacturers' Strict Liability for Injuries from a Well-Made Handgun*, 24 WM. & MARY L. REV. 467 (1983).

12. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 551 (1980).

13. RESTATEMENT (SECOND) OF TORTS § 402A (1965), provides that "[o]ne who sells any product in a defective condition unreasonably dangerous . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer. . . ." Some states have codified a definition of strict products liability that is virtually the same as section 402A. See, e.g., UTAH CODE ANN. § 78-15-6 (1977). In other states, courts have imposed the unreasonably dangerous qualification. See, e.g., *Potthoff v. Alms*, 41 Colo. App. 51, —, 583 P.2d 309, 310-11 (1978) (requirement that alleged defects rendered earth moving machine unreasonably dangerous); *Heldt v. Nicholson Mfg. Co.*, 72 Wis. 2d 110, 115, 240 N.W.2d 154, 157 (1976) (the "unreasonably dangerous" element remains an essential ingredient of a strict liability action). Not all courts require that a defective product be unreasonably dangerous. For instance, in 1972, the Supreme Court of California rejected the unreasonably dangerous standard because it "rings of negligence" and declared that the plaintiff need only show that the product was "defective." *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132-33, 135, 501 P.2d 1153, 1162-63, 104 Cal. Rptr. 433, 442-43 (1972). However, the same court later reintroduced a risk-utility balancing test in *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). See *infra* notes 27, 31 and accompanying

facturing, design, and marketing.¹⁴ Manufacturing defects are unreasonably dangerous when an individual product within a product line is improperly assembled.¹⁵ Design defects make an entire product line or a component part thereof unreasonably dangerous or unsafe.¹⁶ Finally, marketing defects render a product unreasonably dangerous when the manufacturer fails to provide adequate warnings and instructions necessary for the product's safe use.¹⁷

Defects in manufacturing and design have traditionally afforded recovery against firearms manufacturers.¹⁸ Anti-handgun litigants contend that liability should be imposed even for handguns that are flawlessly manufactured and contain no hidden design defects.¹⁹ Short barreled, "snub-nosed" handguns are easily concealed and are designed, manufactured, and distributed principally for shooting individuals. These guns are not sufficiently accurate or reliable for purposes of self-defense, sporting activities, or military and police functions and are the preferred weapons of criminals.²⁰ The extreme danger inherent in handgun design, coupled with the indiscriminate marketing of a small concealable handgun to the general public, renders a handgun defective and unreasonably dangerous.²¹

Courts have applied two tests²² to the unreasonably dangerous qualifica-

text; see also *Wilson v. Piper Aircraft Corp.*, 282 Or. 411, 413, 579 P.2d 1287, 1287-88 (1978) (plaintiff must show that the product was dangerously defective).

14. 2 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 16A[4][f][i] (1982).

15. *E.g.*, *Roy Matson Truck Lines v. Michelin Tire Corp.*, 277 N.W.2d 361 (Minn. 1979) (plaintiff alleged blowout caused by bonding defect in tire); see also 2 L. FRUMER & M. FRIEDMAN, *supra* note 14, § 16A[4][f][iii].

16. *E.g.*, *Rucker v. Norfolk & W. Ry.*, 77 Ill. 2d 434, 437, 396 N.E.2d 534, 535-36 (1979) (plaintiff alleged defective design due to absence of protective "headshield" on tank car); see also 2 L. FRUMER & M. FRIEDMAN, *supra* note 14, § 16A[4][f][iv].

17. *E.g.*, *Freund v. Cellofilm Properties*, 87 N.J. 229, 242-43, 432 A.2d 925, 932 (1981) ("inadequate warning case must focus on safety and emphasize that a manufacturer . . . has not satisfied its duty to warn, even if the product is perfectly inspected, designed, and manufactured"); see also 2 L. FRUMER & M. FRIEDMAN, *supra* note 14, § 16A[4][f][vi].

18. See, *e.g.*, *Cobb v. Insured Lloyds*, 387 So. 2d 13, 18-19 (La. Ct. App. 1980) (manufacturer liable on finding design defect in single-action revolver, which accidentally discharged while fully loaded and in full forward position), *cert. denied*, 394 So. 2d 615 (La. 1980); *Philippe v. Browning Arms Co.*, 375 So. 2d 151, 155 (La. Ct. App. 1979) (malfunction of safety on gun was a result of defect in design and manufacture), *aff'd on rehearing*, 395 So. 2d 310 (La. Ct. App. 1981).

19. *Fisher*, *supra* note 11, at 16; *Podgers*, *supra* note 3, at 5; *Speiser*, *supra* note 3, at 29.

20. *Turley*, *supra* note 11, at 59-62.

21. See *Fisher*, *supra* note 11, at 17; *Turley*, *supra* note 11, at 49.

22. Several scholarly works have analyzed and proposed various tests for design defects. *E.g.* *Birnbaum, Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 602-49 (1980); *Fischer, Products Liability-The Meaning of Defect*, 39 MO. L. REV. 339, 348-52, 357-62 (1974); *Keeton, Products Liability-Design Hazards and the Meaning of Defect*, 10

tion in defining design defects: the consumer expectation test and the Wade-Keeton reasonable manufacturer test. The former test limits recovery to situations in which the product fails to meet the safety expectations of the ordinary consumer.²³ The latter test limits recovery to situations in which a reasonable manufacturer, knowing of the danger, would not have placed the product on the market.²⁴ This test employs a risk-utility balancing process.²⁵ Liability is not mechanically imposed simply because the manufacturer had pre-sale knowledge of some hazard in the product's design. Rather, the balancing process allows the factfinder to impose liability only if its risk-utility calculation reaches a result opposite from the manufacturer's original risk-utility calculation.²⁶

CUM. L. REV. 293, 300-16 (1979); Wade, *supra* note 12, at 557-75.

23. The consumer expectation test was drawn from section 402A, comment i, which discussed the "unreasonably dangerous" qualification: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). The test was rooted in liability for breach of an implied warranty of merchantability. Concepts such as "loss of the bargain" were transposed to the product safety expectations of the purchaser. Wade, *supra* note 12, at 555.

24. The reasonable manufacturer test was derived from tort law rather than contract law and assumes the element of scienter—knowledge of the dangerous condition. Therefore, the plaintiff still is not required to show negligence on the part of the defendant. Wade, *supra* note 12, at 556. Some courts have adopted a dual test, applying both the consumer expectation test and reasonable manufacturer test to the unreasonably dangerous standard. *E.g.*, Welch v. Outboard Marine Corp., 481 F.2d 252, 254 (5th Cir. 1973) (applying Louisiana law).

25. Dean Wade lists seven factors to be considered:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973).

26. Schwartz, *Foreward: Understanding Products Liability*, 67 CALIF. L. REV. 435, 464 n.180 (1979). The difference in the risk-utility calculations lies in the fact that a "manufacturer is concerned with a different trade-off in the cost/benefit analysis than is an injured person." 2 L. FRUMER & M. FRIEDMAN, *supra* note 14, §

In 1978, the California Supreme Court announced a two-part test in *Barker v. Lull Engineering Co.*,²⁷ which paved the way for an onslaught of handgun litigation.²⁸ The case is important to anti-handgun plaintiffs for several reasons. First, the court made clear that satisfaction of the consumer expectation test was not enough to exonerate a defendant from liability.²⁹ Even though a reasonable consumer would know that a handgun could be used as a murder weapon, this would not relieve a handgun manufacturer from liability.³⁰ Second, the court in an alternative holding provided that a risk-utility standard would apply in defining a products liability cause of action for a design defect.³¹ Third, the jury weighs the relevant factors in evaluating the adequacy of a product's design.³² This task is generally reserved for the court in

16A[4][f][iv]. Because profit represents benefit, a manufacturer may conclude that though a risk may be grave, the likelihood of the risk occurring is sufficiently small that it does not warrant the additional expense of an alternative design. *Id.*

27. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). The test provided:

First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.

Id. at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38.

28. *E.g.*, *Brady v. Hinckley*, No. 82-0549 (D.D.C. filed Sept. 8, 1982) (discussed in Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common-Law Approach*, 51 *FORDHAM L. REV.* 771, 777 & nn.1-3 (1983)) (President's press secretary shot and seriously injured in assassination attempt); *Kelley v. R.G. Indus.*, No. 60-323 (Montgomery County Cir. Ct., Md., filed Mar. 15, 1982) (discussed in *Nat'l L.J.*, Apr. 5, 1982, at 4, col. 3) (store owner shot during hold-up attempt); *Riordan v. Interarms Ltd.*, No. 81-L-27,923 (Cook County Cir. Ct., Ill., filed Dec., 1981) (discussed in *Nat'l L.J.*, Dec. 21, 1981, at 30, col. 2) (former deputy police superintendent shot and killed while attempting to escort unruly patron from restaurant). Windle Turley, attorney for plaintiff Judie Richman, predicted that 200 similar lawsuits will be filed against gun manufacturers by the end of 1984. *Suits Target Handgun Makers*, *NEWSWEEK*, Aug. 2, 1982, at 42.

29. *Barker*, 20 Cal. 3d at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

30. *See* Birnbaum, *supra* note 22, at 604-05; *see also infra* text accompanying notes 53-54. As an alternative, liability could be imposed under a risk-utility analysis. *See supra* note 27.

31. *Barker*, 20 Cal. 3d at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38; *see* Birnbaum, *supra* note 22, at 610.

32. 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237. Factors that a jury may consider include: (1) the gravity of the danger posed by the challenged design, (2) the likelihood that such danger would occur, (3) the mechanical feasibility of a safer alternative design, (4) the financial cost of an improved design, and (5) the adverse consequences to the product and to the consumer that would result from an alternative design. *Id.*; *see also* *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 109, 450 N.E.2d 204, 208-09, 463 N.Y.S.2d 398, 402-03 (1983) (jury may consider several factors in balancing risk inherent in product, as designed, against its utility and cost).

determining whether the case should be submitted to the jury.³³ Fourth, under the *Barker* risk-utility balancing test, the plaintiff was given a tactical advantage in that the defendant has the burden of proving that the product is not defective once the plaintiff makes a prima facie showing that the product's design proximately caused the injury.³⁴

Ultimately, anti-handgun litigation advocates contend that *Barker* requires a jury to determine "whether the handgun design presents hazards and costs to society in excess of any socially acceptable utility of its design."³⁵ Since there is no serious utility in these handguns, the product is defective because the risk of harm outweighs the utility of indiscriminately marketing this kind of handgun for sale to the general public.³⁶

In Louisiana, the first element³⁷ that a plaintiff must prove in a products liability suit is "that the product was defective, i.e., unreasonably dangerous to normal use."³⁸ The defect must be one of design, composition, manufacture,³⁹ or inadequate warning.⁴⁰ The *Richman* court employed a two-pronged analysis⁴¹ to determine whether the handgun used to kill Kathy Newman was defective. It first determined that the handgun was in normal use when Watson pulled the trigger.⁴² Relying on *Bennet v. Cincinnati Checker Cab Co.*,⁴³ Charter Arms argued that criminal use was neither a normal nor foreseeable use.⁴⁴ The court rejected this argument, citing *LeBouef v. Goodyear Tire & Rubber*

33. See, e.g., *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 501, 525 P.2d 1033, 1040 (1974) (factors are not the basis for instruction to a jury).

34. 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

35. Turley, *supra* note 11, at 50; see *supra* text accompanying notes 20-21.

36. Turley, *supra* note 11, at 59-62; see also Podgers, *supra* note 3, at 7; Weiss, *supra* note 3, at 10.

37. In *Hunt v. City Stores*, 387 So. 2d 585 (La. 1980), the Louisiana Supreme Court set out four elements that a plaintiff must prove in a products liability suit: (1) that the product was defective; (2) that the product was in normal use at the time the injury occurred; (3) that the defect caused the injury; and (4) that the injury might reasonably have been anticipated by the manufacturer. *Id.* at 589.

38. *Weber v. Fidelity & Casualty Ins. Co.*, 259 La. 599, 603, 250 So. 2d 754, 755 (1971). Though Louisiana courts have not expressly adopted the language of section 402A, their decisions agree with the RESTATEMENT (SECOND) OF TORTS. *Welch v. Outboard Marine Corp.*, 481 F.2d 252, 254 (5th Cir. 1973); see also *Richman*, 571 F. Supp. at 195 n.4.

39. See *Weber*, 259 La. at 602, 250 So. 2d at 755.

40. See *LeBouef v. Goodyear Tire & Rubber Co.*, 623 F.2d 985, 988 (5th Cir. 1980).

41. See *Perez v. Ford Motor Co.*, 497 F.2d 82, 86 (5th Cir. 1974) ("In order to establish defectiveness, the plaintiff must show that the product was in normal use and that the product was unreasonably dangerous in that use.").

42. 571 F. Supp. at 197.

43. 353 F. Supp. 1206, 1210 (E.D. Ky. 1973) (firearms dealer has no duty to anticipate criminal misuse of nondefective pistol). Charter Arms also relied on *Robinson v. Howard Bros.*, 372 So. 2d 1074, 1076 (Miss. 1979) (gun dealer who sold pistol and ammunition to minor not liable for criminal acts of minor).

44. 571 F. Supp. at 196.

Co.⁴⁵ In that case, the plaintiffs were injured in an automobile accident when the tire tread separated. The plaintiff driver was highly intoxicated and driving over 100 miles per hour at the time of the accident. The Court of Appeals for the Fifth Circuit held that the driver's illegal use of the car was a normal use, stating that 'normal use' encompasses all reasonably foreseeable uses of a product.⁴⁶ If car manufacturers must reasonably anticipate that purchasers of their product will speed, the court analogized, then handgun manufacturers must also expect that their products will be used to kill.⁴⁷

Concluding that the handgun was in normal use, the *Richman* court then discussed whether marketing handguns for sale to the general public was unreasonably dangerous. *Richman* cited *Hunt v. City Stores*⁴⁸ to define "unreasonably dangerous." In *Hunt*, the Supreme Court of Louisiana stated that a balancing test was used to determine whether a product is unreasonably dangerous.⁴⁹ The *Richman* court stated, however, that a product is unreasonably dangerous under Louisiana law "when a reasonable seller would not sell the product if he knew of the risks involved or if the risks are greater than a reasonable buyer would expect."⁵⁰

The court held that *Richman* could not show that marketing handguns was unreasonably dangerous. *Richman's* reliance on the "reasonable seller" theory was misplaced.⁵¹ The Louisiana legislature's failure to enact a statute

45. 623 F.2d 985 (5th Cir. 1980).

46. *Id.* at 987-89. The court noted that operating a car "in excess of 100 miles per hour was not 'normal' in the sense of being a routine or intended use." The term "normal use," however, was intended not as a literal term of speech, but as a term of art which delineates the scope of a manufacturer's duty and consequent liability. *Id.* at 989.

47. 571 Supp. at 197. The *Richman* court may have misapplied Louisiana law regarding the "normal use" of the product. The Louisiana Supreme Court had stated that a "manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person. . . . However, the plaintiff claiming injury has the burden of proving that the product was defective, i.e., unreasonably dangerous to normal use. . . ." *Weber v. Fidelity & Casualty Ins. Co.*, 259 La. 599, 602-03, 250 So. 2d 754, 755 (1971). "Normal use," as used in *Weber*, refers to the use of the product by the injured party. *Perez v. Ford Motor Co.*, 497 F.2d 82, 87 (5th Cir. 1974). In *Richman*, Willie Watson, and not Kathy Newman, had used the handgun.

48. 387 So. 2d 585 (La. 1980); see also 571 F. Supp. at 195.

49. "[I]f the likelihood and gravity of harm outweigh the benefits and utility of the manufactured product, the product is unreasonably dangerous." *Hunt*, 387 So. 2d at 589. The *Hunt* court cited *Weber*, which stated that "the manufacturer is presumed to know of the vices in the things he makes, whether or not he has actual knowledge of them." *Id.* (quoting *Weber*, 259 La. at 603, 250 So. 2d at 756).

50. 571 F. Supp. at 195 (quoting *Welch v. Outboard Marine Corp.*, 481 F.2d 252, 254 (5th Cir. 1973)); see also *Bridges v. Chemrex Specialty Coatings, Inc.*, 704 F.2d 175, 179 (5th Cir. 1983) ("basic test is whether a reasonable seller would not sell the product if the risks involved were known or if the risks were greater than a reasonable buyer would expect"); *DeBattista v. Argonaut-Southwest Ins. Co.*, 403 So. 2d 26, 30-31 (La. 1981) (consumer expectation approach particularly appropriate in Louisiana).

51. 571 F. Supp. at 198.

banning the sale of handguns or to amend the state constitution to that effect implied that most legislators do not think that marketing handguns to the public was an unreasonably dangerous activity.⁵²

The court also held that Richman failed under the "consumer expectation" theory.⁵³ The risks involved in marketing handguns are not greater than reasonable consumers expect. "Every reasonable consumer that purchases a handgun doubtless knows that the product can be used as a murder weapon."⁵⁴ Because marketing handguns to the public is not unreasonably dangerous, Richman as a matter of law could not prove that the handgun was defective.⁵⁵ There was thus no basis for recovery under Louisiana products liability law.

The court next examined the plaintiff's alternate theory that marketing handguns for sale to the general public is an ultrahazardous activity. Significantly, the court used the terms "ultrahazardous" and "abnormally dangerous" interchangeably in its analysis.⁵⁶ Like strict products liability, ul-

52. *Id.* The United States District Court for the District of Massachusetts relied on the *Richman* court's reasoning when it dismissed a wrongful death action brought against a gun manufacturer. In that case, the decedent, an innocent bystander, was struck by a bullet from an automatic pistol. *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107, 108, 110 (D. Mass. 1983). The court stated:

The legislature has on numerous occasions in the past ten years considered banning handguns and has consistently rejected the proposals. It has enacted comprehensive licensing provisions for suppliers and purchasers . . . indicating its disinclination toward banning handguns. . . . Thus the clear inference is that the majority of legislators in Massachusetts also do not feel that the marketing of handguns to the public is an unreasonably dangerous activity or socially unacceptable.

Id. at 111. The legislature's failure to ban handguns does not necessarily equate with a court's refusal to impose liability on a handgun manufacturer. Even if liability were imposed, manufacturers could still make and market handguns. *See* 571 F. Supp. at 198 n.9. The fallacy of this argument lies in the assumption that legislative inaction is a dependable indicator of legislative intent or public policy. *Lehrman v. Cohen*, 43 Del. Ch. 222, 234, 222 A.2d 800, 807 (1966).

53. 571 F. Supp. at 197.

54. *Id.* One commentator has proposed that a handgun that causes injury to a human being "has failed to perform as safely as an ordinary consumer would expect." Fisher, *supra* note 11, at 17. The argument is not persuasive because it overlooks the obvious hazards that a handgun poses. *See Keeton, The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 Mo. L. Rev. 579, 589 (1980). However, the consumer expectation test fails to consider the relationship of the product to the victim murdered by the handgun. The test also abbreviates the analytic process by ignoring risk-utility factors. Birnbaum, *supra* note 22, at 613; *see also supra* notes 25-26, 32 and accompanying text.

55. 571 F. Supp. at 195.

56. *See* 571 F. Supp. at 200. RESTATEMENT (SECOND) OF TORTS § 519 (1977) uses the term "abnormally dangerous" rather than "ultrahazardous." RESTATEMENT OF TORTS § 520 (1938) defined ultrahazardous activity as follows: "An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage." The American Law Institute significantly re-

trahazardous activity liability is imposed without a finding of negligence. Additionally, a balancing process is used for determining liability.⁵⁷ However, liability for an ultrahazardous activity is absolute.⁵⁸ In other words, the activity, because of its social value, is not stigmatized as negligent. It simply is required to pay its own way.⁵⁹ This virtually makes the enterpriser an insurer. Once it is determined that the enterpriser's activity is ultrahazardous, the injured party recovers by showing that the enterpriser caused the damage.⁶⁰ However, the rule of absolute liability applies only to the kind of harm within the scope of the risk that makes the activity ultrahazardous. In other words, liability does not extend to every possible harm that may result from carrying on the ultrahazardous activity.⁶¹

The absolute liability for an ultrahazardous activity differs in two other ways from strict products liability. First, an ultrahazardous activity is one in which the potential harm is an unavoidable risk, even though the enterpriser exercises the utmost care in preventing the harm.⁶² Second, the court, and not the jury, determines whether the activity is ultrahazardous. This is because the factors involved raise policy issues that courts are unwilling to entrust to juries.⁶³

The *Richman* court relied on sections 519 and 520 of the *Restatement (Second) of Torts*⁶⁴ in deciding that marketing handguns to the general public

shaped the ultrahazardous activity concept in the RESTATEMENT (SECOND) OF TORTS. See *infra* note 64. Compare RESTATEMENT OF TORTS §§ 519-520 (1938) with RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977). The *Richman* court clearly relied on the RESTATEMENT (SECOND) OF TORTS in its ultrahazardous activity analysis. See 571 F. Supp. at 200.

57. Wade, *supra* note 25, at 835. The factors to be weighed are listed in RESTATEMENT (SECOND) OF TORTS § 520 (1977). See *infra* note 64.

58. *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493, 498 (La. 1982).

59. Wade, *supra* note 25, at 836.

60. *Kent*, 418 So. 2d at 498.

61. RESTATEMENT (SECOND) OF TORTS § 519(2) & comment e (1977); see, e.g., *Foster v. Preston Mill Co.*, 44 Wash. 2d 440, 445, 268 P.2d 645, 648 (1954) (risk that vibrations or noise may frighten mink and cause them to kill their young does not make blasting an ultrahazardous activity).

62. *Kent*, 418 So. 2d at 498; see also Wade, *supra* note 25, at 836.

63. Wade, *supra* note 25, at 836. The *Richman* court appears noncommittal on this issue: "Whether the decision about how to classify the defendant's activities is for the Court or a jury to make is an issue to be resolved at some future date." 571 F. Supp. at 204 n.14. Comment 1 to section 520 provides: "[I]t is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place or whether such an activity as blasting is to be permitted without liability in the center of a large city." RESTATEMENT (SECOND) OF TORTS § 520 comment 1 (1977). Following these provisions, the court would have to decide at trial whether Charter Arms' marketing practices were ultrahazardous.

64. Section 519 sets out the general principle underlying the liability of one who carries on an abnormally dangerous activity:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the

may be an ultrahazardous activity.⁶⁵ The court then examined the factors set out in section 520 and determined that the defendant's marketing practices were not exempt from being classified as ultrahazardous.⁶⁶ Factors (a) and (b) consider whether the activity creates a high degree of risk of harm to a person and whether the likelihood of the harm resulting will be great.⁶⁷ The court found merit in Richman's argument that the harm threatened by Charter Arms' marketing practices—serious physical injury and death—was "major in degree" and "sufficiently great."⁶⁸

Likewise, the court found merit in Richman's argument concerning factor (c), which considers the defendant's inability to eliminate the risk by exercising reasonable care.⁶⁹ Richman contended that so long as Charter Arms continues marketing handguns to the general public, no amount of due care will significantly reduce the risk of harm.⁷⁰ The court next concluded that the op-

activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

RESTATEMENT (SECOND) OF TORTS § 519 (1977). The factors to be weighed in determining whether an activity is abnormally dangerous are listed in section 520:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on;

and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520 (1977).

65. The court manipulated a footnote in *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 249 So. 2d 133 (1971) to maneuver into the *Restatement* provisions. The *Langlois* court stated that "states under common law have recognized that, in ultrahazardous activities such as this, liability is imposed in the absence of negligence." *Id.* at 1083 n.13, 249 So. 2d at 139 n.13. It then cited sections 519 and 520 and other authorities for this proposition. This footnote actually precedes the rule for ultrahazardous activities articulated in *Langlois* and referred to by the *Richman* court. See 258 La. at 1083-84, 249 So. 2d at 140; see also 571 F. Supp. at 199-200.

66. 571 F. Supp. at 200-02, 204.

67. See *supra* note 64.

68. 571 F. Supp. at 201. The court relied on RESTATEMENT (SECOND) OF TORTS § 520 comment g (1977): "The harm threatened must be major in degree, and sufficiently serious in its possible consequences. . . . If the potential harm is sufficiently great . . . the likelihood that it will take place may be comparatively slight . . ." *Id.*

69. 571 F. Supp. at 201.

70. *Id.* The court found the discussion in RESTATEMENT (SECOND) OF TORTS § 520 comment h (1977) illuminating:

What is referred to here is the unavoidable risk remaining in the activity, even though the actor has taken all reasonable precautions in advance and has exercised all reasonable care in his operation, so that he is not negligent. The utility of his conduct may be such that he is socially justified in proceeding with his activity, but the unavoidable risk of harm that is inherent in it re-

eration of handguns is not a matter of common usage under factor (d).⁷¹ Unlike operating an automobile, consuming liquor, or using a knife—activities which are potentially dangerous—handgun use is not “‘customarily carried on by the great mass of mankind or by many people in the community.’”⁷²

Factor (e) considers the inappropriateness of the activity to the place where it is carried on.⁷³ The court stated that Richman’s claim that there is no place in the United States where handguns can be safely marketed for sale to the general public may or may not be true. Furthermore, the court could not say that the claim was “immaterial or that no genuine dispute about it exists.”⁷⁴

Finally, factor (f) considers the extent to which the value of the activity to the community outweighs its dangerous attributes.⁷⁵ Richman’s argument that marketing handguns for sale to the general public has no utility at all was exaggerated.⁷⁶ The court stated that Charter Arms’ marketing activities produce jobs and provide a measure of self-defense to people who buy handguns. Moreover, in failing to ban handgun sales to the general public, the legislature has indicated that Charter Arms’ marketing practices have social utility.⁷⁷ However, the court could not conclude that “‘the community is largely devoted to the [defendant’s] dangerous enterprise and [that the community’s] prosperity largely depends upon it.’”⁷⁸

The next step of the court’s analysis was determining whether Willie Watson’s willful act of murdering Kathy Newman relieved Charter Arms from absolute liability. Charter Arms contended that it was exonerated from liability because Willie Watson, and not the company, caused her death.⁷⁹ In essence, this defense required the court to address the problematic issue of whether marketing handguns to the general public was the proximate cause of Kathy Newman’s death.

Under Louisiana law, no defendant can be held strictly liable for injuries

quires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it.

71. 571 F. Supp. at 202.

72. *Id.* at 201-02 (quoting RESTATEMENT (SECOND) OF TORTS § 520 comment i (1977)). People are likely to use a handgun only in highly unusual circumstances. For instance, they may be attacking a criminal assailant or acting as a criminal assailant. *Id.* at 202.

73. *See supra* note 64.

74. 571 F. Supp. at 202. The court noted that the locality factor normally pertains to activities such as blasting with explosives, crop dusting, and transporting highly inflammable liquids. These activities usually are deemed to be ultrahazardous if they are conducted in densely populated areas. If conducted in a desert, they are not. Therefore, the location of the activity is critical. *Id.*

75. *See supra* note 64.

76. 571 F. Supp. at 202.

77. *Id.*; *see also supra* note 52 and accompanying text.

78. 571 F. Supp. at 202 (quoting RESTATEMENT (SECOND) OF TORTS § 520 comment k (1977)).

79. 571 F. Supp. at 204-05.

caused by the fault of the victim, the fault of a third person, or an irresistible force.⁸⁰ Since a third person, Willie Watson, was at fault, the court turned to *Olsen v. Shell Oil Co.*,⁸¹ in which the Louisiana Supreme Court held that proof that a third person is the "sole cause of the damage" relieves a defendant from liability.⁸² The *Richman* court embarked on a lengthy and confusing analysis of the "sole cause" rule as set forth in *Olsen*.⁸³ Based on its analy-

80. See *Jones v. City of Baton Rouge*, 388 So. 2d 737, 740 (La. 1980).

81. 365 So. 2d 1285 (La. 1978).

82. *Id.* at 1293. The *Olsen* court did refer to the RESTATEMENT (SECOND) OF TORTS §§ 440-453 (1965) in formulating the rule. See 365 So. 2d at 1293 n.15; see also *infra* note 83.

83. The court commenced its analysis by pointing out that subsequent Louisiana appellate court and Fifth Circuit opinions have given *Olsen* both narrow and broad interpretations. 571 F. Supp. at 205. Those courts reading *Olsen* narrowly say that under the "sole cause" rule a defendant can exonerate himself from liability by proving that the third person was a stranger, someone who acted without the defendant's consent. *Id.* (citing *Hyde v. Chevron U.S.A., Inc.*, 697 F.2d 614, 620 (5th Cir. 1983); *Brown v. Soupenne*, 416 So. 2d 170, 173 (La. Ct. App. 1982); *Robertson v. Parish of E. Baton Rouge*, 415 So. 2d 365, 367 (La. Ct. App. 1982)).

The court may have misread a narrow interpretation into these cases. In both *Robertson* and *Brown*, the Louisiana Courts of Appeals discussed the stranger qualification only in a factual context where the third person was not a stranger. Since it was determined that the stranger qualification was not satisfied, the courts were not compelled to discuss the scope of the "sole cause" rule articulated in *Olsen*. See *Robertson*, 415 So. 2d at 368; *Brown*, 416 So. 2d at 173. In *Hyde*, the United States Court of Appeals for the Fifth Circuit stated that one is absolved from liability by "the fault of some third party (who must be a 'stranger' rather than a person acting with the consent of the owner)." *Hyde*, 697 F.2d at 620. The court's statement merely qualifies "third party" and does not necessarily limit the scope of the "sole cause" rule.

It would be easy for Charter Arms to show that Willie Watson was a stranger. 571 F. Supp. at 206. The court, however, elected to follow the broad interpretation, relying on *Ramos v. Liberty Mut. Ins. Co.*, 615 F.2d 334 (5th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981), for a broad reading of *Olsen*. *Ramos* stated: "When the 'third person' is a stranger, not one acting with the owner's consent, the owner cannot avoid [Louisiana Civil Code article] 2322 liability." *Id.* at 342. Thus, the mere fact that the third person was a stranger does not preclude liability. The court gave three reasons for following the broad interpretation. First, it looked to the language used by the *Olsen* court. In *Olsen* the court stated:

The fault of a "third person" which exonerates . . . is that which is the sole cause of the damage, of the nature of an irresistible and unforeseen occurrence—i.e. where the damage resulting has no causal relationship whatsoever to the fault of the owner . . . and where the "third person" is a stranger rather than a person acting with the consent of the owner.

Olsen, 365 So. 2d at 1293. A broad reading of *Olsen* indicates that Charter Arms would have to show both that Willie Watson was a stranger and that the risk of harm it created by marketing handguns for sale to the general public did not contribute to Kathy Newman's death. 571 F. Supp. at 206.

Second, a broad interpretation of *Olsen* was appropriate because the Louisiana Supreme Court noted in *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493 (La. 1982), that no Louisiana decision has placed any activities in which a third person contributed to causing the damages in the ultrahazardous category. *Id.* at 499 n.8. The *Richman* court indicated that *Kent* made no distinction between strangers and other persons.

sis, the court stated that Charter Arms would have to show both that Willie Watson was a stranger *and* that the risk of harm it created by marketing handguns for sale to the general public did not contribute to Kathy Newman's death.⁸⁴

Charter Arms could readily satisfy the "stranger" prong of the sole cause test.⁸⁵ Relying on dicta⁸⁶ from *Olsen*, however, the court ultimately concluded

Furthermore, it concluded that *Kent* left ultrahazardous activity law unsettled as to a defendant's liability for damages caused by third-person strangers. 571 F. Supp. at 206. By the same token, the *Kent* court may have been indicating that Louisiana law governing ultrahazardous activities exempted those activities when a third person could "reasonably be expected to be a contributing factor in the causation of damages with any degree of frequency." 418 So. 2d at 499 n.8. In *Kent*, the Louisiana Supreme Court refused to find that transmitting electricity over isolated high tension power lines was an ultrahazardous activity. Injury resulting from transmitting electricity was almost always due to substandard conduct of the utility, the victim, or a third party. *Id.* at 498-99.

Finally, the court emphasized that the *Olsen* court based the third-person defense on §§ 440-453 of the RESTATEMENT (SECOND) OF TORTS, which also draw no distinctions between strangers and other persons. 571 F. Supp. at 206. Those sections relevant to the case at bar are § 440, which defines superseding cause, and § 448, which deals with criminal acts done under an opportunity afforded by the defendant's negligence. Section 440 provides: "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." RESTATEMENT (SECOND) OF TORTS § 440 (1965). Section 448 provides:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Id. § 448. The court acknowledged that these sections discuss superseding cause only as it relates to a defendant's negligence. Further, it stated that these sections prescribe that a negligent defendant is liable only when an intervening act by a third person is foreseeable. 571 F. Supp. at 206-07.

By contrast, *Olsen* was a strict liability case. *Olsen* stated, however, that the same rule applies in both negligence and strict liability cases. 571 F. Supp. at 207. The *Olsen* court stated:

[T]he owner . . . of a defective . . . thing . . . is not relieved of . . . strict liability to a victim injured thereby by the circumstance that the fault or negligence of a third person contributing to the injury, unless the intervening third person's act or fault is in the nature of a superseding cause in Anglo-American tort law. See Restatement of Torts, 2d, Sections 440-453 (1965).

365 So. 2d at 1293 n.15. Because the facts in *Olsen* did not require that court to discuss or expand the scope of section 448, and because *Olsen* cited no authority in support of its claim, the *Richman* court concluded that *Olsen's* claim was dicta. Nevertheless, the court followed the dicta. 571 F. Supp. at 207.

84. 571 F. Supp. at 206; *see also supra* note 83.

85. 571 F. Supp. at 206; *see also supra* note 83.

86. 571 F. Supp. at 207; *see also supra* note 83.

that the second prong presented a jury question.⁸⁷ In other words, it was now up to a jury to decide whether Charter Arms' marketing practices had "something to do with the harm"⁸⁸ or were "a substantial factor contributing to the . . . injury."⁸⁹

The court stated that the critical question in this motion for summary judgment was "not whether Willie Watson's conduct was the sole cause or a superseding cause of Kathy Newman's death."⁹⁰ The court phrased what it considered to be the critical issue in the following question: "What are the legal limits of a handgun manufacturer's liability for the criminal acts of third persons?"⁹¹ The answer to this question is derived from Louisiana products liability and ultrahazardous activity law. A close examination of both areas of the law thus led the court to hold that Judy Richman could proceed with her claim only under the ultrahazardous activity theory.⁹²

There are several problems with the court's holding and reasoning. There are inherent problems with a plaintiff proceeding under sections 519 and 520 of the *Restatement*. First, absolute liability is imposed under these sections because the activity is deemed to have social utility.⁹³ Yet anti-handgun plaintiffs insist that there is no social value in marketing handguns to the general public.⁹⁴ A plaintiff is seeking recovery under a theory which, by its very nature, negates the plaintiff's contention that handguns have no utility when marketed to the public.

Second, though the court weighs all of the factors in section 520 to determine whether a given activity is ultrahazardous or abnormally dangerous, the comments consistently stress the importance of locality.⁹⁵ Cases under section

87. 571 F. Supp. at 207.

88. *Id.* (quoting *Jones v. Robbins*, 289 So. 2d 104, 106 (La. 1974); *Hill v. Lundin & Assocs.*, 260 La. 542, 547, 256 So. 2d 620, 622 (1972)).

89. 571 F. Supp. at 207 (quoting *Frank v. Pitre*, 353 So. 2d 1293, 1296 (La. 1977) (Tate, J. concurring); *Taylor v. State*, 431 So. 2d 876, 879 (La Ct. App. 1983)).

90. *Id.*

91. *Id.* at 208.

92. *Id.*

93. See RESTATEMENT (SECOND) OF TORTS § 520 comment b (1977): The "activity . . . is of such utility that the risk which is involved in it cannot be regarded as so great or so unreasonable as to make it negligence merely to carry on the activity at all." *Id.*

94. 571 F. Supp. at 202. They concede that a handgun has social utility with respect to law enforcement functions. *Suits Target Handgun Makers*, NEWSWEEK, August 2, 1982, at 42. However, marketing handguns to law enforcement agencies is not an activity at issue in handgun litigation.

95. See RESTATEMENT (SECOND) OF TORTS § 520 (1977) and the following comments:

c. *Relation to nuisance* . . . The rule of strict liability stated in § 519 frequently is applied . . . under the name of "absolute nuisance," even when the harm that results is physical harm to person, land or chattels.

e. *Not limited to the defendant's land*. In most of the cases . . . the abnormally dangerous activity is conducted on land in the possession of the

519 emphasize the dangers and inappropriateness of the activity in relation to the locality in which it is carried on.⁹⁶ No cases have extended liability to an activity deemed to be inappropriate in all localities.

Admittedly, this may not be the most persuasive argument upon which a defendant might rely in attacking a theory of recovery based on sections 519 and 520 of the *Restatement*. There is no outright requirement that the activity be inappropriate to the place where it is carried on. The factor is only one of six to be considered and weighed under section 520.⁹⁷ However, ultrahazardous case law in any given jurisdiction may emphasize the locality

defendant. This, again, is not necessary to the existence of such an activity. It may be carried on in a public highway or other public place or upon the land of another.

f. "*Abnormally dangerous*." . . . In other words, are its dangers and inappropriateness for the locality so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.

g. *Risk of harm* . . . In determining whether there is such a major risk, it may therefore be necessary to take into account the place where the activity is conducted . . .

h. *Risk not eliminated by reasonable care* . . . There is probably no activity . . . from which all risks of harm could not be eliminated by . . . the exercise of the utmost care, particularly as to the place where it is carried on.

. . . .
j. *Locality* . . . [T]he fact that the activity is inappropriate to the place where it is carried on is . . . sometimes expressed . . . by saying there is strict liability for a "non-natural" use of the defendant's land.

k. *Value to the community* . . . There is an analogy here to the consideration of the same elements in determining the existence of a nuisance

96. See RESTATEMENT (SECOND) OF TORTS app. § 519 reporter's note (1981). Abnormally dangerous activities are categorized as follows: (1) water collected in quantity in unsuitable or dangerous place; (2) explosives in quantity in a dangerous place; (3) inflammable liquids in quantity in the midst of a city; (4) blasting in the midst of a city; (5) pile driving with abnormal risks to surroundings; (6) release into air of poisonous gas or dust; and (7) drilling oil wells or operating refineries in thickly settled communities. *Id.* In *Richman*, the plaintiff contended that "there is no place in the United States where handguns can be safely marketed for sale to the general public." 571 F. Supp. at 202. The doctrine of strict liability for ultrahazardous activity developed from the leading English case of *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868). The rule that emerged from *Rylands* was that a "defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings." W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 78, at 547-48 (5th ed. 1984). American courts have applied the *Rylands* principle only to activities that are out of place—the abnormally dangerous condition or activity which is not a natural one where it is. *Id.* at 549-51. Prosser emphasized that American cases generally have stressed the place where the activity is carried on. Furthermore, American courts have applied the *Rylands* principle under the cloak of an absolute nuisance theory. *Id.* at 551-52.

97. See W. PROSSER & W. KEETON, *supra* note 96, § 78, at 555.

factor.⁹⁸ For example, Louisiana courts have held that blasting near residential areas,⁹⁹ pile driving with risk to neighboring property,¹⁰⁰ and crop dusting in proximity to another's land¹⁰¹ are ultrahazardous activities. Handgun manufacturer defendants might argue that the locality factor is thereby one of the most important factors for a court to weigh when it applies the ultrahazardous concept to the facts as found by the jury. In summary, extending liability to an activity deemed to be inappropriate in all localities is contrary to case law.

A more basic flaw in *Richman* is that the court violated the holding in *Erie Railroad v. Tompkins*.¹⁰² Under *Erie*, state substantive law is to be followed by a federal court in diversity cases.¹⁰³ Louisiana courts have found ultrahazardous activities to include pile driving, storage of toxic gas, blasting with explosives, and crop dusting.¹⁰⁴ The Louisiana Supreme Court has reviewed and interpreted the law regarding ultrahazardous activities on four separate occasions.¹⁰⁵ None of these decisions suggest that the Louisiana Supreme Court would agree with the holding and analysis in *Richman*. The court disregarded *Erie* by relying on the *Restatement (Second) of Torts*, an approach the Louisiana Supreme Court has never taken.¹⁰⁶

98. See *supra* note 96 and accompanying text.

99. E.g., *Roshong v. Travelers Ins. Co.*, 281 So. 2d 785, 786-88 (La. Ct. App. 1973).

100. E.g., *Selle v. Kleamenakis*, 142 So. 2d 50, 50-51 (La. Ct. App. 1962).

101. E.g., *Romero v. Chris Crusta Flying Serv.*, 140 So. 2d 734, 735-36 (La. Ct. App. 1962).

102. 304 U.S. 64 (1938).

103. *Id.* at 78.

104. *Kent*, 418 So. 2d at 498 n.7.

105. See *id.*

106. In imposing liability for ultrahazardous activities, the Louisiana Supreme Court has relied on Civil Code Articles 2315, 667 and 669. LA. CIV. CODE ANN. art. 2315 (West Supp. 1984) provides in relevant part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." LA. CIV. CODE ANN. art. 667 (West 1980) deals with limitations on the use of property and provides: "Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him." LA. CIV. CODE ANN. art. 669 (West 1980) deals with regulation of inconvenience and provides:

If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place.

The *Richman* court stated that it had no reason to suspect that its analysis was incompatible with *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 249 So. 2d 133 (1971). 571 F. Supp. at 204. In *Langlois*, the Louisiana Supreme Court articulated the following rule regarding ultrahazardous activities:

We do not here establish a new standard for liability, but merely apply the standard set by law and applied repeatedly in our jurisprudence. The activities of man for which he may be liable without acting negligently are to be determined after a study of the law and customs, a balancing of claims and

There are other *Erie* problems with the court's holding. In every case where the Louisiana Supreme Court has found an activity to be ultrahazardous, liability was imposed on the parties using the item or on landowners authorizing the use of the item that made the activity ultrahazardous.¹⁰⁷ These cases suggest that a product must be joined with a particular use of the product before any ultrahazardous activity is created.¹⁰⁸ Handguns, like explosives and deadly gases, are subject to a variety of uses, and the magnitude of risk occasioned by a handgun significantly depends on which use its owner selects. Whether based on policy considerations of fairness or accident prevention, liability should remain with the entity or individual utilizing the handgun rather than be shifted back to the gun manufacturer.¹⁰⁹

In *Martin v. Harrington & Richardson, Inc.*,¹¹⁰ the United States Court of Appeals for the Seventh Circuit declined to follow the *Richman* court's lead in creating such a cause of action. The *Martin* court's primary misgiving with *Richman* was that Charter Arms' potential liability under an ultrahazardous activity theory was grounded in the sale, rather than the use, of the hand-

interests, a weighing of the risk and the gravity of harm, and a consideration of individual and societal rights and obligations.

258 La. at 1083-84, 249 So. 2d at 140. The *Richman* court characterized the rule as vague and immediately moved into the *Restatement* provisions. 571 F. Supp. at 200; see *supra* note 65. Though the factors enumerated in *Langlois* are similar to those in the *RESTATEMENT (SECOND) OF TORTS* § 520, the *Richman* court did not reconcile its analysis with the statement in *Langlois* that there was "sound jurisprudential authority that liability for dangerous and hazardous activities . . . flows from Civil Code Article 2315 by analogy with other Civil Code Articles." 258 La. at 1081, 239 So. 2d at 139. In other words, it is by analogy with Articles 667 and 669 that Article 2315 is applicable to ultrahazardous activities. Yiannopoulos, *Civil Responsibility in the Framework of Vicinage: Articles 667-69 and 2315 of the Civil Code*, 48 *TULANE L. REV.* 195, 225 (1974). *Langlois* expanded the concept of fault under Article 2315 to include responsibility for ultrahazardous activities, namely responsibility based on the notion of risk. *Id.* at 222-23. See also 258 La. at 1081-82 & nn.11-12, 239 So. 2d at 137-39 & nn.11-12. Louisiana decisions have restricted Article 2315 liability for ultrahazardous activities to conduct which falls within the framework of Articles 667 and 669. See e.g., 258 La. at 1084, 239 So. 2d at 140 (defendant injured plaintiff by its fault as analogized from conduct required under Article 669 and responsibility attached under Article 2315). In holding that marketing handguns to the general public may be an ultrahazardous activity, the *Richman* court failed to analyze how Charter Arms' liability attaches under Article 2315 by analogy with either Articles 667 or 669, or, for that matter, with any article in the Civil Code.

107. E.g., *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 249 So. 2d 133 (1971) (chemical company storing toxic gas); *Craig v. Montelepre Realty Co.*, 252 La. 502, 211 So. 2d 627 (1968) (company conducting pile driving during construction); *Gotreux v. Gary*, 232 La. 373, 94 So. 2d 293 (1957) (landowner and company conducting crop dusting); *Fontenot v. Magnolia Petroleum Co.*, 277 La. 866, 80 So. 2d 845 (1955) (petroleum company conducting blasting operations).

108. See Schwartz, *supra* note 26, at 490-91.

109. See *id.*

110. 743 F.2d 1200 (7th Cir. 1984). *Martin* was also a diversity action against a gun manufacturer in which plaintiffs sought damages for injuries suffered by two men who were shot by a judgment-proof third party. *Id.* at 1201.

gun.¹¹¹ Emphasizing that strict liability for the sale of a product was limited to unreasonably dangerous products, the court stated that "Illinois has never imposed liability upon a non-negligent manufacturer of a product that is not defective."¹¹² Indeed, Illinois courts have imposed liability for engaging in ultrahazardous activities relating only to the use of the product.¹¹³

Finally, the *Richman* court ignored *Erie* in its risk-bearer analysis. The court justified its holding by reasoning that Charter Arms was a better risk bearer than Willie Watson.¹¹⁴ An overriding goal of imposing absolute liability is "allocation of loss to the party better equipped to pass it on to the public."¹¹⁵ Charter Arms has a greater ability than Judie Richman to act as a risk bearer because it can insure against risks created by its marketing practices and pass on the cost to consumers in the form of higher prices for handguns.¹¹⁶ Thus, a superior risk-bearing capacity may justify shifting loss from a plaintiff to a defendant.¹¹⁷ The *Richman* court, however, distinguished the superior risk bearer as between two defendants. Because the principal case was different from ordinary ultrahazardous activity cases, in which the entity using the item is likely to be a good risk bearer, the court reasoned that Richman would be without an effective remedy if liability were not extended.¹¹⁸ The Louisiana Supreme Court has noted the trend toward expanding the classes from whom recovery can be had.¹¹⁹ However, nothing in these cases suggests extension of enterprise liability under Louisiana law to second generation risk-bearers such as Charter Arms.

Though the *Richman* court permitted the proximate cause question to go to the jury, courts as a matter of law are reluctant to impose liability on a defendant when in fact a third party commits an intentional criminal act which causes the injury.¹²⁰ The *Richman* court determined that, under Louisiana law, liability will be imposed unless the defendant proves that the fault of a third person is the sole cause of the damage.¹²¹ The Louisiana rule differs from the general rule of proximate cause that limits liability to the scope of the original risk created and to foreseeable consequences.¹²² This is the rule

111. *Id.* at 1203-04.

112. *Id.* at 1204.

113. *Id.*

114. 571 F. Supp. at 203 n.13.

115. Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172, 1176 (1952).

116. *See* 571 F. Supp. at 203.

117. Morris, *supra* note 115, at 1176-79.

118. 571 F. Supp. at 203 n.13.

119. *Langlois*, 258 La. at 1079-80, 249 So. 2d at 138. The court was referring to the fact that ultrahazardous activity liability was not limited to the landowner who hired the contractor but included the contractor who carried on the activity. *Id.*

120. *See, e.g., Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970) (when third party intentionally shot victim, plaintiff could not recover as a matter of law).

121. 571 F. Supp. at 205; *see supra* notes 80-84 and accompanying text.

122. W. PROSSER & W. KEETON, *supra* note 96, § 43, at 281, 297.

generally applied in cases of intervening causes.¹²³ In strict liability cases, practical necessity also dictates restricting liability within some reasonable bounds. It is one thing to require an enterpriser to pay its way within reasonable limits and quite another to require it to take responsibility for every conceivable harm that its activity may cause.¹²⁴

Within the framework of this general rule of proximate cause, courts have consistently refused to invoke liability in cases involving intentional criminal acts with firearms. First and foremost, courts would agree that Willie Watson's criminal misuse of the handgun was not foreseeable.¹²⁵ Second, courts

123. *Id.* at 282.

124. *Id.* § 78, at 559-60.

125. *See, e.g.,* Bennet v. Cincinnati Checker Cab Co., 353 F. Supp. 1206, 1210 (E.D. Ky. 1973) (firearms dealer could not reasonably have foreseen criminal misuse of weapon); Adkinson v. Rossi Arms Co., 659 P.2d 1236, 1239 (Alaska 1983) (manufacturer or distributor of firearm could not foresee that "shooter will unlawfully and intentionally point the firearm and be convicted of manslaughter"); Hulsman v. Hemmeter Dev. Corp., 65 Hawaii 58, 70, 647 P.2d 713, 721-22 (1982); (party's conduct in purchasing weapon would not lead seller to foresee that party would criminally misuse firearm); Robinson v. Howard Bros., 372 So. 2d 1074, 1076 (Miss. 1979) (less reason to foresee premeditated murder as opposed to acts that are merely negligent); Thomas v. Bokelman, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970) (although defendants left gun and ammunition accessible, there was no reason for defendants to foresee that ex-felon would kill visitor with the gun).

The foreseeability debate between proponents and opponents of handgun litigation has raged profusely. Opponents contend that the intended purpose of handguns encompasses hunting, trapshooting, target shooting, and self-defense. Some Americans collect firearms, while others employ them in military, law enforcement, and private security positions. Santarelli & Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471, 479 (1983). They argue that criminal misuse of a handgun, while foreseeable, breaks the chain of causation. *Id.* at 495. The proposition is put succinctly in the statement, "Guns don't kill people, people kill people." Weiss, *supra* note 3, at 12. Conversely, proponents contend that the intended purpose of handguns encompasses criminal misuse. *See* Turley, *supra* note 11, at 58-59. Handguns rank as the second leading cause of unnatural death in the United States. Although handguns comprise only about 30% of the firearms in public hands, they account for 90% of firearm misuse and approximately 22,000 deaths annually. *Id.* at 41-42 (citing BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS STATISTICS (1980); U.S. DEPT. OF JUSTICE, F.B.I. UNIFORM CRIME REPORTS 5-21 (1981); U.S. DEPT. OF JUSTICE, F.B.I. UNIFORM CRIME REPORTS 130 (1980)). Handgun misuse can be divided into four categories: (1) suicide, (2) accidental shootings, (3) shootings resulting spontaneously during arguments, and (4) homicides. In 1979, 50% of handgun deaths resulted from suicide, whereas only 15% resulted from homicides. Accidental shootings accounted for 6% of total handgun deaths, and the remaining 29% were a result of spontaneous shootings. *Id.* at 42 (citing 2 MORTALITY STATISTICS BRANCH, DIV. OF VITAL STATISTICS, NAT'L CENTER FOR HEALTH STATISTICS, VITAL STATISTICS OF THE U.S., MORTALITY 35 (1980); U.S. DEPT. OF JUSTICE, F.B.I. UNIFORM CRIME REPORTS 12 (1979)). Though criminal misuse accounts for only 15% of handgun deaths, statistics show that handguns are used in 50% of all murders, 23% of aggravated assaults, and 40% of all robberies. In 1980, handguns were used in 220,000 robberies and 157,000 aggravated assaults. *Id.* at 58-59 (citing U.S. DEPT. OF JUSTICE, F.B.I. UNIFORM CRIME REPORTS 13, 18-21 (1980)). The frequency with which these events occur

generally view a third party criminal act as an independent intervening cause that insulates a defendant from liability.¹²⁶ Following this reasoning, the criminal act perpetuated by Willie Watson broke any causal connection between Charter Arms' marketing practices and Kathy Newman's death.¹²⁷ Third, a manufacturer of a nondefective firearm has no duty to anticipate unlawful acts or to protect against criminal conduct.¹²⁸ Fourth, public policy prohibits shifting liability from the criminal actor to the gun manufacturer.¹²⁹ For example, the policy of preventing future harm would not be advanced by allowing civil recovery against the gun manufacturer. To do so would effectively minimize the criminal significance of the third party's conduct. Moreover, the degree of "moral blame" of a gun manufacturer is less significant than that which society attaches to the commission of a crime like that in *Richman*.¹³⁰

In rejecting the holding in *Richman*, the *Martin* court summarized the pervasive position adopted by the courts: criminal misuse of a handgun is an unforeseeable, intervening cause that relieves a manufacturer of liability, and "whether such an intervening cause exists can be determined as a matter of law."¹³¹ Considering all of the above factors, the great weight of authority clearly militates against the holding of *Richman*.

A more basic issue to be addressed with handgun litigation is gun control. Is *Richman* before a federal court merely as a wrongful death suit? Opponents contend that plaintiffs' lawyers and proponents seek to implement gun control through litigation.¹³² They argue that the proposed shift in liability is a legislative matter.¹³³ Present gun control laws restrict public access to firearms. Furthermore, a court that allows a case such as *Richman* to proceed to trial exceeds the bounds of judicial restraint.¹³⁴

precludes the manufacturer from arguing that criminal misuse is not an intended purpose of a handgun. Moreover, liability does not require that the manufacturer have anticipated the chain of events leading to criminal misuse. *Id.* at 48-49. A limited number of cases supports this view. *See, e.g.,* *Franco v. Bunyard*, 261 Ark. 144, 147, 547 S.W.2d 91, 93 (1977) (when handgun was obtained through illegal sale, use of gun to rob grocery store and murder two persons was foreseeable), *cert. denied*, 434 U.S. 835 (1977); *Palmisano v. Ehrig*, 171 N.J. Super. 310, 313, 408 A.2d 1083, 1084 (1979) (foreseeable that son's friend would cause a firearm to discharge through roof and injure plaintiff on floor above), *cert. denied*, 82 N.J. 287, 412 A.2d 793 (1980).

126. *See, e.g.,* *United States v. Shively*, 345 F.2d 294, 296-97 (5th Cir. 1965) (although army personnel negligently issued pistol without authorization, sergeant's independent illegal use of gun to cause injuries was proximate cause), *cert. denied*, 382 U.S. 883 (1965).

127. *See* *Adkinson v. Rossi Arms Co.*, 659 P.2d 1236, 1239 (Alaska 1983) (no significant degree of closeness of connection).

128. *Bennet*, 353 F. Supp. at 1210; *Adkinson*, 659 P.2d at 1238.

129. *Adkinson*, 659 P.2d at 1238.

130. *Id.* at 1239-40.

131. *Martin*, 743 F.2d at 1205.

132. *Santarelli & Calio*, *supra* note 125, at 505-06.

133. *Id.*

134. *Id.* at 505.

Proponents counter that current gun control laws are ineffective in reducing handgun violence;¹³⁵ legislatures have sold out to the gun lobby. In addition, juries are not as easily influenced or susceptible to political pressures as legislators.¹³⁶ Therefore, it is a proper judicial function to supplement duties imposed by gun control statutes with those imposed by the common law.¹³⁷

In fact, proponents believe that extending tort liability theories to handgun manufacturers will accomplish several goals. It will provide plaintiffs with an untapped source of damage recovery. Public policy goals will be served by forcing manufacturers to pay for damages caused by handguns.¹³⁸ Substantial judgments for plaintiffs and the cost of litigation may increase insurance premiums.¹³⁹ This will deter sales, thus reducing handgun injuries and death.¹⁴⁰ Plaintiffs' lawyers also hope that insurance companies will pressure gunmakers to curtail their marketing practices severely or even eliminate the production of "Saturday Night Specials."¹⁴¹

That litigation proponents are using the courts to indirectly implement handgun control is apparent.¹⁴² In *Richman*, the court addressed important issues within the narrow confines of that case. Opponents argue that issues of the magnitude of those raised in *Richman* are best resolved from the broad, general perspective of the legislature.¹⁴³ Furthermore, courts often inadequately consider the broader implications of a given decision.¹⁴⁴ For instance, if *Richman* prevails at trial and on appeal, Charter Arms could become an absolute insurer of marketing practices that result in handgun injuries inflicted by a criminal third party.¹⁴⁵ Such judicial action would hamper general economic growth. The cost of doing business would be passed to consumers. Should the company be forced out of business, American workers would lose

135. Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common-Law Approach*, 51 *FORDHAM L. REV.* 771, 773 (1983). One commentator suggests that gun laws are constructed primarily to affect only individuals who intend to use a gun for criminal activity. Criminal violence accounts for only 16% of total handgun deaths. Therefore, handgun legislation addresses only a minor problem when it does not take into account individuals owning firearms for noncriminal reasons. The effectiveness of handgun laws largely depends upon criminal justice officials: police, prosecutors, and judges. These officials are often reluctant to enforce the laws, press charges, or sentence persons guilty of handgun crimes. These actions render conclusions concerning the effectiveness of gun legislation invalid. DeZee, *Gun Control Legislation*, 5 *LAW & POL'Y Q.* 367, 375-76 (1983).

136. See *Handguns New Target for Tort Lawyers*, 67 *A.B.A. J.* 1443, 1443 (1981).

137. Note, *supra* note 135, at 773.

138. Note, *Manufacturers' Strict Liability for Injuries from a Well-Made Handgun*, 24 *WM. & MARY L. REV.* 467, 469-70 (1983).

139. Weiss, *supra* note 3, at 15.

140. Note, *supra* note 138, at 470.

141. Weiss, *supra* note 3, at 15.

142. *Id.* at 13.

143. Santarelli & Calio, *supra* note 125, at 506.

144. *Id.*

145. See *id.* at 504.

jobs. Tax revenues would be reduced.¹⁴⁶ At the other extreme, the company might attempt to do business with inadequate liability insurance. Such a practice would jeopardize the "stability of the business and the *legitimate rights* of claimants to compensation for harm caused by defective products."¹⁴⁷

The argument is persuasive, but it does not account for the cost that relatively inexpensive handguns exact of society. An estimated \$500 million is spent annually for treatment of gunshot wounds. Moreover, the annual cost to the nation's GNP is estimated to exceed twenty billion dollars.¹⁴⁸ Though these costs are not derived exclusively from the criminal misuse of handguns, the figures illustrate the financial burden on individuals and the nation resulting from handgun misuse.

If anti-handgun plaintiffs are successful in the courtroom, the gun industry may seek a legislative remedy to immunize itself from liability or at least impose a ceiling on damage awards.¹⁴⁹ Ironically, legislatures may be called on to solve problems created by handgun litigation instituted as an answer to what proponents considered ineffective gun control legislation.

Though current handgun litigation based on theories proposed in *Richman* involves criminal and accidental shootings, suicide suits may soon follow.¹⁵⁰ In addition, although litigants now are focusing their attack on manufacturers,¹⁵¹ if decisions prove to be favorable to plaintiffs, gun dealers or even ammunition manufacturers may find themselves subjected to suits involving

146. See *id.* at 504-05. Johns-Manville Corp. is a prime example of how multiple judgments can produce detrimental effects on even a large company. The company produced asbestos products, which were found to cause asbestosis, or lung cancer. When plaintiffs inundated the corporation with suits, it responded by declaring Chapter 11 bankruptcy. See Wall St. J., Aug. 27, 1982, at 1, col. 6; see also Weiss, *supra* note 3, at 15.

147. Santarelli & Calio, *supra* note 125, at 505.

148. Turley, *supra* note 11, at 43; see also Ram, Geldres, & Bueno, *Health Care Costs of Gunshot Wounds*, 73 OHIO ST. MED. ASSOC. J. 437 (1977).

149. See Weiss, *supra* note 3, at 16. The *Richman* court points out that defendants may already have a remedy of sorts in statutes of limitation. 571 F. Supp. at 203. In Louisiana, for example, plaintiffs would be barred from recovery in wrongful death actions if they failed to file suit within one year following the date of death. LA. CIV. CODE ANN. art. 3492 (West Supp. 1984).

150. See Turley, *supra* note 11, at 55-56; see also Nat'l L.J., Dec. 12, 1983, at 15, col. 1 (wrongful death suit against gun vendor for suicide).

151. Several public policy considerations support this strategy:

(1) The manufacturer was in a peculiarly strategic position to promote safety in his products; (2) The manufacturer was often in the dominant economic position in the chain of production and distribution; (3) Imposing liability on the manufacturer corresponded to the growing practice for makers to indemnify or insure dealers who handled their products; (4) The manufacturer could anticipate some hazards and guard against the recurrence of others, as the public could not; (5) The cost of an injury and the loss of time or health could be insured by the manufacturer and distributed among the public as a cost of doing business.

W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 2, at 11 (1979 & Supp. 1981).

similar theories of recovery. Manufacturers also may be forced either to indemnify these groups or to seek contribution toward damage awards.¹⁵²

Opponents of the proposed theories are equally concerned that partially shifting responsibility for the consequences of a criminal act will undermine the public interest.¹⁵³ Willie Watson should be fully accountable for his own criminal acts. Cases like *Richman* may enhance the stereotype that criminals are not held sufficiently responsible for their conduct.¹⁵⁴ The *Richman* court, however, views this issue not so much as a question of whether society should subsidize Willie Watson's criminal acts but rather as a question of "who has the burden of trying to recover from Willie Watson and of bearing the loss in the event that he cannot pay."¹⁵⁵ It is still true that Willie Watson has been convicted, and his position will not be altered substantially, if at all, by the outcome in the case. Therefore, this argument against liability is perhaps one of the weakest used by litigation opponents.

The *Richman* court struck boldly by creating a cause of action that extends liability for the criminal acts of third persons to a handgun manufacturer. In doing so, it responded positively to the contention that the entrance of tort law into handgun litigation is "a normal, historically proper and absolutely necessary function."¹⁵⁶ The court's overriding concern seemingly was that Judie Richman should have an effective legal remedy to compensate her for her daughter's death.¹⁵⁷ The court labored arduously to fashion Louisiana jurisprudence into a workable medium for that remedy.

Unfortunately, the court's efforts were misplaced. It may be difficult for the trial court to determine whether Charter Arms' marketing activities are ultrahazardous. The underlying legal theories and policy considerations of abnormally dangerous/ultrahazardous activity law do not support an anti-handgun plaintiff's recovery, whether viewed from the context of Louisiana law or sections 519 and 520 of the *Restatement (Second) of Torts*.

In allowing the proximate cause question to go to the jury, the *Richman* court pushed Louisiana law to its limits by relying on dicta to conclude that Charter Arms might be responsible for Kathy Newman's death, even though Willie Watson intentionally pulled the trigger. Convincing a judge or jury that a gunmaker is legally responsible for the reprehensible criminal acts of another person should prove to be a formidable task for any plaintiff. In most

152. See *id.*; see also 571 F. Supp. at 203 n.13.

153. Santarelli & Calio, *supra* note 125, at 507; see also *supra* text accompanying notes 129-30.

154. Santarelli & Calio, *supra* note 125, at 507.

155. 571 F. Supp. at 195.

156. Podgers, *supra* note 3, at 40.

157. 571 F. Supp. at 203 n.13, 209. In *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984), the court stated that adoption of an ultrahazardous activity theory of recovery against a gun manufacturer would effectively hold that someone must be answerable in damages whenever someone is injured. Such a theory was felt to be untenable and unsuited for current adoption in Illinois. *Id.* at 1205.

instances, a gun manufacturer's claim of superseding cause will prevail.¹⁵⁸

Given the brutal facts in *Richman*, one sympathizes with the plaintiff. To immunize the gun industry from liability for the consequences exacted by cheap handguns seems unjust. The net result of such immunity is a plaintiff left without an effective remedy. However, civil liability must be based on sound legal principle, not sympathy. The ultrahazardous activity theory is not a viable approach for imposing liability on handgun manufacturers for the intentional criminal acts of a third person.

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158. Note, *supra* note 138, at 493; *see also supra* text accompanying notes 120-31.